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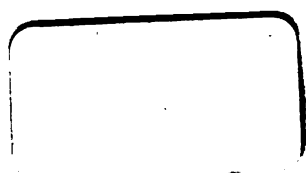
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A TREATISE
ON THE
LAW OF TAXATION,
INCLUDING
THE LAW OF LOCAL ASSESSMENTS.

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IN THE UNIVERSITY OF MICHIGAN.

SECOND EDITION. GREATLY ENLARGED.

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PREFACE TO THE FIRST EDITION.

The following pages have been prepared with a view to present in a shape for practical use, the general rules which must govern the action of all authorities acting in matters of taxation. Had a similar task been previously undertaken, the writer would gladly have been spared the labor; but Mr. Blackwell's Treatise on Tax Titles covers the ground only in part, and Judge Dillon, though he has done valuable service in the same direction, has not, in his work on Municipal Corporations, deemed it advisable to go beyond what seemed necessary to a legitimate and perspicuous presentation of that subject. Other writers have had occasion to discuss only particular topics in the law of taxation, leaving a comprehensive examination of the general subject to be still entered upon.

The decisions in this country on the subject of taxation have become so numerous, that it would be impossible to give abstracts of them all, within any reasonable compass. The author has thought it preferable, instead of attempting a digest of them, to group the references about the controlling principles. The tax systems of the several states are so dissimilar, that a mere digest of the cases is exceedingly liable to mislead, by giving, as a general rule of law, what is only a conclusion from a local law or custom. There are, or should be, general principles underlying all the cases; and an understanding of these will enable one to make use of decisions under the various tax systems without confusion.

The subject of taxation seems to invite some consideration of questions of political economy; but these have been passed by after bare mention, as not being necessarily involved in a discussion of the legal points. They present considerations

for the legislature in framing tax laws; but courts and ministerial officers must enforce tax laws as they are, whether based on sound or unsound principles of political economy.

The preparation of any treatise on taxation necessarily involves the presentation of disputed points, and the expression of opinions upon them. This has been done in the following pages. It has not been the purpose, however, to take any positions which it was not believed the authorities would justify; and if this has been done in any instance, the references which are made to authorities will doubtless enable the reader to detect the error. Possibly it may be thought that, on some points, too much importance has been attached to those fundamental principles which restrict the power to tax. But when one considers how vast is this power, how readily it yields to passion, excitement, prejudice or private schemes, and to what incompetent hands its execution is usually committed, it seems unreasonable to treat as unimportant, any stretch of power — even the slightest — whether it be on the part of the legislature which orders the tax, or of any of the officers who undertake to give effect to the order. Especially is this so when it is understood how little restraint there can be on the ignorant action of assessors, acting with jurisdiction, and how very seldom an effectual remedy can be administered where fraud or corruption exists. And as the benefits of republican government have been reached through the efforts of the people to establish and maintain the legitimate restraints upon the power to tax, it seems unwise in a high degree to slight or disregard any of the checks which the law has provided, whether those which are intrusted to the hands of the judiciary, or those which are the lawful right of the people themselves who are to bear the burden of the particular tax.

THOMAS M. COOLEY.

UNIVERSITY OF MICHIGAN,
Ann Arbor, January, 1876.

PREFACE TO THE PRESENT EDITION.

Since the first edition of this work appeared, several thousand cases have been decided by courts of last resort in this country, involving questions of importance in the law of taxation, and the time seems to have arrived for bringing together the results of the cases under the appropriate headings. This has now been done, and the author has reason for believing that this work is very considerably improved thereby.

In the original edition pains were taken to present in as clear a light as possible the fundamental principles underlying the law of taxation. This involved the necessity for expressions of opinion on some points not yet covered by authoritative decision; but the author is happy to believe that on no important point have the subsequent decisions shown him to be in error. He therefore offers the new edition to the public in confidence that it will not only be found convenient for professional use, but also a reliable presentation of the results of judicial thought on this very important subject.

THOMAS M. COOLEY.

UNIVERSITY OF MICHIGAN,
Ann Arbor, January, 1886.

TABLE OF CONTENTS.

CHAPTER I.

TAXES, THEIR NATURE AND KINDS.

Definitions: Taxes, subsidies, duties, imposts, tolls, - . . .	1-4
Taxing power an incident of sovereignty, - . . .	4-6
Classification of taxes, as direct and indirect, - . . .	6-8
Maxims of policy in taxation, - . . .	8-18
Taxes in kind, and in labor, - . . .	18-15
Taxes not debts, - . . .	15-19
Taxation and protection reciprocal, - . . .	19-25
Taxes it is customary to lay, - . . .	25-39
Land taxes, - . . .	26
Taxes on houses, - . . .	27
On income, - . . .	28
On employment, - . . .	28
On carriage of property, - . . .	29
On wages of labor, - . . .	29
On servants; horses, carriages, etc., - . . .	29
On interest of money, - . . .	30
On dividends, - . . .	30
On successions, - . . .	30
On sales, bills, bullion, etc., - . . .	31
On newspapers, - . . .	31
On legal process, - . . .	31
On consumable luxuries, - . . .	32
On exports and imports, - . . .	33
On corporate franchises, - . . .	34
On property by value, - . . .	35-39
On amusements, etc., - . . .	39

CHAPTER II.

THE NATURE OF THE POWER TO TAX.

Separation of departments of government, - . . .	41
The taxing power not judicial, - . . .	42-47
Protection of rights by the law of the land, - . . .	47-53

CHAPTER III.

LIMITATIONS OF THE TAXING POWER BY PARAMOUNT LAW.

Limitations inherent, - - - - -	54
Enforcement of limitations, - - - - -	54
Purpose must be public, - - - - -	55
Territorial limitations, - - - - -	55-57
Taxation and representation, - - - - -	58-61
The power not to be delegated, - - - - -	61-66
Exception to this rule, - - - - -	63
Restriction of power by contract, - - - - -	66-82
State repudiation, - - - - -	73-75
Municipal repudiation, - - - - -	75-80
What impairs a contract, - - - - -	80-82
Exemption of agencies of government, - - - - -	82
General liability, - - - - -	83
National and state powers exclusive, - - - - -	83
Federal agencies not taxable by states, - - - - -	83
State agencies exempt from federal taxation, - - - - -	85
Inadmissible personal taxes, - - - - -	86
Taxation of public property, - - - - -	87
Taxation of occasional public agencies, - - - - -	89
Taxes on commerce, - - - - -	90
On imports and exports, - - - - -	90
Tonnage duties, - - - - -	91-94
Taxes on foreign and interstate commerce, - - - - -	94-99
Taxes in abridgment of privileges and immunities of citizens, - - - - -	99
Taxes violative of treaties, - - - - -	100
State restraints on power to tax, - - - - -	101

CHAPTER IV.

THE PURPOSES FOR WHICH TAXES MAY BE LAID.

The general rule, - - - - -	103
Presumption in favor of legislation, - - - - -	105-108
Grade of the government which taxes is important, - - - - -	108
General expenses of government, - - - - -	110-118
Public purposes in general, - - - - -	118-118
Religious instruction, - - - - -	118
Secular instruction, - - - - -	119-124
Public charity, - - - - -	124
Private business enterprises, - - - - -	126
Moral obligations, - - - - -	127
Amusements and celebrations, - - - - -	128
Highways and roads, - - - - -	130-134
Municipal water and gas works, - - - - -	134
Military and other bounties, - - - - -	136

TABLE OF CONTENTS.

ix

Public health, - - - - -	187
Protection against calamities, - - - - -	188
Payment of the public debt, - - - - -	188
General remarks, - - - - -	188
Exclusiveness of public interest, - - - - -	189

CHAPTER V.

THE PURPOSE MUST PERTAIN TO THE DISTRICT TAXED.

The general rule, - - - - -	140-142
State control of municipalities, - - - - -	142
Violations of rules of apportionment, - - - - -	148-146
Taxing districts in general, - - - - -	146-148
Establishment of districts, - - - - -	149-151
Diversity of districts, - - - - -	151
Overlying districts, - - - - -	153-159
Extraterritorial taxation, - - - - -	159-163

CHAPTER VI.

EQUALITY AND UNIFORMITY IN TAXATION.

Requirement of equality and difficulty in attaining it, -	164-171
Exemptions, express, - - - - -	171
Implied exemptions, - - - - -	172
Allowance for debts, - - - - -	174
Provisions in constitutions of the states, - - - - -	175-199
General right to make exemptions, - - - - -	200
Customary exemptions, - - - - -	201
Charitable organizations, schools and libraries, -	202
Church property, - - - - -	202
Cemeteries, - - - - -	203
State indebtedness, - - - - -	204
Taxability presumed, - - - - -	204
Strict construction of exemptions, - - - - -	205
Case of local assessments, - - - - -	207
Railroad exemptions, - - - - -	209
Corporate exemptions generally, - - - - -	212
Invidious exemptions, - - - - -	214
Accidental omissions from taxation, - - - - -	216
Invidious assessments, - - - - -	218
Duplicate taxation, - - - - -	219-234
Presumption against, - - - - -	227
Commuting taxes, - - - - -	234
Diversity of taxation in districts, - - - - -	235
Monopolies, - - - - -	235
Importance of permanence in legislation, - - - - -	236

CHAPTER VII.

THE APPORTIONMENT OF TAXES.

Necessity of apportionment, - - - - -	237
Specific taxes, - - - - -	238
<i>Ad valorem</i> taxes, - - - - -	238
Taxes apportioned by benefits, - - - - -	239-241
General principles of apportionment, - - - - -	241
Apportionment presumptively just, - - - - -	242
Apportionment imperative, - - - - -	243
Diverse rules of apportionment, - - - - -	243-247

CHAPTER VIII.

OFFICIAL ACTION IN MATTERS OF TAXATION.

Necessity for official action, - - - - -	248
Officers, who are, - - - - -	248
Officers <i>de facto</i> , - - - - -	249
Usurpers, - - - - -	251
Questioning title of officer <i>de facto</i> , - - - - -	251
Validity of acts of officer <i>de facto</i> , - - - - -	253
Officers <i>de facto</i> in tax cases, - - - - -	255
Estoppel against intruders who have acted, - - - - -	256
Action by official boards, - - - - -	257-259
Official returns and certificates, - - - - -	260-262

CHAPTER IX.

CONSTRUCTION OF TAX LAWS.

Rules of construction in general, - - - - -	268
Legislative intent to govern, - - - - -	264
Construction of revenue laws, - - - - -	265-275
Local powers to tax, - - - - -	275
Construction of local power, - - - - -	276
As to objects for taxation, - - - - -	278
As to taxables, - - - - -	279
Liability of power to abuse, - - - - -	280
Directory and mandatory provisions, - - - - -	280-290
Instances of mandatory provisions, - - - - -	285
Of directory provisions, - - - - -	289
Retrospective taxation, - - - - -	291
Repeals by implication, - - - - -	294
General revisions of tax laws, - - - - -	295

CHAPTER X.

CURING DEFECTS IN TAX PROCEEDINGS.

Curative laws in general, - - - - -	297
Conclusive rules of evidence, - - - - -	297

TABLE OF CONTENTS.

xi

Legislative mandates, - - - - -	299
Special curative acts, - - - - -	300-306
General curative acts, - - - - -	307
Prospective curative laws, - - - - -	308
Reassessments, - - - - -	309-312
Judicial corrections, - - - - -	313
Corrections by amendment, - - - - -	313-323

CHAPTER XI.

THE LEGISLATIVE DETERMINATION THAT A TAX SHALL BE LAID.

Necessity for legislation, - - - - -	324
Revenue bills, statement of purpose, - - - - -	325
Contracting debts, - - - - -	327
Municipal taxation, - - - - -	329
Voting taxes in popular meetings, - - - - -	332
Submission to tax payers only, - - - - -	333
Calling popular meetings, - - - - -	334-337
Voting the tax, - - - - -	337
Record of votes, - - - - -	339
Adherence to vote, - - - - -	341
Certifying the vote, - - - - -	341
Conclusiveness of municipal action, - - - - -	342
Judicial questions, - - - - -	343
Restrictions upon municipal taxation, - - - - -	344
Excessive taxes, - - - - -	346
The general restriction, - - - - -	348
Exhausting authority, - - - - -	349

CHAPTER XII.

LISTING OF PERSONS AND VALUATION OF ESTATES FOR TAXATION.

General course, - - - - -	351
Assessment, what is, - - - - -	351
Necessity for, - - - - -	352
Mandatory requirements, - - - - -	353
Date of, - - - - -	354-356
Tax payer's lists, - - - - -	356
Oath to, - - - - -	357
Conclusiveness of, - - - - -	357
Penalties for not giving, - - - - -	357-361
Right to a hearing, - - - - -	361-366
Classification of property as real and personal, - - - - -	366-369
Personal taxes in general, - - - - -	369
Assessment of personalty, - - - - -	371
General description, - - - - -	372
Place of, - - - - -	372
Water craft, - - - - -	373
Tangible personalty, - - - - -	379

Property in business, - - - - -	374
Trust property, - - - - -	375
Property of decedent estates, - - - - -	376
Property of persons under guardianship, - - - - -	377
Assessment of corporations; in general, - - - - -	377
Franchise taxes, - - - - -	379
Dividends, - - - - -	381
Income, - - - - -	382
Taxing franchises as property, - - - - -	383
Railroad taxation, - - - - -	383-386
Insurance companies, - - - - -	386
Miscellaneous corporations, - - - - -	387
Taxing by value, - - - - -	388
Taxation of national banks, - - - - -	389-392
Assessment of real property, - - - - -	392
General course, - - - - -	393
Classification of lands, - - - - -	393-396
Assessment of occupied lands, - - - - -	396-400
Separate assessment of parcels, - - - - -	400
What are separate parcels, - - - - -	402
Description, - - - - -	404-408
Valuation, - - - - -	409-412
Authentication of assessment, - - - - -	412
Return of assessment, - - - - -	414
Shifts to evade taxation, - - - - -	415-417
Review of assessments, - - - - -	418
Powers of board, - - - - -	418
Meeting of board, - - - - -	418
Changing individual assessments, - - - - -	419
Equalization, - - - - -	421
Extending the tax, - - - - -	423

CHAPTER XIII.

THE COLLECTOR'S WARRANT.

Necessity for, - - - - -	424
Statutory requisites, - - - - -	425
Signing, - - - - -	427
Different rolls for different taxes, - - - - -	427
Delivery of warrant, - - - - -	428
Exhausting authority, - - - - -	428
Blending taxes, - - - - -	428
Excessive taxes, - - - - -	429-431

CHAPTER XIV.

THE COLLECTION OF THE TAX.

Summary remedies necessary, - - - - -	432
The law must prescribe remedies, - - - - -	432

TABLE OF CONTENTS.

xiii

Methods of collection, - - - - -	434
Farming out the revenues, - - - - -	434
Collection by suit, - - - - -	435
Enforcement by arrest of person, - - - - -	437
Distress and sale of chattels, - - - - -	438-443
Detention of goods and chattels, - - - - -	444
Sale of lands, - - - - -	444-448
Suit to enforce lien, - - - - -	448-450
Payment or tender of tax, - - - - -	450-453
Return of no goods, etc., - - - - -	454
Penalties for non-payment, - - - - -	456-461
Conditions on exercise of rights, - - - - -	459
Forfeiture of property taxed, - - - - -	461-465
Liability for taxes in special cases; subrogation, - - - - -	466
Mortgagor and mortgagee, - - - - -	466
Vendor and vendee, - - - - -	467
Tenants for life, - - - - -	467
Tenants in common, - - - - -	467
Payment under mistake as to ownership, - - - - -	467
Collection, as between state and municipalities, - - - - -	468

CHAPTER XV.

THE SALE OF LANDS FOR UNPAID TAXES.

When to be made, - - - - -	469
The land must be liable, - - - - -	469
Necessity for regular proceedings, - - - - -	469-472
Onus of proof, - - - - -	472-477
Presumptions of regularity, - - - - -	477-481
Special authority to sell, - - - - -	481
Notice of sale, - - - - -	482-487
Time and place of sale, - - - - -	487
Competition at sale, - - - - -	489
Officer not to buy, - - - - -	492
Sale in separate parcels, - - - - -	493
Surplus bond, - - - - -	495
Excessive sale, - - - - -	496
Sale to highest bidder, and for cash, - - - - -	498
Who may acquire tax titles, - - - - -	500-509
Bids by state or county, - - - - -	509
Different sales at the same time, - - - - -	511
Certificate of sale, - - - - -	511
Report of sale, - - - - -	513
Deed on the sale, - - - - -	513
Tax deed as evidence, - - - - -	517-522
Special proceedings, - - - - -	523
Judicial sales for taxes, - - - - -	523-530
Liens when titles fail, - - - - -	531

The methods of apportionment, - - - - -	687
Assessments by benefits, - - - - -	688-644
Assessments by the foot front, - - - - -	644-648
Apportionment by the acre, - - - - -	648
Assessment by value of lots, - - - - -	649
Property subject to assessment, - - - - -	650-658
Proceedings in levying and collecting assessments, - - - - -	658-659
Municipal action, - - - - -	659-659
Proceedings in assessment, - - - - -	659
Estimating benefits, - - - - -	660-667
Collection of assessments, - - - - -	668-672
Collection by sale of lands, - - - - -	672
Personal liability for assessment, - - - - -	674-677

CHAPTER XXI.

LOCAL TAXATION UNDER LEGISLATIVE COMPULSION.

The general doctrine, - - - - -	678
Local power to tax, - - - - -	679
Compulsory local taxation, - - - - -	680-683
Roads and bridges, - - - - -	683
Schools, - - - - -	683
Public health, - - - - -	684
Contract obligations, - - - - -	685
Mobs and riots, - - - - -	686
Doubtful cases, - - - - -	687
Nature of municipal corporations, - - - - -	688-700
Right to be protected in their property, - - - - -	700-708

CHAPTER XXII.

THE REMEDIES OF THE STATE AGAINST COLLECTORS OF TAXES.

Remedies in general, - - - - -	704
Suit at the common law, - - - - -	704
Collector's bond, - - - - -	706-717
Liability of sureties, - - - - -	712-717
Summary remedies, - - - - -	717-728

CHAPTER XXIII.

ENFORCING OFFICIAL DUTY UNDER THE TAX LAWS.

Customary provisions, - - - - -	724
The official oath, - - - - -	725
An official bond, - - - - -	725
Penalties for neglect of duty, - - - - -	725
Common law remedies, - - - - -	726
<i>Mandamus</i> , its nature, - - - - -	726
The writ not of right, - - - - -	727

TABLE OF CONTENTS.

xv

Manufacturers and dealers in liquors, - - - - -	580
Amusements and exhibitions, - - - - -	581
Hackmen, draymen, etc., - - - - -	582
Hotel keepers, - - - - -	583
Manufacturers, - - - - -	583
Taxes on offices, - - - - -	583
Other privilege taxes, - - - - -	584

CHAPTER XIX.

TAXES UNDER THE POWER OF POLICE.

Taxation and regulation compared, - - - - -	586-588
Sidewalk assessments, - - - - -	588
Sewer assessments, - - - - -	590
Levee assessments, - - - - -	590
Assessments for drains, - - - - -	591
License fees in general, - - - - -	592-596
License, what is, - - - - -	596
Fees, when a tax, - - - - -	597-600
What may be licensed, - - - - -	600-603
Issuing the license, - - - - -	603
Recalling licenses, - - - - -	604
Collection of license fees, - - - - -	604
Federal licenses, - - - - -	605

CHAPTER XX.

TAXATION BY SPECIAL ASSESSMENTS.

The principles underlying them, - - - - -	606
Special authority requisite, - - - - -	609
Cases for assessment, - - - - -	609
Court-house and other public buildings, - - - - -	610
Streets and highways, - - - - -	610-615
Sidewalks, - - - - -	615
Parks, - - - - -	615
Drains, sewers, etc., - - - - -	616-619
Levees, - - - - -	620
Water pipes in streets, - - - - -	620
Lighting streets with gas, - - - - -	621
Fencing townships, - - - - -	621
Other special cases, - - - - -	621
Objections in point of policy and justice, - - - - -	622
Objections under constitutional principles and provisions, - - - - -	623
That they take property without due process of law, - - - - -	623
That they take property for public use without compensation, - - - - -	624
That they violate express constitutional provisions securing uniformity in taxation, - - - - -	626
Provisions examined, - - - - -	626-637

CHAPTER XVI.

REDEMPTION OF LANDS FROM TAX SALES.

Redemption favored by the law, - - - - -	532
General rules of, - - - - -	532
Construction of statutes, - - - - -	532
Redemption a statutory right, - - - - -	533
Special conditions, - - - - -	535
Judicial remedies, - - - - -	535
Conditions imposed on the purchaser, - - - - -	536
Who may redeem, - - - - -	538
Who may not redeem, - - - - -	540
Imperfect redemption, - - - - -	540
Waiver of defects in redemption, - - - - -	541
Unauthorized conditions, - - - - -	542
Rights pending redemption, - - - - -	542
Effect upon title, - - - - -	543
Legislative power over purchases, - - - - -	544
Foreclosing redemption, - - - - -	545
Defective title; purchaser's lien, - - - - -	546-548

CHAPTER XVII.

PROCEEDINGS AT LAW TO RECOVER LANDS SOLD FOR TAXES.

The general rule, - - - - -	549
Special rule for tax cases, - - - - -	549
Repayment to purchaser, - - - - -	550-554
Payment for betterments - - - - -	554
Short statutes of limitation, - - - - -	555-564
Constructive possession, - - - - -	565
Claim or color of title, - - - - -	567-569

CHAPTER XVIII.

TAXATION OF BUSINESS AND PRIVILEGE.

The general right, - - - - -	570
Federal taxation, - - - - -	570
Methods of taxation, - - - - -	571
Taxation of privileges, - - - - -	571
Construction of municipal powers, - - - - -	574
Customary business taxes, - - - - -	575
Bankers, - - - - -	575
Carriers of goods and persons, - - - - -	576
Members of learned professions, - - - - -	576
Auctioneers and commission dealers, - - - - -	577
Merchants, - - - - -	578
Peddlers and transient dealers, - - - - -	579
Butchers, - - - - -	580

TABLE OF CONTENTS.

XVII

Discretionary authority, - - - - -	727-730
Case of assessments, - - - - -	730
Political duties, - - - - -	734-740
Legislative duties, - - - - -	740
Executive duties, - - - - -	740
Ministerial duties in general, - - - - -	742
Collectors and receivers of public moneys, - - - - -	742
General remarks, - - - - -	743
Federal jurisdiction, - - - - -	744

CHAPTER XXIV.

THE REMEDIES FOR WRONGFUL ACTION IN TAX PROCEEDINGS.

Right to a remedy, - - - - -	746
Wrongs in tax cases, - - - - -	746
Abatement of taxes, - - - - -	747
Reviews and appeals, - - - - -	747-752
Refunding taxes, - - - - -	753
Remedy by <i>certiorari</i> , - - - - -	753-759
Injunction: General rule of equitable relief, - - - - -	760-764
Illegal corporate action, - - - - -	764-768
Voting the taxes, - - - - -	769
Joint complaint by several persons taxed, - - - - -	769
Protecting the value of securities, - - - - -	772
Personal taxes, - - - - -	772-775
Excessive assessments, - - - - -	775
Irregular taxation, - - - - -	775-778
Tax upon lands: Cloud on title, - - - - -	778-783
Quieting a title after sale, - - - - -	783
Fraud, - - - - -	784
Bills of interpleader, - - - - -	786
Action at law against assessors, - - - - -	786-795
Action against supervisors, - - - - -	795
Resisting collection, - - - - -	796
Liability of collector, - - - - -	797
What process protects him, - - - - -	800
Accounting for illegal taxes, - - - - -	801
Federal collectors, - - - - -	803
Liability of municipal corporations, - - - - -	804-808
Irregular taxes, - - - - -	808
Voluntary payments, - - - - -	809-813
Compulsory payments, - - - - -	814
Form of action, - - - - -	815
Torts by officers, - - - - -	816
Implied warranty, - - - - -	818
Misappropriations, - - - - -	818
Federal liability, - - - - -	818

TABLE OF CASES.

A.

Abbott v. Britton, 18.
 v. Edgerton, 454, 774.
 v. Lindenbower, 299, 302, 305, 397, 398, 520, 528.
 v. Yost, 797, 799.
Abell v. Cross, 456.
Academy of Fine Arts v. Philadelphia, 70, 207.
Adam v. Litchfield, 372, 816.
Adams v. Beale, 452, 520, 539.
 v. Auditor-General, 771.
 v. Beman, 215, 219.
 v. Castle, 763.
 v. Farnsworth, 704, 710.
 v. Hackett, 604.
 v. Hyde, 338.
 v. Jackson, 256.
 v. Larrabee, 462.
 v. Lindell, 192.
 v. Mack, 475.
 v. Mills, 515.
 v. Nashville, 390, 392.
 v. Seymour, 281, 283, 291, 395.
 v. Somerville, 197, 602.
 v. Wakefield, 446.
Adams Co. v. Railroad Co., 781, 821.
Adamson v. Auditor, 188.
Addison v. Saulnier, 90.
Adraska City v. Gas Co., 17.
Adsit v. Lieb, 750.
Agricultural Society v. Worcester, 207.
Agry v. Young, 789.
Aguirre v. Maxwell, 110.
Ahl v. Gleim, 136.
Ainsworth v. Dean, 397, 398, 409, 496.
Alabama, etc., Ins. Co. v. Lott, 175, 763.
Alameda, etc., Co. v. Huff, 288, 484.
Albany Brewing Co. v. Meriden, 403, 444, 445.
Albany St., Matter of, 525, 609, 663.
Albany, etc., Co. v. Auditor-General, 366, 776, 777.
Albany, etc., R. Co. v. Canaan, 219, 385, 785.
 v. Osborn, 385.
Albany City B'k v. Maher (9 Fed. Rep.), 244, 352, 391, 764, 769, 771.

Albany City B'k v. Maher (19 Blatch.), 365, 392, 414, 417, 760.
 v. Maher (20 Blatch.), 53, 363.
Albee, Case of, 559.
Albertson v. Wallace, 99, 578, 579.
Albrecht v. State, 572, 581.
Albright v. Governor, 718.
 v. Tapscott, 261.
Alcorn v. Hamer, 45, 149, 620, 632, 648.
Alden v. Springfield, 667.
Aldrich, In re, 81.
Aldrich v. Aldrich, 437, 797, 799.
 v. Cheshire R. Co., 871, 750.
Alexander v. Baltimore, 63, 207, 216, 609, 612, 636, 637, 639.
 v. Bush, 478, 495, 512.
 v. Commonwealth, 359, 458.
 v. Dennison, 760, 763.
 v. Helber, 449.
 v. Hoyt, 792, 797.
 v. O'Donnell, 434, 572.
 v. Pitts, 483, 486.
 v. Sully, 502.
 v. Worthington, 264.
Alexandria, etc., Co. v. District of Columbia, 205, 213, 367, 749, 750, 774.
Alger v. Curry, 285.
 v. Eaton, 817.
Alkan v. Bean, 452, 762.
Allegany Co. v. Mining Co., 363, 401, 763.
Allegheny City's Appeal, 446.
Allen v. Archer, 300, 315, 317, 789.
 v. Armstrong, 256, 520, 522.
 v. Buffalo, 781.
 v. Burlington, 335, 339, 812, 816.
 v. Drew, 149, 163, 293, 603, 621, 622, 624, 638, 645.
 v. Galveston, 207.
 v. Jay, 104, 105, 115, 117, 126.
 v. Morse, 496, 522.
 v. Parish, 290.
 v. Peoria, etc., R. Co., 324, 430.
 v. Poole, 502, 511.
 v. Railroad Co., 75, 761.
 v. Scott, 797.
 v. Sharp, 749.
 v. Smith, 471, 479, 517.
 v. Taunton, 135.
Allentown v. Henry, 609, 621, 639.

- Allentown v. Saeger, 812, 814.
 Allender v. Riston, 260.
 Alley v. Edgecombe, 136, 277, 279.
 Allhands v. People, 181, 703.
 Allison v. Armstrong, 501.
 Almony v. Hicks, 784.
 Almy v. California, 91, 95, 96.
 Alter v. Shepherd, 538.
 Alton v. Ins. Co., 268, 278, 329.
 Alvany v. Powell, 374.
 Alvis v. Whitney, 59, 162, 239.
 Alvord v. Collin, 257, 289, 396, 428, 485.
 Amberg v. Rogers, 408, 520.
 Amenias v. Stanford, 14, 15, 588.
 American, etc., Association v. Smith, 537.
 American Bank v. Mumford, 227, 228, 229, 800.
 American Coal Co. v. Commissioners, 23, 226, 378, 433.
 American Emig. Co. v. Land Co., 806.
 American U. Ex. Co. v. St. Joseph, 98, 169, 192, 360.
 Amesbury, etc., Co. v. Amesbury, 225, 227, 229, 814.
 v. Weed, 3, 229.
 Amy v. Taxing District, 17.
 Anderson, Matter of, 656.
 Anderson v. Commonwealth, 72.
 v. Courtright, 564.
 v. Draining Co., 64, 187, 182, 243, 616, 630.
 v. Hancock, 409.
 v. Hensley, 399, 467.
 v. Kerns Draining Co., 616, 630.
 v. State, 205, 444.
 Anding v. Levy, 461, 572.
 Andover Turnpike v. Gould, 16.
 Andrews v. Auditor, 87.
 v. Linton, 260.
 v. People (75 Ill.), 262, 455, 456, 527.
 v. People (83 Ill.), 484.
 v. People (84 Ill.), 310, 484.
 v. Ramsay, 551.
 v. Senter, 494.
 v. Worcester Ins. Co., 293.
 Angell v. Bowler, 260.
 Angier v. Ash, 260, 261.
 Ankenny v. Multnomah Co., 174.
 Ankeny v. Albright, 450.
 v. Hennigsen, 668.
 Annan v. Baker, 323, 478.
 Annely v. De Saussure, 501.
 Anthony v. Sturgis, 763.
 Antoni v. Greenhow, 67, 73, 711, 742.
 Appeal Tax Court v. Baltimore Academy, 203.
 v. Baltimore Cemetery Co., 78, 206.
 v. Gill, 204.
 Appeal Tax Court v. Grand Lodge, 202, 203, 204.
 v. Patterson, 204.
 v. Pullman Car Co., 96.
 v. Red Men's Hall, 203.
 v. Railroad Co., 294, 296, 367, 373, 385.
 v. Regents, 204.
 v. Rice, 206, 220.
 v. St. Mary's Seminary, 208.
 v. St. Peter's Academy, 203.
 v. Zion's Church, 203.
 Apperson v. Memphis, 17, 169, 197.
 Applegate v. Applegate, 729.
 v. Ernst, 384.
 Appleton v. Hopkins, 16, 18, 437.
 Arapahoe Com'rs v. Cutler, 873, 815.
 Arbegust v. Louisville, 64, 158, 247.
 Arberry v. Beavers, 741.
 Archer v. Railroad Co., 773.
 Archy, *Ex parte*, 99.
 Armand v. Dumas, 203.
 Armstrong v. Athens Co., 67, 70, 214.
 v. County Court, 752.
 v. Jackson, 554.
 v. St. Paul, 664.
 v. Toler, 434.
 v. Treasurer, 207.
 Arn v. Hoppin, 547.
 Arnett v. Griffin, 332, 801.
 Arnold v. Cambridge, 150, 643.
 v. Davis, 370.
 v. Middletown, 357, 372.
 v. Supervisors, 763.
 Arrington v. Liscom, 781.
 Arthurs v. King, 394, 544.
 v. Smathers, 395, 533.
 Ash v. Ashton, 303.
 v. Cummings, 115.
 v. People, 593, 599.
 Ashville v. Means, 276.
 Asken v. Columbia Co., 711.
 Astor, *In re*, 614, 659.
 Astor v. New York, 48, 810, 682, 762.
 Astrom v. Hammond, 68.
 Asylum v. New Orleans, 69.
 Atchison, etc., R. Co. v. Francis, 184.
 v. Jaques, 448.
 v. Maquillin, 302, 305.
 v. Wilhelm, 761.
 v. Wilson, 761.
 v. Woodcock, 305, 766.
 Athens v. Long, 6, 168, 201.
 Atkins v. Hinman, 5, 314, 402, 409, 411, 493, 530, 553.
 v. Kinman, 473, 517.
 v. Randolph, 689, 690.
 Atkinson v. Armick, 442.
 v. Dunlap, 569.
 Atlanta, etc., R. Co. v. State, 212, 446.
 Atlanta St. R. Co. v. Atlanta, 214.
 Atlantic, etc., R. Co. v. Allen, 210, 212, 213.
 v. Cleino, 440, 819.

- Atlantic, etc., R. Co. v. Com'rs, 210.
 v. State (35 Ga.), 72.
 v. State (60 N. H.), 412.
 Attorney-General v. Burrell, 129.
 v. Cambridge, 152, 682.
 v. Detroit, 765.
 v. Eau Claire, 117.
 v. Leavenworth, 352.
 v. Mining Co., 231, 380.
 v. Napier, 19.
 v. Plank R. Co., 199.
 v. Railway Co., 30.
 v. Salem, 823.
 v. Supervisors (34 Mich.), 145.
 v. Supervisors (42 Mich.), 412, 731, 749.
 Atwater v. Woodbridge, 816.
 Atwell v. Zeluff, 409, 616, 790, 796, 814.
 Atwood v. Lincoln, 337.
 v. Weems, 452.
 Auditor v. New Albany, etc., R. Co., 225, 389.
 v. Treasurer, 711.
 Auditor-General v. Pullman Car Co., 813.
 v. Supervisors, 293, 805.
 Auditor of State v. Railroad Co., 46, 752, 794.
 Auditors v. Benoit, 253, 254.
 Augusta v. Dunbar, 373, 458.
 v. Georgia R., etc., Co., 225.
 v. National Bank, 279, 346.
 v. North, 347.
 v. Walton, 275, 279.
 Augusta Bank v. Augusta, 223.
 Augustine v. Jennings, 535.
 Aulanier v. The Governor, 580, 602.
 Aurora v. Lamar, 138, 776.
 v. West, 183.
 Austin v. Barrett, 562.
 v. Baston, 84.
 v. Bremer Co., 821.
 v. Holt, 516.
 Avery v. East Saginaw, 418, 421, 423.
 v. Judd, 501.
 v. Rose, 482, 496, 517.
 Ayres v. Duprey, 260.
 v. Lawrence, 768.
 v. Moulton, 255.
- B.
- Babbitt v. Johnson, 510.
 Babcock v. Granville, 748, 794, 815.
 v. Lamb, 259.
 Bachelder v. Epping, 135.
 v. Thompson, 425, 801.
 Bacon v. Callender, 554.
 v. School District, 240, 816.
 Bagby v. Bateman, 328.
 Bagg v. Detroit, 664.
 Bailey v. Ackerman, 425.
- Bailey v. Buell, 748, 789, 812.
 v. Doolittle, 529, 530.
 v. Fisher, 251.
 v. Fuqua, 444.
 v. Howard, 561.
 v. Maguire, 71, 212.
 v. New York, 173, 689.
 v. Railroad Co., 212, 232, 381, 439, 797, 808.
 Baird v. Bank of Washington, 254.
 v. People, 153.
 Baker v. Allen, 791.
 v. Boston, 604.
 v. Cincinnati, 195, 582, 598, 812, 815.
 v. Clark, 504.
 v. Kelly, 462, 558.
 v. McDuffie, 260, 261.
 v. Panola Co., 580, 602, 805.
 v. State, 794.
 v. Whiting, 502.
 v. Windham, 128.
 Bakewell v. Police Jury, 152.
 Baldwin v. Buffalo, 756.
 v. City Council, 63, 329.
 v. First Parish, 377.
 v. Mayne, 447.
 v. McClinch, 790.
 v. Merriam, 514.
 v. North Brandford, 136.
 v. Tucker, 772.
 v. Trustees, 377.
 Ballance v. Forsyth, 493, 497.
 Baltimore v. Cemetery Co., 207, 209, 624, 625, 636, 639, 651, 653.
 v. City R. R. Co., 23, 433.
 v. Gill, 765, 768, 770.
 v. Grand Lodge, 364, 366.
 v. Howard, 16, 676.
 v. Hughes, 146, 245, 624, 640, 641, 662.
 v. Johns Hopkins Hospital, 363, 646.
 v. Marriott, 282.
 v. Porter, 770.
 v. Railroad Co., 211, 213, 225, 229, 772.
 v. Scharf, 363, 646.
 v. State, 112, 113, 205, 681.
 v. Stirling, 375.
 Baltimore & O. R. Co. v. Allen, 97, 711.
 v. Dist. of Columbia, 205.
 v. Marshall Co., 70, 205.
 v. Maryland, 234.
 v. Wheeling, 205.
 Baltimore Turnpike Co., *Ex parte*, 259.
 Bancroft v. Dumas, 434, 572.
 v. Lynnfield, 128.
 v. Thayer, 121.
 Bangor v. Luncey, 259, 350, 414.
 v. Masonic Lodge, 202.
 Bangor, etc., R. Co. v. Harris, 226, 384.

- Bangor, etc., R. Co. v. Smith, 71.
 Bangs v. Snow, 279, 324.
 Bank v. Tennessee, 215.
 Bank of Augusta v. Earle, 57.
 Bank of Cape Fear v. Edwards, 212, 226, 229, 230.
 Bank of Chenango v. Brown, 259, 801.
 Bank of Columbia v. Hines, 195, 196.
 Bank of Commerce v. New York, 83, 84, 226, 231, 233, 379, 380.
 Bank of Commonwealth v. New York, 807.
 Bank of Georgia v. Savannah, 212, 227, 228, 229.
 Bank of Mendocino v. Chalfant, 178, 803.
 Bank of New York v. Supervisors, 84, 85.
 Bank of Pennsylvania v. Commonwealth, 4, 45, 377.
 Bank of Republic v. Hamilton, 207.
 Bank of Rome v. Rome, 345.
 Bank of Santa Rosa v. Chalfant, 812.
 Bank of the State v. New Albany, 182, 183, 630.
 Bank of United States v. State, 20.
 Bank of Utica v. Utica, 230, 234.
 Bank of Woodland v. Webber, 812.
 Bank Tax Cases, 84, 380.
 Banks, The, v. Mayor, 84.
 Banta v. Richards, 301.
 Barber v. Evans, 546.
 Barbour v. Camden, 136.
 v. Nelson, 462.
 Barhyte v. Shepherd, 789, 791, 792.
 Barker v. Blake, 395, 400, 401.
 v. Hesseltine, 395.
 v. Morton, 443.
 v. Omaha, 863, 820.
 v. Watertown, 375.
 Barkley v. Levee Com'rs, 450, 726.
 Barlow v. National Bank, 447.
 v. The Ordinary, 43, 710.
 Barnard v. Argyle, 790.
 v. Graves, 261, 426, 442, 456, 801.
 v. Hoyt, 538, 782.
 Barnardiston v. Soane, 787.
 Barnes v. Atchison, 636, 644.
 v. Doe, 268, 517.
 v. Dyer, 642.
 v. Marshall Co., 753.
 v. Woodbury, 372.
 Barnett v. Cline, 763, 781.
 Barney v. State, 433.
 Barr v. Deniston, 768, 770.
 v. Patrick, 544.
 Barrett v. Amerein, 501, 507.
 v. Cambridge, 809.
 v. Copeland, 260.
 v. Crane, 526, 722.
 v. Holmes, 560, 561, 566.
 v. Love, 563.
 v. Porter, 437.
 v. Reed, 254.
 Barringer v. Cowan, 206.
 Barrington v. Austin, 256.
 Barrow v. Davis, 760, 772.
 v. Lapene, 783.
 Bartemeyer v. Iowa, 100.
 Barthel v. New Orleans, 580.
 Barthell v. Syverson, 466.
 Bartholomew v. Harwinton, 136.
 v. Leach, 502.
 Bartlett v. Carter, 379.
 v. Kinsley, 336.
 v. Morris, 264.
 Barton v. Gilchrist, 485, 512.
 v. Kalloch, 178.
 v. McWhinney, 546.
 v. Moss, 503.
 Baskins v. Winston, 494, 496.
 Bassett v. Jacksonville, 329.
 Bass v. Fond du Lac, 312.
 Bassett v. Barbin, 726.
 v. Governor, 720.
 v. Porter, 437, 791.
 v. Welch, 501, 507.
 Bassford, *In re*, 641, 663.
 Basso v. Benker, 539, 542.
 Basten v. Carew, 787.
 Bate v. Speed, 283.
 Bates v. Boston, 799.
 v. Kimball, 43.
 v. Mobile, 375, 584.
 v. People's, etc., Association, 467.
 v. York Co., 809.
 Bates' Case, 58.
 Baton Rouge, etc., R. Co. v. Kirkland, 206.
 Baton Rouge Water Works, *Re*, 462.
 Battle v. Mobile, 63.
 Baugh v. Ryan, 207.
 Bausman v. Lancaster, 161.
 Bayard v. Inglis, 555.
 v. Klinge, 338.
 Bay City v. State Treasurer, 125, 345.
 Bay County v. Brock, 707.
 Bays v. Lapidge, 435.
 Beach v. Botsford, 801.
 v. Furman, 797.
 v. Shoenmaker, 780.
 Beals v. Amador, 128, 168, 178.
 v. Providence Rubber Co., 209.
 Beaman v. Board of Police, 785.
 Bean v. Parker, 260.
 v. Thompson, 315, 319, 493.
 Beard v. Brooklyn, 670.
 v. Cameron, 254.
 v. Green, 497.
 v. Supervisors, 236.
 Beardstown v. Virginia, 264.
 Beatty v. Mason, 517.
 Bechtle v. Lingle, 396.
 Beck v. Obst, 658, 668.
 Bedard v. Hall, 629.
 Beebe v. State, 43.
 Beecher v. Clay Co., 807.
 v. Supervisors of Webster, 459.

- Beekman v. Bigham, 518.
 Beekman St., Matter of, 743.
 Beers v. People, 310, 419.
 Beeson v. Johns, 412, 480, 491, 750.
 Belcher v. Mhoon, 520, 784.
 Belden v. State, 455.
 Belfast, etc., R. Co. v. Brooks, 389.
 Belfast Savings Bank v. Kennebec, etc., Land Co., 258.
 Bell v. Coats, 262, 523, 560.
 v. Gordon, 45, 515.
 v. Pierce (48 Barb.), 361, 789, 791.
 v. Pierce (51 N. Y.), 370.
 v. Railroad Co., 267.
 Belleville Nail Co. v. People, 447, 463.
 Bellinger v. Gray, 66, 419, 423, 814.
 v. White, 89, 367.
 Bellmeyer v. School District, 120.
 Bellocq v. New Orleans, 446.
 Bellows v. Elliott, 287, 478.
 v. Weeks, 300, 323, 425.
 Belo v. Forsyth Co., 233, 380.
 Belvidere v. Railroad Co., 19.
 Belz v. Bird, 551.
 Bemis v. Boston, 56, 374.
 Benbow v. Iowa City, 735.
 Bench v. Otis, 616.
 Beniteau v. Detroit, 656.
 Benjamin v. Malaka, 337.
 v. Manistee, etc., Co., 95.
 Bennett v. Birmingham, 56, 276, 532, 593.
 v. Buffalo, 339, 420, 518, 676, 789, 817.
 v. Burch, 797.
 v. Hunter, 450, 451, 452, 462.
 v. McWhorter, 713.
 Bennington v. Park, 103, 333.
 Benoist v. St. Louis, 157.
 Bentley v. Barton, 398.
 Benton v. Taylor, 755.
 Bergen v. Clarkson, 145, 488.
 Berlin Mills v. Wentworth's Location, 20, 373.
 Berliner v. Waterloo, 333.
 Bernal v. Lynch, 503.
 Berney v. Tax Collector, 6, 83, 243.
 Berri v. Patch, 772.
 Berrien Co. Treasurer v. Bunbury, 705, 707.
 Bertonneau v. School Directors, 121.
 Bertram v. Cook, 500.
 Berwin v. Legras, 445.
 Besore v. Dosh, 489, 512, 547.
 Bestor v. Powell, 488, 553.
 Bethel v. Mason, 797.
 Bettison v. Budd, 485.
 Beveridge v. Livingston, 659.
 Beverly v. Burke, 568.
 Bibb Co. v. Cent. R. Co., 210.
 Biddle v. Oaks, 457.
 v. Noble, 394.
 Bicknall v. Story, 811.
 Bidleman v. Brooks, 395, 399, 520.
 Bidwell v. Coleman, 409, 486.
 v. Webb, 409, 486.
 v. Whittaker, 264.
 Big Black Creek Imp. Co. v. Commonwealth, 274.
 Bigelow v. Boston, 663.
 v. Chicago, 640.
 Biggins v. People, 440, 463, 526.
 Biggs v. Lawrence, 484.
 Bigler v. Karnes, 553, 559.
 v. Sacramento, 44, 45.
 Bilbo v. Henderson, 819.
 Billings v. Detten, 304, 553.
 v. McDermott, 512.
 v. Russell, 797.
 v. Starke, 259, 518.
 Billingsley v. State, 256, 719, 720.
 Bingham v. Smith, 409.
 Binghamton Bridge Case, 71.
 Binkert v. Jansen, 294, 761, 774.
 v. Wabash R. Co., 441, 447.
 Birch v. Fisher, 251.
 Bird v. Jones, 513.
 v. Perkins, 249, 284, 409, 411, 414, 428, 755, 797, 799, 802.
 Biscoe v. Coulter, 205, 445.
 Bishop v. Gone, 315, 317, 319, 480.
 v. Lovan, 442.
 v. Marks, 591, 630, 648.
 Biss v. New Haven, 611, 777.
 Bissell v. Jeffersonville, 331, 340.
 v. Spring Valley, 332.
 Bittinger v. Bell, 133, 284.
 Black v. Jeffersonville, 605.
 v. Percifield, 527.
 Blackburn v. Walpole, 336, 338.
 Blackstone v. Sherwood, 518, 537.
 v. Taft, 254.
 Blackstone Manuf. Co. v. Blackstone, 56.
 Blackwell v. Pidcock, 499.
 Blackwood v. Van Vleet, 296, 508, 509, 784.
 Blaiden v. Abel, 295.
 Blain v. Irby, 441.
 Blair v. Forehand, 601.
 Blair Town, etc., Co. v. Scott, 409, 516.
 Blake v. Baker, 209.
 v. Howe, 501.
 v. Johnson, 802.
 v. People, 302, 363.
 v. Sturtevant, 253, 475.
 Blakely v. Bestor, 409, 507.
 Blakeney v. Ferguson, 517.
 Blalock v. Gaddis, 483.
 Blanchard v. Detroit, etc., R. Co., 133.
 v. Dow, 802.
 v. Goss, 797.
 v. Powers, 261, 410, 475, 481.
 Blanding v. Burr, 128, 177, 627.
 Blandin v. Harrison Co., 771.
 Blanton v. Ludeling, 536.

- Bleeker v. Ballou, 207, 676.
 Blessing v. Galveston, 198, 572.
 Blickenderfer v. School Directors, 348.
 Blight v. Atwell, 323.
 v. Banks, 323.
 Block v. Jacksonville, 20, 580, 602.
 Blodgett, Matter of, 656.
 Blodgett v. German, etc., Bank, 440, 448.
 v. Holbrook, 339, 859, 475.
 Blood v. Sayre, 56, 873.
 Blossom v. Van Court, 447.
 Blount v. Munroe Co., 91, 96.
 Blue Jacket v. Johnson Co., 4, 87.
 Blythe v. Luning, 57.
 Board of Assessment v. Alabama Cent. R. Co., 176.
 Board of Commissioners v. Bearss, 186, 803.
 v. Elston, 763, 764.
 Board of Directors v. Houston, 64, 654, 703.
 Board of Education v. Aberdeen, 294.
 v. McLandsborough, 128, 636.
 v. Old Dominion, etc., Co., 17, 444, 449, 450.
 Board of Excise v. Barrie, 604.
 Board of Justices v. Fennimore, 718.
 Board of Liquidation v. McComb, 767.
 Board of Regents v. Hamilton, 173.
 Board of Revenue v. Gas Light Co., 176, 227, 228, 381.
 Board of Wardens v. Philadelphia, 130.
 Board, etc., of Indianapolis v. Magner, 276.
 Boardman v. Beckwith, 800, 803.
 v. Bourne, 400.
 v. Goldsmith, 437.
 v. Supervisors of Tompkins, 374, 753.
 Bodertha v. Spencer, 448.
 Boeck v. Merriam, 558.
 Bohler v. Schneider, 179.
 Bolles v. Bowen, 260, 261.
 Bollman, *Ex parte*, 254.
 Bolton v. Cleveland, 310.
 Bonaparte v. Tax Court, 80.
 Bond Debt Cases, 327.
 Bond v. Kenosha, 634, 763.
 Bonds v. Greer, 533, 539.
 Bonham v. Needles, 331.
 Bonnell v. Roane, 442, 448, 784.
 Bonner v. Welborn, 581.
 Bonsall v. Lebanon, 589.
 Boomer v. Laine, 260.
 Booth v. Woodbury, 103, 107, 186, 237, 303.
 Boothbay v. Giles, 426.
 v. Race, 856.
 Borden v. Houston, 256.
 Borland v. Boston, 20, 370, 813.
 Boro v. Phillips Co., 591.
 Borough of Dunmore's Appeal, 240, 687.
 Borroughs v. Lowder, 706.
 Boston v. Schaffer, 276, 593.
 v. Shaw, 590.
 v. Weymouth, 475.
 Boston, etc., Glass Co. v. Boston, 226, 878, 803, 814, 815.
 Boston Loan Co. v. Boston, 378.
 Boston Manuf. Co. v. Newton, 403.
 Boston & Me. R. R. Co. v. Cambridge, 89, 214.
 Boston & Roxbury Mill Corporation v. Newman, 114.
 Boston Turnpike v. Pomfret, 317.
 Boston Water Power Co. v. Boston, 226, 229, 383.
 Bosworth v. Danzien, 409.
 Bott v. Burnell, 260.
 v. Parley, 64.
 Boughton v. State, 719.
 Bouldin v. Baltimore, 276, 277.
 Bouligny v. Dormenon, 668.
 Bourne v. Boston, 748, 750.
 Bouton v. Brooklyn, 779.
 v. Neilson, 671.
 Bowdoinham v. Richmond, 240, 690, 700.
 Bowen v. Donovan, 262, 456.
 v. King, 335.
 v. Striker, 449, 547, 549.
 Bowers v. Anderson, 514.
 v. Chambers, 409, 515.
 Bowles v. Clough, 395.
 Bowling Green, etc., v. Warren Co., 268.
 Bowman v. Cockrill, 509, 515, 559, 566.
 v. Echstien, 511.
 v. Middleton, 299.
 v. Officer, 503.
 v. Stark, 318.
 Bowyer v. O'Donnall, 409.
 Boyce v. Sinclair, 300.
 Boyd v. Hood, 263, 533.
 v. State, 604.
 Boye v. Girardy, 186.
 Boyer v. Boyer, 390, 391, 410.
 v. Jones, 358.
 Boykin v. Smith, 518.
 Boynton v. Newton, 735.
 v. Willard, 260, 261.
 Bracey v. Ray, 453.
 Bracken v. Cooper, 502.
 Brackett v. Norcross, 554.
 v. Vining, 442, 485, 802.
 v. Whidden, 819.
 Bradford v. Lafargue, 446.
 v. Randall, 414.
 v. Shine, 569.
 Bradley, *Ex parte*, 728, 729.
 Bradley v. Bauder, 373.
 v. Eau Claire, 803.
 v. Fisher, 787.
 v. Lincoln Co., 312, 324.

- Bradley v. McAtee**, 70, 614, 624, 639.
 v. People, 84, 226, 390.
 v. Ward, 289, 414, 800.
Bradstreet, Ex parte, 728.
Bradwell v. State, 100.
Brady, Matter of, 752.
Brady, Petition of, 614, 641, 663.
Brady v. Bartlett, 290, 656, 672.
 v. Dowden, 898, 915.
 v. Kelly, 673.
 v. King, 46, 50, 302, 644, 659.
 v. Offut, 353.
 v. Page, 666.
Brainard v. Colchester, 70, 867.
Brainerd v. Head, 797, 799.
Braley v. Seaman, 411.
Branch v. Charleston, 212.
 v. Marengo, 388.
Brandirff v. Harrison Co., 338, 776, 821.
Bratton v. Mitchell (1 W. & S.), 304, 400, 480.
 v. Mitchell (7 W. & S.), 480.
Braun v. Chicago, 181, 182.
 v. Sauerwein, 804.
Brauns v. Green Bay, 219.
Brazil v. Kress, 812.
Breisch v. Cox, 450, 453, 552.
Brevoort v. Brooklyn, 414.
 v. Detroit, 280, 300, 311, 312, 639, 643.
 v. Randolph, 466.
Brewer v. King's Sureties, 714.
 v. Springfield, 617, 639, 650, 772, 773, 778.
Brewer Co. v. Brewer, 171, 188, 201.
Brewster v. Hough, 204, 207.
 v. Hyde, 339.
 v. Syracuse, 128, 151, 676.
Brick Presbyterian Church v. New York, 604.
Bride v. Watt, 567.
Bridge v. Ford, 526, 722.
Bridge Co. v. District of Columbia, 205.
 v. Mayer, 378.
 v. New Hanover Co., 194, 436.
Bridge Proprietors v. State, 5, 46, 70.
Bridgeport v. Bishop, 223, 226, 231.
 v. New York, etc., R. Co., 207, 208, 609, 624, 637, 651, 652.
 v. Nichols, 280.
Bridges v. Griffin, 873.
 v. Supervisors, 326, 685.
Briggs v. Georgia, 285.
 v. Hubbard, 569.
 v. Johnson, 779.
 v. Johnson Co., 119, 155.
 v. Lewiston, 814, 816.
 v. Morse, 443.
 v. Murdock, 257, 386.
 v. Rochester, 370.
 v. Whipple (6 Vt.), 128.
 v. Whipple (7 Vt.), 487.
Bright v. McCullough, 142, 183, 216, 235, 324, 630.
 v. Supervisors of Chenango, 730.
Brightman v. Kirner, 208.
Brighton v. Wilkinson, 152.
Brigins v. Chandler, 330, 515, 750.
Brimmer v. Boston, 604.
Brisbane v. Dacres, 809.
Briscoe v. Allison, 430, 763.
 v. Coulter, 411, 520.
Bristol v. Johnson, 128, 686, 771.
 v. New Chester, 162, 240.
 v. Supervisors, 305, 686.
Bristol Manuf. Co. v. Gridley, 793.
British, etc., Co. v. Com'rs of Taxes, 378.
Britten v. Clinton, 158.
Broadbent v. Tuskaloosa, etc., Ass'n, 68.
Broadway Bap. Ch. v. McAtee, 207, 276, 614, 653.
Brocaw v. Gibson Co., 347, 350.
Brock v. Leighton, 549.
Brodhead v. Milwaukee, 103, 107, 187.
Brodie v. McCabe, 76, 737.
Brodnax v. Groom, 45, 195, 278.
Bromley v. Reynolds, 142, 145.
 v. Smith, 763.
Bronson v. Kukuk, 88, 89.
 v. Kinzie, 81.
Brook v. Shelton, 749.
Brookings v. Woodin, 498.
Brooklyn v. Breslin, 66, 596, 602.
 v. Cleves, 605.
 v. Meserole, 773, 776.
Brooks v. Baltimore, 160, 607.
 v. Eighmey, 440.
 v. Hardwick, 542.
 v. Howland, 781.
 v. Satterlee, 288, 483, 656.
 v. State, 716.
Broughton v. Journeay, 895, 484, 538, 542.
Brown v. Austin, 411.
 v. Chicago, 575.
 v. Concord, 135, 772.
 v. Davis, 260.
 v. Day, 450, 451, 539.
 v. Denver, 44, 363, 641.
 v. Fitchburg, 613.
 v. Fodder, 449, 547, 552.
 v. Gates, 443.
 v. Goodwin, 447, 520.
 v. Greer, 409.
 v. Hays, 403, 406, 408, 566.
 v. Herron, 763.
 v. Hogle, 490, 502, 529, 530.
 v. Houston, 90, 94, 98.
 v. Lattimore, 714.
 v. Lunt, 249, 251, 256.
 v. Maryland, 90, 91, 94, 95, 98.
 v. Noble, 376.
 v. Painter, 468, 560, 562.
 v. Phipps, 712.

- Brown v. Simons**, 466, 501, 504.
 v. Smith, 19, 789, 791.
 v. State, 604.
 v. Storm, 554.
 v. Walker, 516, 526.
 v. Way, 260.
 v. Wright, 289, 424, 473.
 v. Veazie, 395, 398, 471, 517.
Brownell v. Storm Lake Bank, 784.
 v. Supervisors, 727.
Brownlee v. Marion Co., 441.
Bruce v. Holden, 260, 261, 456.
 v. McBee, 401.
Brumagin v. Tillinghast, 91.
Brundige v. Malony, 499.
Brunner v. Bay City, 770.
Brunswick v. Dure, 736.
 v. Finney, 388, 442.
 v. Litchfield, 690.
Brush v. Baker, 359, 363.
 v. Cook, 254.
 v. Detroit, 657.
Bryan v. Chicago, 65.
 v. Harvey, 295.
 v. Lundberg, 14.
Bryant v. Estabrook, 512, 546, 750, 822.
Bryson v. Spaulding, 742.
Bubb v. Tompkins, 541.
Buchanan v. County Com'rs, 206.
 v. Litchfield, 831.
Buck v. People, 310, 338, 365, 405, 409, 422.
Buckley v. Taggart, 509.
Bucknall v. Story, 429, 497, 517, 523, 779, 781.
Bucknam v. Ruggles, 252, 254.
Buckner, Ex parte, 758.
Bucksport v. Spofford, 386, 475.
 v. Woodman, 372.
Budd v. Houston, 783.
 v. State, 300.
Buell v. Ball, 118, 158, 819.
 v. Irwin, 429.
 v. Schaale, 818.
Buena Vista Co. v. Railroad Co., 821.
Buffalo, Matter of, 656.
Buffalo v. Le Conteulx, 346.
 v. Webster, 602, 605.
Buffalo City Cemetery v. Buffalo, 207, 208, 589, 652.
Buffalo, etc., R. Co. v. Supervisors, 152, 219, 386, 414.
Buie v. Fayetteville, 392.
Bulfinch v. Bonner, 435.
Bulkley v. Callanan, 309.
 v. Williamstown, 370.
Bull v. Griswold, 446.
 v. Read, 63, 120, 348, 770.
Bullis v. Marsh, 489, 522, 562.
Bullock v. Curry, 132, 276, 324, 383.
Bunnell v. Farris, 262.
Burbank v. People, 455, 456.
Burch v. Savannah, 179, 223, 573, 599.
Burd v. Patterson, 555, 559.
Burd v. Ramsey, 894, 442.
Bureau Co. v. Railroad Co., 180, 219, 423.
Burger v. Carter, 457.
Burgess v. Clark, 115.
 v. Jefferson, 236.
 v. Pue, 63.
Burke, Matter of, 613, 614.
Burke v. Badlam, 226.
 v. Elliott, 251, 254.
Burlew v. Quarrier, 513.
Burlington v. Beasley, 127.
 v. Bumgardner, 586, 597.
 v. Davis, 593.
 v. Kellar, 277.
 v. Putnam Ins. Co., 574, 598, 599.
 v. Quick, 309, 655, 676.
 v. Railroad Co., 16, 458, 468, 562.
Burlington, etc., R. Co. v. Buffalo Co., 802.
 v. Cass Co., 777.
 v. Clay Co., 347, 781.
 v. Lancaster Co., 192, 340, 342.
 v. Saline Co., 217, 218, 291, 414.
 v. Saunders Co., 341, 761.
 v. Seward Co., 217.
 v. Spearman, 651, 652.
 v. Stewart, 821.
Burmeister, Petition of, 613, 663.
Burnes v. Leavenworth, 760.
Burnett, Ex parte, 13, 598.
Burnett v. Cincinnati, 782.
 v. Sacramento, 177, 627, 639.
Burnham v. Chelsea, 136.
Burns v. Bender, 715.
 v. Byrne, 502.
 v. Ledbetter, 542.
 v. Lyon, 406, 488.
Burr, Ex parte, 723, 729.
Burr v. Atlanta, 179, 580.
 v. Carbondale, 123, 155, 697.
 v. Hunt, 781.
 v. Veeder, 466.
Burrill v. Auditor-General, 784.
Burt v. Auditor-General, 777.
Burton v. Fulton, 788, 794, 797.
Busbee v. Lewis, 511, 779.
Busby v. Noland, 812.
Busch v. Huston, 500.
Bush v. Davidson, 482, 488, 537.
 v. Williams, 408.
Bushnell v. Beloit, 345.
Bussey v. Leavitt, 484, 790.
Bussy v. Gilmore, 278.
Butler v. Bailey, 358, 453.
 v. Delano, 489, 522.
 v. Dunham, 345.
 v. Nevin, 427.
 v. Palmer, 545.
 v. Pennsylvania, 604.
 v. Porter, 502.
 v. Putney, 136.
 v. State, 261.
 v. Supervisors, 800, 812, 863.

Butler v. Toledo, 800.
 Butler's Appeal, 63, 171, 200, 288, 570, 605.
 Buttrick v. Nashua, etc., Co., 497.
 Butts v. Francis, 520.
 Butz v. Muscatine, 295, 348.
 Butzman v. Whitbeck, 581, 596.
 Buzzell v. Johnson, 443.
 Byers v. Olney, 575, 602.
 Byington v. Buckwalter, 540, 548.
 v. Rider, 539.
 Byles v. Genung, 797.
 v. Golden, 727, 807.
 Byram v. Detroit, 811, 820.

C.

Cabot v. Boston, 370.
 v. Given, 254.
 Cadmus v. Jackson, 446, 452, 530.
 Cahn v. Wright, 720.
 Cahoon v. Coe, 268, 363, 364, 366, 411, 497, 518.
 Cain v. Commissioners, 195, 331, 621, 633, 636.
 v. Hunt, 555, 568.
 Cairo, etc., R. Co. v. Parks, 342, 521, 563.
 Cairns v. Chabert, 467.
 Caldwell v. Harlan, 260.
 v. Harrison, 259.
 v. Hawkins, 797.
 v. Justices, 63.
 v. Moore, 814.
 v. Rupert, 655, 656.
 v. State, 358.
 Cald v. Kurby, 604.
 Calhoun v. Fletcher, 549.
 v. Lunsford, 708.
 v. McLendon, 300.
 Calhoun Co. v. Emigrant Co., 785.
 California, etc., R. Co. v. Supervisors of Butte, 758.
 Callam v. Saginaw, 682, 697.
 Callaway v. Millidgeville, 812.
 Cambioso v. Maffitt, 484.
 Cambridge v. Chandler, 484.
 v. Lexington, 682.
 Camden v. Allen, 17.
 Camden & Amboy R. Co. v. Com'rs, 198, 210, 233.
 v. Hillegas, 198, 210, 429.
 Cameron, *In re*, 659.
 Cameron v. Cappeller, 357.
 v. Burlington, 376.
 v. Stephenson, 821.
 Camp v. Algansee, 807.
 Campau v. Detroit, 658.
 Campbell v. Packard, 409, 533.
 v. Union Bank, 300.
 v. Webster, 260, 261.
 v. Wilson, 308, 394.
 Campbell Co. Court v. Taylor, 276, 277, 279, 333.
 Canal Bank v. Albany, 661.
 Canal Street, Matter of, 661, 748.
 Canal Trustees v. Chicago, 207.
 Canal and Walker Sts., Matter of, 743.
 Cannell v. Crawford Co., 425.
 Cannon v. New Orleans, 92, 93.
 Cantagrel v. Von Lupin, 547.
 Cantwell v. Owens, 264.
 Capital City, etc., Co. v. Insurance Co., 368.
 Capron v. Raistrick, 481.
 Capwell v. Hopkins, 253.
 Carbon Iron Co. v. Carbon County, 223, 232, 380.
 Cardigan v. Page, 317, 336, 339, 397, 398, 428, 498.
 Cardinal v. Smith, 819.
 Carees v. Foster, 449.
 Carey v. Giles, 271.
 Cargill v. Power, 545.
 Carithers v. Weaver, 501, 503, 561, 568.
 Carleton v. Ashburnham, 360, 376, 813.
 v. Salem, 823.
 v. Whitcher, 257.
 Carlin v. Cavender, 525, 674.
 Carlisle v. Marshall, 375.
 Carlisle Bank, Case of, 223.
 Carlisle School District v. Hepburn, 749.
 Carmichael v. Aiken, 395.
 Carnoe v. Freetown, 370.
 Carolina Cent. R. Co. v. Wilmington, 194.
 Caron v. Martin, 757.
 Carondelet v. Picott, 17.
 Carpenter v. Dalton, 752.
 v. Gann, 498.
 v. Sawyer, 287.
 v. School Trustees, 205.
 Carr v. Commercial Bank, 260.
 v. State, 581.
 Carrier v. Gordon, 98.
 Carrington v. Farmington, 169.
 Carroll v. Mayor, 758.
 v. Perry, 6, 83, 88.
 v. Safford, 88.
 v. Tuscaloosa, 585.
 Carroll Co. v. Graham, 777, 820.
 Carron v. Den, 276.
 Carter v. Bustamente, 506.
 v. Dow, 170, 199, 601.
 v. Greenhow, 64, 742.
 v. Hadley, 546.
 v. Harrison, 787.
 v. Mercer, 359.
 v. New Orleans, 403.
 v. State, 578.
 v. Walker, 530.
 Cartwright v. McFadden, 494, 784.
 Caruthers v. McLaren, 292, 515.

- Carville v. Addition*, 443, 798.
Cary v. Pekin, 159.
Casady v. Lowry, 183, 838, 763.
Case v. Dean, 216, 290, 299, 323, 419, 422, 428, 480, 491, 520, 557.-
 v. Johnson, 657.
 v. Redfield, 260, 261.
 v. Wildridge, 264.
Casey v. Leavenworth, 670.
Cash, Appellant, 300.
Cass v. Bellows, 315, 319, 478, 481, 484.
 v. Dillon, 186, 187, 294, 787.
Cassady v. Hammer, 209.
Cass Co. v. Johnston, 337.
 v. Morrison, 88.
Casselbury v. Piscataway, 476.
Castello v. St. Louis County Court, 729.
Castner v. Styer, 260.
 v. Symonds, 260, 261.
Caston v. Caston, 469, 484.
Caterlin v. Douglass, 454.
Catlin v. Hull, 4, 21, 56, 79, 872, 875.
Catoir v. Waterson, 815.
Cattell v. Lowry, 754.
Cauldwell v. Curry, 763, 775.
Caulfield v. Bullock, 788.
Cavis v. Robertson, 480, 481.
Caykendall, Ex parte, 728.
Center, etc., Co. v. Black, 776.
Center Township v. Hunt, 765.
Central Branch U. P. R. Co. v. Smith, 127.
Central Park, Matter of, 129, 615.
Central, etc., R. Co. v. Board of Equalization, 89, 178.
 v. Corcoran, 772.
 v. Howard, 88, 89.
 v. Georgia, 212.
 v. Placer Co., 749, 757.
 v. State, 69, 212.
Cerbat Mining Co. v. State, 860.
Chalwick v. Maginnes, 205.
Chaffee v. Granger, 670.
Chaffin v. Taylor, 75.
Chalker v. Ives, 424, 800.
Challis v. Hekelinkemper, 401, 763.
Challiss v. Atchison Co., 776.
 v. Parker, 149, 150, 152.
Chamberlain v. Cleveland, 656, 661, 664.
 v. Crane, 818.
 v. Dover, 817.
Chambers v. Satterlee, 178, 209, 398, 613, 627, 645, 660, 673, 750.
Champaign v. Harmon, 509.
Champaign Co. v. Reed, 211.
Champaign Co. Bank v. Smith, 79.
Chandler v. Bradish, 337.
 v. Dunn, 511.
 v. Keeler, 489, 515, 550.
 v. Moulton, 492.
 v. Nash, 722.
 v. Reynolds, 239.
Chandler v. Spear, 287, 425, 567.
Chapel of Good Shepherd v. Boston, 203.
Chapin v. Curtenius, 589, 540, 553.
 v. Worcester, 658.
Chaplin v. Holmes, 781.
Chapman v. Brooklyn, 807, 817.
 v. Commonwealth, 714.
 v. Doe, 471, 517.
 v. Drain Commissioners, 754.
 v. Mull, 504.
 v. Sollars, 477.
 v. Templeton, 567, 568.
Chappee v. Thomas, 717.
Charles v. Waugh, 473, 527, 528.
Charles River Bridge Co. v. Warren Bridge, 5.
Charleston v. Branch, 212.
 v. National Bank, 392.
 v. Oliver, 18, 438, 571, 574.
 v. Rogers, 603.
 v. Stacy, 706.
Charlestown v. County Com'rs, 857, 860, 375, 759.
Chase v. Blackstone Canal Co., 730.
 v. Chase, 779.
Chase Co. Com'rs v. Shipman, 89, 368.
Chattanooga v. Railroad Co., 197, 312, 785.
Chauvenet v. Commissioners, 58.
Cheaney v. Hooser, 5, 60, 63, 83, 107, 158, 346.
Cheatnam v. Howell, 487.
 v. United States, 804.
Cheever v. Merritt, 797, 801.
Chegaray v. Jenkins, 207, 797, 804.
 v. New York, 202.
Chelsea Water Works v. Bowley, 368.
Cheney v. Jones, 6, 763.
Chenery v. Waltham, 371.
Cheraw, etc., R. Co. v. Com'rs, 210.
Cherokee, etc., Ins. Co. v. Justices, 878.
Cherokee Tobacco, 100.
Cherry v. Wilson, 714.
Chesapeake, etc., Co. v. Hoard, 294.
Chesapeake, etc., R. Co. v. Miller, 67, 198, 742, 771.
 v. Virginia, 212.
Cheshire v. Co. Com'rs, 190.
 v. Howland, 256, 710, 711, 799.
Chestnut v. Elliott, 418.
 v. Marsh, 530.
Chicago v. Baer, 629, 639, 652.
 v. Chicago, etc., R. Co., 276.
 v. Colby, 208.
 v. Fidelity Bank, 809, 812.
 v. Larned, 156, 244, 627, 629, 639.
 v. Lunt, 576.
 v. People, 174, 668.
 v. Sherwood, 658, 668.
 v. Wright, 114.
Chicago Packing, etc., Co. v. Chicago, 603.

- Chicago, etc., *R. Co. v. Auditor-General*, 212.
v. Boller, 463.
v. Boone Co., 180.
v. Carroll Co., 427, 458, 485.
v. Chicago, 652.
v. Cole, 750, 785.
v. Coyer, 132.
v. Crawford Co., 214.
v. Davenport, 88, 89, 384.
v. Frary, 776, 782.
v. Livingston Co., 219, 386, 410, 423.
v. Miller, 228.
v. Paddock, 228, 388.
v. Page, 381.
v. People, 384, 527.
v. Raymond, 227, 230.
v. Sabrela, 184.
v. Siders, 181, 227, 230.
v. South Park Com'rs, 651.
Chickering v. Faile, 411, 502, 504.
Chicopee v. County Com'rs, 410.
Childress v. Vance, 467.
Childs v. Shower, 554.
Chiles v. Commonwealth, 359, 458.
v. Davis, 569.
Chilvers v. People, 93, 584, 594, 596, 598, 605.
Chiniquy v. People, 262, 310, 405, 407, 456.
Chisholm v. Montgomery, 767.
Choteau v. Jones, 502, 507.
Chrisman v. Curry, 550.
Chrismon v. Reich, 17.
Christian, Ex parte, 717.
Christian v. Ashley Co., 717.
Christie v. Malden, 761.
Christ's Church v. Philadelphia, 63.
Christy v. Fisher, 507.
v. Minor, 471, 517.
Christy's Adm'rs v. St. Louis, 809.
Church, Matter of, 325.
Church v. Baltimore, 750.
v. Sterling, 237.
Churchill, Matter of, 644.
Chy Lung v. Freeman, 97.
Cincinnati v. Beckett, 674.
v. Bryson, 275, 582, 598, 602.
v. Buckingham, 605.
v. Dieckmeier, 671.
Cincinnati College v. State, 207, 652.
v. Yeatman, 403.
Cincinnati Gas Light Co. v. State, 598.
Cincinnati Mutual Health Assurance Co. v. Rosenthal, 57.
Cincinnati, etc., R. Co. v. Sullivan, 603.
Citizens' Bank v. Bouny, 187, 212.
v. Sharp, 388.
Citizens' Gas Light Co. v. Alden, 293, 754.
City Bank v. Bogel, 279, 389.
City Council v. Ahrens, 579.
City Council v. St. Phillip's Church, 171.
City Council of Charleston ads. State, 219.
City Council of Indianapolis v. McLean, 205.
City Council of Madison v. Fish, 205.
City National Bank v. Paducah, 391, 771.
City Railway Co v. Chesney, 433.
Claasen v. Shaw, 706.
Clafin v. Hopkinton, 136.
v. McDonough, 468, 810.
v. Thayer, 813.
Clapp v. Cedar Co., 845.
v. Hartford, 619, 642, 648, 649.
v. Mason, 31.
Clark v. Axford, 796.
v. Blair, 452.
v. Commonwealth, 251, 256.
v. Connor, 520.
v. Crane, 284, 413.
v. Davenport, 276, 277, 294, 295, 780.
v. Drain Com'rs, 654.
v. Dunkirk, 216.
v. Ganz, 772.
v. Hall, 292, 296.
v. Janesville, 345.
v. Lincoln Co., 219, 774.
v. Mobile, 176, 181.
v. Mowyer, 486.
v. Mulford, 421.
v. Norton, 355, 790.
v. Porter, 673.
v. Sickel, 8.
v. Thompson, 511, 522.
v. United States, 712.
Clark County Court v. Turnpike Co., 737.
Clarke v. Clarke, 96.
v. Dutcher, 809.
v. Rowan, 483, 484, 495.
v. Strickland, 486, 494, 517.
Claussen v. Rayburn, 581.
Claybrooke v. Owensboro, 53, 122, 185.
Clayton v. Chicago, 457.
Clegg v. State, 19, 449.
Cleghorn v. Postelwaite, 364, 365, 421, 778, 785.
Clemens v. Baltimore, 676.
Clemons v. Lewis, 426, 443.
Clement v. Everest, 763.
v. Hale, 363.
Clementi v. Jackson, 307, 743.
Cleveland v. Heisley, 145, 239.
v. Tripp, 291, 364, 645.
v. Wick, 612, 613.
Cleveland Literary Inst. v. Pelton, 202.
Clewis v. Hartman, 554.
Clews v. Lee Co., 736, 745.
Clifton v. Wynne, 101, 705, 715.

- Clinton, etc., R. Co. v. Tax Collector, 435.
 Clinton School District's Appeal, 201, 749, 776.
 Clippinger v. Tuller, 742.
 v. Hepbaugh, 135.
 Cliquot's Champagne, 270, 271.
 Clopton v. Philadelphia, etc., R. Co., 447.
 Clough v. Monroe, 260, 261.
 Cloutman v. Pike, 722.
 Clove Spring Iron Works v. Cone, 868, 425.
 Clugas v. Penaluna, 434.
 Clute v. Barron, 492.
 Clymer v. Cameron, 510.
 Coatesville Gas Co. v. Chester Co., 196, 226, 228.
 Cobb v. Elizabeth City, 17, 101, 194, 195, 295.
 Coblens v. Abel, 804.
 Coburn v. Richardson, 168.
 Cochecho Co. v. Stratford, 748.
 Cochran v. Collins, 671.
 v. Dry Dock Co., 446.
 v. Guild, 448.
 Cocke v. Halsey, 251.
 Cockrell v. Smith, 261.
 Coco v. Thieneman, 550.
 Codman v. Johnson, 209, 637.
 Cody v. Lennard, 762, 819.
 Coe v. Farwell, 784.
 v. Gregory, 822.
 Cofer v. Brooks, 559, 560, 568.
 Coffin v. Estes, 528, 529.
 Coffinger v. Rice, 501.
 Coffman v. Keightley, 186.
 Cogburn v. Hunt, 408, 467, 476, 531, 547.
 Cohen v. Sharp, 781.
 Cohn, *Ex parte*, 386, 387.
 Coit v. Claw, 710.
 v. Wells, 255, 475, 481.
 Coite v. Conn. Mu. L. Ins. Co., 280, 380, 387.
 v. Society for Savings, 4, 6, 84, 169, 230, 379, 388.
 Colbert v. Supervisors of Lake, 355.
 Colburn v. Ellis, 253.
 Colby v. Russell, 413, 790.
 Cole v. Blackwell, 334.
 v. Hall, 602.
 v. La Grange, 104.
 v. Moore, 493.
 v. Randolph, 98, 580.
 Coleman, Matter of, 753.
 Coleman v. Eldred, 561.
 v. Shattuck, 479, 516, 520.
 Colerain v. Bell, 709.
 Collamer v. Drury, 798.
 Collector v. Day, 86, 584.
 v. Hubbard, 804.
 College St., Matter of, 207.
 Collins v. Chicago, 890.
 Collins v. Henderson, 121.
 v. Louisville, 598.
 Collinsville v. Cole, 582.
 Colman v. Anderson, 430, 797.
 Coloma v. Eaves, 831.
 Colorado Co. v. Com'rs, 88, 89.
 Colton v. Beardsley, 253.
 v. Hanchett, 768.
 v. Longmeadow, 370.
 Columbia v. Guest, 324, 571.
 Columbia Co. v. King, 787.
 Columbia, etc., Co. v. Commonwealth, 381, 382.
 Columbian, etc., Co. v. Vanderpoel, 201.
 Columbus, etc., R. Co. v. Grant Co., 258, 773.
 Comer v. Folsom, 186, 168, 191, 303.
 Commercial Bank v. Woodside, 84, 87, 304, 307, 396.
 Commercial National Bank v. Iola, 116, 127.
 Commissioners v. Atlanta, etc., R. Co., 750.
 v. Blake (19 Kan.), 847.
 v. Blake (25 Kan.), 350.
 v. Boles, 331.
 v. Carter, 308.
 v. Clark, 331.
 v. Duckett, 173.
 v. Harrisville, 239.
 v. Improvement Co., 88.
 v. Jordan, 581.
 v. Lang, 363.
 v. Land Co., 812.
 v. Lucas, 133.
 v. Markle, 774.
 v. McCormick, 714.
 v. Morrison, 48.
 v. North German Lloyd, 97.
 v. Patterson, 63, 573.
 v. Sergeant, 751.
 v. Supervisors of Carthage, 757.
 v. Taylor, 715.
 v. Thayer, 132.
 v. Walker, 810.
 Commissioners of Highways v. Newell, 276, 277.
 Commissioners of Roads v. Dennis, 581.
 Commissioners of Schools v. Alleghany Co., 189, 235, 684.
 v. County Com'rs, 727, 735.
 Commissioners of St. Joseph Co. v. Ruckman, 368.
 Common Council v. Whitney, 740, 742.
 Common Council of Albany, *Ex parte*, 427, 735.
 Comstock v. Beardsley, 482.
 Commonwealth v. Alleghany Co. Com'rs, 101, 346, 348, 785.
 v. Berkshire Life Ins. Co., 337.
 v. Bird, 70

- Commonwealth v. Brennan**, 604.
 v. Byrne, 437, 583, 599.
 v. Campbell, 581.
 v. Carey Improvement Co., 230, 379, 750, 751.
 v. Chesapeake, etc., R. Co., 22, 206.
 v. Clary, 55.
 v. Cleveland, etc., R. Co., 381.
 v. Colton, 601.
 v. Common Council of Pittsburgh, 295, 738.
 v. Fayette Co. R. Co., 71, 72, 204.
 v. Fowler, 254.
 v. Gaines, 57.
 v. Gloucester Ferry Co., 93.
 v. Hamilton Manuf. Co., 84, 190, 230, 233, 379, 389.
 v. Hartman, 120.
 v. Hays, 56, 371.
 v. Holbrook, 20, 605.
 v. Holmes, 713, 716.
 v. Keenan, 605.
 v. Land Com'rs, 259.
 v. Lehigh Valley R. Co., 378.
 v. Lowell Gas Light Co., 233, 368, 379, 583.
 v. McCombs, 250, 254.
 v. McWilliams, 133.
 v. Milton, 57, 100, 574.
 v. Moore, 5, 578.
 v. Newburyport, 682.
 v. N. E. Slate & Tile Co., 168, 233, 291.
 v. Ocean Oil Co., 221, 382.
 v. Pennsylvania Gas Coal Co., 382.
 v. Pennsylvania Ins. Co., 292.
 v. People's Savings Bank, 379.
 v. Philadelphia, 257, 706, 905.
 v. Pittsburgh, 348, 688, 726, 737.
 v. Pittsburgh, etc., R. Co., 381.
 v. Pottsville Water Co., 70.
 v. Provident Inst., 84.
 v. Rodes, 711, 718.
 v. Runk, 366.
 v. Savings Bank (5 Allen), 168, 190, 273, 379, 429.
 v. Savings Bank (123 Mass.), 379.
 v. Savings Bank (126 Mass.), 383.
 v. Smith, 603.
 v. Standard Oil Co., 18, 20, 23, 380, 459.
 v. Stodder, 583, 598.
 v. Supervisors of Colby, 777.
 v. Thayer, 581.
 v. Thorniley, 605.
 v. Williams' Ex'rs, 372.
 v. Wilson, 722.
 v. Woods, 619, 624, 639, 662.
 v. Wyoming Valley Canal Co., 458.
Commonwealth's Appeal, 372.
- Comstock v. Beardsley**, 482, 537.
Concord v. Boscawen, 163.
Cone v. Forest, 797, 803.
 v. Hartford, 590, 619, 639.
Cones v. Wilson, 442.
Coney v. Owen, 554, 555.
Conklin v. Cambridge, 205.
 v. Commissioners, 765.
Conley v. Chedic, 56, 772.
Conlin v. Seaman, 671, 750.
Conn v. Conn, 502.
Connecticut Mutual L. Ins. Co. v. Bulte, 503, 504.
 v. Commonwealth, 189, 330, 336.
Connors, Appeal of, 276, 277, 333.
Connorsville v. State Bank, 183.
Connors v. Detroit, 430, 763.
Conrad v. Darden, 432.
 v. Ithaca, 817.
Conway, Ex parte, 729.
Conway, In re, 656.
Conway v. Cable, 292, 304, 460, 530, 551, 553, 557.
 v. Taylor, 93, 584.
 v. Waverley, 763, 780.
 v. Younkin, 323.
Conwell v. Connorsville, 149, 160, 225, 232, 339.
 v. O'Brien, 183.
Cook v. Burlington, 184, 227, 232.
 v. Hackleman, 520.
 v. Ipswich Board of Health, 312.
 v. Leland, 376, 377.
 v. Norton, 411, 452.
 v. Pennington, 522.
 v. Pennsylvania, 91, 94, 95.
 v. Smith, 79.
 v. State, 210.
Cook Co. v. Chicago, 174, 653.
 v. Chicago, etc., R. Co., 760, 761.
Coolbaugh v. Huck, 418, 421, 422, 778.
Cooley v. Board of Wardens, 98, 94.
 v. Granville, 127, 765.
 v. O'Conner, 259.
 v. Waterman, 401, 502.
Coombs v. O'Neal, 412.
 v. Steere, 291.
 v. Warren, 397, 408, 501.
Coon v. Congdon, 797.
Coonrad v. Myers, 551.
Coons v. People, 705, 706, 707.
Cooper, Ex parte, 602.
Cooper v. Ash, 181, 234.
 v. Brockway, 406.
 v. Bushley, 543.
 v. Corbin, 440, 445, 447.
 v. Jackson, 399, 501, 531.
 v. Moore, 254.
 v. Savannah, 449.
 v. Shepardson, 542.
Cope v. Collins, 739.
 v. Rowlands, 434.
Corbett v. Bradley, 285.

- Corbett v. Nutt, 533.
 Corbin v. Bronson, 516.
 v. Hill, 299.
 v. Inslee, 403.
 v. Woodbine, 763.
 v. Young, 547.
 Corkle v. Maxwell, 809.
 Corfield v. Coryell, 56, 99, 373.
 Corliss v. Corliss, 290.
 Cornell v. Barnes, 797, 799.
 v. People, 692.
 Corning Town Co. v. Davis, 398, 497, 541.
 Cornwall v. Todd, 264, 274, 876.
 Corpus Christi v. Woessner, 329.
 Corrothers v. Board of Education, 760, 771.
 Corry v. Folz, 674.
 Corson v. State, 100.
 Cory v. Carter, 121.
 Costley v. Allen, 512.
 Cottingham v. Springer, 530.
 Cotton Exchange v. Assessors, 324.
 Cotzhausen v. Kaehler, 455, 480.
 Couch v. McKee, 569.
 Coughlin v. Gray, 504.
 Coughran v. Gutchens, 815.
 Coulson v. Harris, 223, 573.
 v. Portland, 770, 781.
 Counterman v. Dublin, 768.
 County Com'rs v. Annapolis, etc., Co., 213.
 v. Claggett, 440.
 v. Clarke, 487.
 v. Karp, 344.
 v. Parker, 422, 815.
 v. Sisters of Charity, 203.
 County Court v. Marr, 749.
 v. Robinson, 334.
 County Judge v. Shelby R. Co., 152.
 County Levy, Case of, 63.
 County of Pike v. State, 741.
 Couper v. Rowe, 331, 332.
 Courtney v. Louisville, 158.
 Cousins v. Allen, 540.
 v. Commonwealth, 578.
 v. State, 576, 577.
 Covell v. Young, 497, 514, 546.
 Cover v. Baytown, 136, 137.
 Covington v. Boyle, 65, 446, 644.
 v. Casey, 247, 658, 659.
 v. East St. Louis, 294.
 v. Powell, 279, 810.
 v. Southgate, 46, 158.
 Covington City Nat. Bank v. Covington, 391.
 Covington Draw Bridge Co. v. Auditor, 163.
 Covington, etc., R. Co. v. Kenton Co. Court, 333.
 Cowen v. McCutcheon, 298.
 Cowgill v. Long, 290, 300, 305.
 Cowles v. Brittain, 48, 50, 579.
 Cowley v. Monson, 568.
 Cox v. Cliff, 779.
 Coxe v. Deringer (78 Pa. St.), 451, 476.
 v. Deringer (82 Pa. St.), 516.
 v. Gibson, 501, 508.
 v. Sartwell, 543.
 v. Woolcott, 501, 503, 541, 543.
 Coy v. Lyons City, 282, 735.
 Craft v. Tuttle, 391.
 Cragin v. Henry, 493.
 Craig v. Bradford, 290.
 v. Burnett, 598.
 v. Flanagan, 458, 535, 551, 554.
 v. Philadelphia, 645, 695.
 Crampton v. Zabriske, 765.
 Crandall v. Nevada, 87, 99.
 Crane v. Janesville, 401, 780.
 v. Randolph, 486, 494, 779.
 v. Reeder, 463.
 Cranmer v. Hall, 555, 558.
 Cranston v. Smith, 597.
 Crapo v. Stetson, 16.
 Craw v. Tolono, 589, 629, 674.
 Crawford v. Burrell, 204, 207.
 v. Carson, 715.
 v. People, 625, 640.
 v. Stewart, 495.
 Craycraft v. Selvage, 655, 669.
 Crecelius v. Mann, 546.
 Credit Mobilier v. Commonwealth, 383.
 Creighton v. Manson, 444, 449.
 v. Scott, 621, 643, 650, 666, 676.
 v. Toledo, 671.
 Crenshaw v. Slate River Co., 115.
 Creote v. Chicago, 244.
 Crittenden v. White, 597.
 Crocker v. Crane, 259.
 Cromartie v. Commissioners, 789.
 Cronan v. Municipality, 668.
 Crooke v. Andrews, 395, 781.
 Crooks v. Whitford, 412.
 Crosby v. Lyon, 177, 216, 627.
 Cross v. Milwaukee, 311.
 Crow v. Hudson, 260.
 v. State, 99.
 Crowell v. Goodwin, 496, 497.
 v. Hopkinton, 105, 136, 137, 303.
 v. Merrill, 445.
 v. Utley, 460.
 v. Washburn, 511.
 Crowley v. Copley, 207, 591, 648.
 Cruger, Petition of, 660, 661.
 Cruger v. Dougherty, 275, 329, 397, 518.
 Cruikshanks v. Charleston, 48, 379, 324, 720.
 Crum v. Burke, 453, 480, 559.
 Crutchfield v. Wood, 802.
 Cruther v. Sterling, 14.
 Culbertson v. Cincinnati, 782.
 v. Com'rs, 370, 371.
 Culver v. Hayden, 288.
 v. Watson, 536.

- Cumberland Marine R. v. Portland, 226, 232, 384.
 Cuming v. Grand Rapids, 150, 497, 643.
 Cumming v. Brooklyn, 676.
 Cummings v. Clark, 253.
 v. Easton, 448.
 v. Fitch, 347, 349, 350.
 v. Frye, 271, 347.
 v. Holt, 473.
 v. National Bank, 175, 219, 391, 410, 751, 761, 773, 785.
 v. Police Jury, 636.
 v. Wilson, 537, 539.
 Cunningham v. Mitchell, 795, 797, 799.
 Curl v. Watson, 534, 540.
 Curnen v. New York, 312.
 Currie v. Fowler, 409, 462, 514.
 v. Van Horn, 289.
 Curry v. Decatur Co., 767.
 v. Hinman, 426, 450, 460, 530, 553.
 Curryer v. Merrill, 121, 265.
 Curtenius v. Hoyt, 768.
 Curtis v. East Saginaw, 779.
 v. Smith, 509.
 v. Supervisors of Brown Co., 407.
 v. Ward, 374.
 v. Whipple, 105, 115, 123, 124.
 Cushing v. Newburyport, 120, 343, 684.
 v. Longfellow, 498.
 Cuthbert v. Conly, 573, 596.
 Cutler v. Hurlbut, 516, 560, 568.
 Cutliff v. Albany, 179, 201.
 Cutting v. Gilbert, 769, 804.
 Cuttle v. Brockway, 308, 480, 483, 494, 495, 510, 543.
 Cypress Pond Draining Co. v. Hooper, 64.
- D.
- Daggett v. Everett, 264, 437, 720.
 Dailey v. Swope, 46, 277, 324, 620, 632, 648.
 Daily v. Newman, 530.
 Dakin v. Hudson, 526, 722.
 Dale v. Frisbie, 569.
 v. Governor, 70.
 v. McEvers, 445.
 Dallinger v. Rapello, 55, 56, 377.
 Dalrymple v. Milwaukee, 1, 309, 607.
 Dalton v. Fenn, 514.
 v. Lucas, 568.
 Dane v. Glennon, 409, 470.
 Danforth v. Williams, 436.
 Daniel v. Askew, 14, 710, 743.
 v. McCorrell, 302.
 v. Richmond, 95.
 v. Sullivan, 370.
 Daniels v. Nelson, 439.
 Danville Co. v. Parks, 375.
 Darling v. Gunn, 363, 413, 421, 778, 785.
- Darlington v. New York, 686.
 Darmstetter v. Molony, 413, 414, 415.
 Dartmouth College v. Woodward, 67, 71, 73, 701.
 Dashiell v. Baltimore, 657, 664, 667, 676, 677.
 Dater v. Earl, 434.
 Daughdrill v. Insurance Co., 175, 182, 185, 196, 234.
 Davenport v. Dodge Co., 744.
 v. Dows, 770.
 v. Knox, 547, 563.
 v. Railroad Co., 5.
 Davidson v. New Orleans, 46, 47, 51, 223, 663, 677, 775.
 v. Wallace, 467.
 Davis v. Boget, 118.
 v. Boston, 311, 312, 731.
 v. Brace, 692.
 v. Clinton, 48.
 v. Dubuque, 158.
 v. Farnes, 281, 286.
 v. Harp, 450, 452, 456.
 v. Jackson, 530.
 v. King, 502.
 v. Macon, 179, 206, 580, 582.
 v. Macy, 375, 750.
 v. Minge, 454, 521.
 v. Minor, 569.
 v. Police Jury, 249.
 v. Read, 65.
 v. Simms, 487.
 v. State, 716.
 v. State Bank, 300.
 v. Van Arsdale, 523.
 v. Wilson, 799.
 Davison v. Ramsay Co., 1.
 Dawley v. Van Court, 567.
 Dawson v. Aurelius, 618, 807, 817.
 Day v. Justices of Fleming, 729.
 v. Peasley, 255.
 Dayton v. Relf, 534, 546.
 v. Rice, 501.
 v. Rounds, 76, 733.
 Deady v. Townsend, 656.
 Dean v. Aiken, 365.
 v. Borchsenius, 304, 312, 763.
 v. Charlton, 236, 276, 312.
 v. Carron, 614.
 v. Davis, 760.
 v. Earley, 560.
 v. Gleason, 217.
 v. Lufkin, 327, 346, 347, 350, 767.
 v. Madison, 779, 780.
 Deane v. Hathaway, 373.
 v. Todd, 750, 772.
 Deason v. Dixon, 19.
 De Baker v. Carillo, 811.
 Deblois v. Barker, 589.
 De Camp v. Eveland, 165.
 Decatur Co. Board v. State, 736, 737, 738.
 Decell v. Lewenthal, 461, 572.
 Decker v. Hughes, 635.

- Decker v. McGowan, 179, 570, 578, 763.
 Dederer v. Voorhies, 654, 672.
 Deeds v. Sanborn, 158.
 Deen v. Wills, 452.
 Deerham v. People, 529.
 De Fremery v. Austin, 498, 812.
 De Graw v. Taylor, 559.
 De Graw St., Matter of, 411, 612, 639, 666.
 Degroot v. Van Dwyer, 57.
 Deiman v. Fort Madison, 158.
 De Lancy, Matter of, 219.
 Delany v. Godden, 516, 730.
 Delaplaine v. Cook, 520.
 Delaroderie v. Hillen, 521.
 Delaware Div. Canal Co. v. Commonwealth, 312, 458.
 Delaware Institute v. Delaware Co., 202.
 Delaware Railroad Tax Case, 45, 46, 69, 71, 204, 211, 378, 380.
 Delcambree v. Clere, 597.
 Delenger v. Higgins, 260.
 Delphi v. Bowen, 776, 785.
 Deming v. Corwin, 526.
 v. James, 773, 819.
 Den v. Terrell, 450.
 Denegre v. Gerac, 483, 783.
 Denike v. Rourke, 444, 513.
 Denn v. Diamond, 267.
 Dennett v. Crocker, 452.
 Dennis v. Shaw, 797.
 Dennison v. Keokuk, 444, 445, 446.
 Denny v. Mattoon, 300, 302.
 Densmore v. Haggerty, 447.
 Dent v. Bryce, 342, 415.
 Dentler v. State, 464, 530, 538, 546.
 Denton v. Jackson, 163.
 Denver v. Clements, 404.
 De Pauw v. New Albany, 20, 45.
 De Peyster, *In re*, 365, 660.
 De Pierris, Petition of, 656.
 De Quasie v. Harris, 518.
 Deraismes v. Deraismes, 399, 467.
 Des Moines v. Dorr, 646.
 Des Moines, etc., Co., Appeal of, 173, 174, 367, 421.
 Des Moines, etc., R. Co. v. Lowry, 753, 807.
 Des Mond v. Babbitt, 395.
 v. Machias, 56.
 De Soto Bank v. Memphis, 215.
 De Soto Co. v. Dickson, 719.
 De Treville v. Smalls, 457, 520.
 Detroit v. Corey, 173, 689.
 v. Jepp, 17.
 v. Martin, 779, 811.
 v. Paving Co., 658.
 v. Plank Road Co., 68.
 v. Weber, 714, 717.
 Detroit City R. Co. v. Guthard, 67, 73, 218.
 Detroit Young Men's Society v. Detroit, 408.
 Devaux v. Detroit, 784.
 Deveraux v. Taft, 504.
 De Vignier v. New Orleans, 22, 79.
 Devor v. McClintock, 239.
 Dewey v. Donovan, 499, 536.
 v. Stratford, 761.
 De Witt v. Hays, 371, 372, 577.
 Diamond Coal Co. v. Fisher, 475.
 Dicas v. Lord Brougham, 787.
 Dickens v. Jones, 802.
 Dickerson v. Acosta, 5, 462, 522.
 v. Breeden, 567.
 v. Yetzer, 88.
 Dickey v. Polk Co., 418, 806.
 Dickinson v. Billings, 791, 816.
 Dickinson Co. Com'rs v. Land Co., 500.
 Dickison v. Reynolds, 397, 413, 455.
 Dickson v. Gamblé, 452, 453, 710.
 Dietrick v. Mason, 308, 400, 499, 541, 542.
 Diggins v. Reay, 678.
 Dike v. Lewis, 407.
 Dikeman v. Dikeman, 545.
 v. Parrish, 559.
 Dill v. Roberts, 312.
 Dillingham v. Brown, 568.
 v. Snow, 162, 216, 789, 791, 793, 794, 795.
 Dingey v. Paxton, 48.
 Dinsmore v. Westcott, 425.
 Directors of the Poor v. School Directors, 126, 173, 174.
 Dishon v. Smith, 335.
 District No. 110 v. Feck, 674.
 District Township v. Dubuque, 264.
 Dixon v. United States, 707.
 Doane v. Eldridge, 713.
 Dobbins v. Com'rs of Erie Co., 84.
 Dodd v. Hartford, 771, 772, 776, 778.
 v. Tomas, 295.
 Dodge v. Woolsey, 69, 71, 73, 767.
 Doe v. Allen, 482.
 v. Attica, 261.
 v. Deavors, 48.
 v. Flagler, 517.
 v. Hearick, 559.
 v. Ins. Co., 517.
 v. Leonard, 478.
 v. McQuilkin, 339.
 v. Railroad Co., 89.
 v. Roe, 517.
 v. Snaith, 267.
 v. Sweetzer, 517.
 Dogan v. Griffin, 497.
 Dolan v. Trelevan, 409.
 Donahugh's Appeal, 202.
 Donald v. McKinnon, 424, 471.
 Donnel v. Bellas, 490, 495, 498.
 Donnelly v. Howard, 670.
 v. Tillman, 658.
 Donohoe v. Beal, 512.
 Donovan v. Insurance Co., 858, 859.
 v. Kloke, 89.
 Dool v. Cassopolis, 363.

- Doolittle v. Supervisors, 765.
 Donan v. Board of Education, 771.
 Doran v. Phillips, 572, 710.
 Dore v. Gray, 618.
 Dorgan v. Boston, 141, 151, 612, 624, 631, 639.
 Dorn v. Backer, 161, 790, 793.
 Dorr v. Boston, 375, 816.
 Dorrance St., Matter of, 624, 634, 639.
 Dorton v. Hearn, 118.
 Dorwin v. Strickland, 55, 790, 793.
 Dothage v. Stuart, 554.
 Doty v. Ellsbree, 766.
 Dougherty v. Crawford, 483.
 v. Dickey, 450.
 v. Harrison, 657.
 v. Henarie, 449.
 v. Miller, 671.
 Doughty v. Hope, 259, 275, 290, 804, 329, 517, 518, 537, 538, 676.
 Douglass, *In re*, 283.
 Douglass v. Dangerfield, 401, 507.
 v. Dickson, 499, 543.
 v. Harrisville, 190, 192, 199, 760.
 v. Nuzum, 499, 516.
 v. Pike Co., 77.
 v. Placerville, 276, 768.
 v. Short, 498.
 v. State, 210.
 v. Tullock, 559.
 v. Wickwire, 254.
 Douglasville v. Johns, 816.
 Douthett v. Kettle, 494, 510.
 Dover v. Robinson, 712.
 Dow v. Humbert, 745.
 v. Sudbury, 21, 355, 814, 815, 816.
 Dowdney v. New York, 448.
 Downer v. Boston, 650.
 v. Woodbury, 254, 256, 443, 798.
 Downer's Adm'r v. Smith, 502.
 Downey v. Nutt, 496.
 Downing v. Roberts, 798.
 v. Rugar, 258, 259.
 Dows v. Chicago, 760, 772, 776, 780.
 Dox v. Postmaster-General, 717.
 Doyle v. Cont'l Ins. Co., 113.
 Drainage of Lands, Matter of, 608, 661.
 Draining Co. Case, 64, 137, 483, 588, 616, 617, 630.
 Draining Co. v. Alkire, 616.
 Drake v. Phillips, 276, 768, 774.
 v. Shurtliff, 812.
 Draper v. Hatfield, 371, 416.
 Drennan v. Beierlein, 428, 498.
 Dresden v. Goud, 255.
 Dreutzer v. Baker, 558, 560, 561.
 v. Smith, 513, 561.
 Drew v. Davis, 429, 790.
 Drexel v. Commonwealth, 231, 291, 359, 458, 573.
 Driggers v. Cassidy, 352, 409, 448.
 Droz v. East Baton Rouge, 443.
 Dryfuss v. Bridges, 285.
 Drysdale v. Pradat, 573.
 Duaneburg v. Jenkins, 333, 700.
 Dubois v. Campau, 502, 507.
 v. Hepburn, 533, 538, 539.
 Dubuque v. Chicago, etc., Railroad Co., 168, 184, 381, 384.
 v. Ill. Cent. R. Co., 16, 184, 201, 385, 438.
 v. Life Ins. Co., 574.
 v. Wooton, 307, 484.
 Dubuque County v. Railroad Co., 845.
 Dubuque, etc., R. Co. v. Webster Co., 184, 811.
 Ducat v. Chicago (48 Ill.), 57, 181, 387.
 v. Chicago (10 Wall.), 100.
 Dudley v. Chilton Co., 707, 712.
 v. Jamaica Pond Aqueduct Co., 583.
 v. Little, 490, 491.
 v. Ross, 819.
 Dudley's Ex'rs v. Oliver, 841.
 Duffit v. Tuhan, 500.
 Duffy, *In re*, 459.
 Dugan v. Baltimore, 16.
 Dugro, *In re*, 236, 613.
 Duke v. Brown, 546.
 Dukes v. Rowley, 411, 529, 530.
 Dumphy v. Supervisors, 350.
 Duncan v. Smith, 539.
 Dundee Mortgage Co. v. School District, 50.
 Dunden v. Snodgrass, 300, 406.
 Dundy v. Richardson Co., 418, 776, 777.
 Dungan's Appeal (68 Pa. St.), 445.
 Dungan's Appeal (88 Pa. St.), 447, 540.
 Dunham v. Chicago, 180, 217, 815.
 v. People, 129, 616.
 v. Rochester, 573.
 Dunklin Co. v. District Court, 738.
 Dunlap v. Gallatin Co., 16.
 v. Henry, 514.
 v. Hunting, 797, 799.
 v. Minor, 446.
 Dunlieth, etc., Bridge Co. v. Dubuque, 184, 208.
 Dunn v. Relyea, 406.
 v. Snell, 460, 501.
 v. Winston, 398, 401, 411.
 Dunnell Manuf. Co. v. Pawtucket, 360, 816.
 Dunning v. Drain Com'r, 754.
 Dunovan v. Green, 75, 685.
 Duperier v. Police Jury, 740.
 v. Viator, 333.
 Dupuy, Succession of, 433.
 Durach's Appeal, 111, 163, 170, 846, 570, 580, 600.
 Durant v. Eaton, 772, 791, 817.
 v. Kauffman, 158.
 v. Supervisors, 17.
 Durfee v. Murray, 782.
 Durham v. Board, etc., 806, 811.
 Durkee v. Commissioners, 172.

Duryee, *In re*, 17.
 Dwight v. Boston, 280, 374.
 v. Springfield, 755.
 Dwinells v. Parsons, 791.
 Dwyer v. Hackworth, 833, 866.
 Dyar v. Farmington, 188, 216.
 Dyer v. Barstow, 674.
 v. Boswell, 455, 517.
 v. Chase, 618.
 v. Miller, 657.
 v. Osborne, 221.
 v. Parrott, 667.

E.

Eagan v. Connolly, 530.
 Eager, *In re*, 236, 660, 748.
 Eagle Fire Ins. Co. v. Pell, 466.
 Eames v. Johnson, 290, 800.
 Earl v. Camp, 799, 801, 804.
 Earle v. Simons, 262, 516.
 Earley v. Euwer, 894, 477.
 Early v. Doe, 473, 483, 484.
 v. Whittingham, 352, 477, 547, 562.
 East Feliciana v. Gurth, 186.
 East Kingston v. Towle, 299.
 Eastman v. Bennett, 260, 261.
 v. Curtis, 260.
 v. Jackson, 580.
 v. Little, 436.
 v. Thayer, 399, 499, 779.
 Easton v. Calendar, 789, 791, 792.
 v. Perry, 522.
 v. Savery, 284, 488, 522.
 Easton Bank v. Commonwealth, 70.
 East Portland v. Multnomah Co., 196.
 East Saginaw v. County Treasurer, 743.
 East Saginaw Salt Manuf. Co. v. East Saginaw, 68.
 East St. Louis v. Trustees of Schools, 597, 739.
 v. Wehrung, 65, 182, 574, 581.
 v. Wider, 603.
 v. Zebley, 738, 739.
 Eaton v. Lyman, 484, 506, 514.
 v. North, 499, 508, 540.
 Eberville Coal Co. v. Commonwealth, 223.
 Eckrote v. Myers, 508.
 Eddy v. Wilson, 139, 340, 343, 428.
 Edenton v. Capeheart, 60.
 Edes v. Boardman, 752, 792.
 Edgerton v. Bird, 560.
 v. Hart, 530.
 v. Schneider, 501.
 Edgefield v. Brien, 450.
 Edgerton v. Bird, 556, 568.
 Edinburg v. Hackney, 812.
 Edmonson v. Galveston, 17, 445.
 Edwards, Succession of, 289, 406, 456.
 Edwards v. James, 290.
 Edwards v. People, 175, 810, 828, 346, 777.
 v. Taliaferro, 429.
 Egan v. County Court, 576.
 Egerton v. Green Cove Springs, 628.
 Eggleston v. Charleston, 20.
 Egyptian Levee Co. v. Hardin, 591, 620, 632, 648.
 Eitel v. Foote, 526, 530.
 Elam v. State, 458.
 Elbin v. Wilson, 788.
 Eldred v. Sexton, 254.
 Eldridge v. Kuehl, 309, 520, 556, 559.
 Elevated Railway, Matter of, 825.
 Elizabethtown, etc., R. Co. v. Trustees, 67, 212, 369.
 Ellicott v. Levy Court, 726.
 Elliott v. District of Columbia, 451.
 v. Eddins, 473, 484.
 v. Miller, 711.
 v. Railroad Co., 459.
 v. Spinney, 897, 899.
 v. Swartwout, 804, 809.
 v. Wiltz, 74.
 Ellis v. Foster, 467.
 v. Hall, 161, 394, 395.
 v. Kenyon, 473.
 v. Peck, 477, 493.
 Ellsworth v. Cordrey, 508, 535, 537.
 v. Freeman, 517.
 v. Grand Rapids, 821.
 v. Green, 537.
 v. Low, 537, 539, 540.
 Elmendorf v. New York, 290.
 Elmwood v. Marcy, 703.
 Elson v. Spraker, 458.
 Elston v. Kennicott, 411, 412, 514, 530.
 Elwell v. Shaw, 429, 498.
 Emerick v. Sloan, 819.
 Emerson v. Thompson, 443.
 Emery v. Bradford, 627, 671, 672, 750.
 v. Gas Co., 177, 207, 627, 689, 655.
 Emigrant, etc., Sav. Bank, Matter of, 656.
 Eminence, Trustees of, v. Deposit Bank, 228.
 Emory v. State, 226.
 Emporia v. Bates, 311.
 v. Norton, 311.
 Emsly v. Memphis, 232.
 Enaut v. Tax Collectors, 203.
 Engle v. Sohn, 588.
 English v. Oliver, 14, 107, 276, 710.
 v. People, 116, 744, 752.
 Eno v. New York, 310, 658, 667.
 Enos v. Bemis, 399, 819.
 Enright v. People, 310.
 Entrekin v. Chambers, 483.
 Enyart v. Trustees, 334.
 Eppinger v. Kirby, 411, 529.
 Erie v. First Universalist Church, 209.
 Erie County v. Transportation Co., 210.

- Erie Railroad Co. v. Commonwealth**, 70, 71, 223.
 v. Pennsylvania, 70, 205, 335.
 v. State, 96.
Ernst v. Kunkle, 633, 644, 676.
Erskine v. Hohnbach, 797, 798, 803.
 v. Van Arsdale, 810.
Ervine's Appeal, 299, 300.
Eschbach v. Pitts, 448, 449, 676.
Espy v. Fort Madison, 810.
Estabrook v. Hapgood, 260.
Estes v. Stebbins, 535, 557.
Esty v. Westminster, 137.
Etchinson Association v. Bressenbach, 616.
Evans v. Bradford, 443.
 v. Commissioners, 278.
 v. Commonwealth, 457.
Evansville v. Pfisterer, 820.
Evansville Bank v. Britton (8 Fed. Rep.), 175.
 v. Britton (105 U. S.), 391.
Eve v. State, 721, 762.
Everett v. Beebe, 492.
Everitt's Appeal, 393, 749, 775.
Everson v. Syracuse, 436.
Ewart v. Davis, 520, 526.
Ewing v. St. Louis, 779.
Exchange Bank v. Hines, 1, 215.
Exchange Bank Tax Cases, 307.
Exchange Nat. Bank v. Miller, 391, 392, 761.
Express Co. v. Ellyson, 184.
Eyermann v. Blakesley, 458.
Eyre v. Jacob, 30, 101, 224, 584.
Ezekiel v. Dixon, 264.
- F.**
- Factory Co. v. Gardiner**, 228.
Fagan v. Chicago, 88.
Fahlor v. Wells Co., 330.
Fair v. Brown, 505.
Fairbanks v. Fitchburg, 653.
 v. Kittredge, 361, 374, 789.
 v. Williams, 547.
Fairfax's Devisee v. Hunter's Lessee, 462.
Fairfield v. County Com'rs, 749.
 v. People, 311, 766.
 v. Ratcliffe, 276, 590, 615, 636.
Falch v. People, 484, 629.
Falconer v. Shores, 424.
Faler v. McRae, 539.
Fales v. Wadsworth, 298.
Falkner v. Hunt, 371.
Fallon v. Chidester, 502.
Fall River v. County Com'rs, 190, 226, 368, 389.
Falmouth v. Watson, 60, 161, 599.
Fanning v. Gregorie, 93.
Fant v. Miller, 461.
Farber v. Purdy, 467.
Faribault v. Misener, 17, 191.
Faris v. Reynolds, 762.
Farmers' Bank v. Commonwealth, 69, 330.
Farmers', etc., Bank v. Dering, 391.
Farmers' Loan & Trust Co. v. New York, 230, 234.
Farmers' & Merchants' Bank v. Chester, 258.
Farnham v. Jones, 401, 493, 494.
Farnsworth Co. v. Lisbon, 188, 201.
 v. Rand, 309, 441, 802.
Farnum v. Buffum, 408, 486, 487.
Farrar v. Clark, 521, 557, 784.
Farrell v. United States, 436.
Farrer v. Fessenden, 339, 340.
Farrington v. Tennessee, 63, 212, 229, 232.
Farrot v. East Baton Rouge, 735.
Farwell v. Chicago, 582.
 v. Harding, 782.
Fass v. Schawer, 657, 659, 669, 671.
Fatch v. People, 527.
Faure v. Winans, 466.
Favia v. New Orleans, 696.
Favor v. Philbrick, 434.
Faxon v. Wallace, 533, 539.
Feigert v. State, 708.
Fell v. Cessford, 567.
Fellows v. Denniston, 393, 493.
Felsenthal v. Johnson, 357.
Fender v. Neosho Falls, 239.
Fenelon, Petition of, 639.
Fenton v. Way, 533.
Fenwick v. Gill, 554.
Ferguson v. Landram, 187.
 v. Miller, 512.
Ferris v. Coover, 353, 471.
Ferton v. Feller, 316.
Fetterman v. Hopkins, 253.
Field v. Boston, 355.
 v. West Orange, 782.
Fields v. Com'rs, 170, 195.
Fifield v. Close, 86.
 v. Marinette Co., 777.
Findlay v. McAllister, 737.
Finley v. Brown, 533.
 v. Philadelphia, 222, 375.
Finn v. Haynes, 293.
Finnegan v. Fernandina, 17, 18, 745, 760.
Finney v. Oshkosh, 669.
Fire Department v. Helfenstein, 57, 199, 603.
 v. Noble, 57.
 v. Tuttle, 294.
 v. Wright, 57.
Fire District v. County Com'rs, 259.
Firemen's Benevolent Ass'n v. Lounsbury, 57.
First Division, etc., R. Co. v. Parcher, 212.
First Ecclesiastical Society v. Hartford, 429, 816.
First National Bank v. Americus, 805.

- First National Bank v. Concord** (50 Vt.), 381.
 v. Concord (59 N. H.), 392.
 v. Douglas Co., 773.
 v. Fancher, 433.
 v. Farwell, 391, 392.
 v. Hughes, 392.
 v. Merideth, 390, 760.
 v. Peterborough, 392.
 v. St. Joseph, 392, 411, 425, 480.
 v. Waters, 391, 804.
First Parish in Sherbourne v. Fiske, 253, 795.
First Presbyterian Church v. Fort Wayne, 207, 288, 609.
 v. New Orleans, 203.
Fischel v. Mercier, 479, 549.
Fish v. Brown, 394.
Fisher v. Charleston, 736.
 v. Com'rs, 374.
 v. Horicon Co., 115.
 v. People, 276, 310, 484.
Fiske v. Brunette, 504.
 v. Framingham Manuf. Co., 114.
 v. Hazard, 136.
Fitch v. Casey, 517.
 v. Pinckard, 473.
Fitchburg Railroad Co. v. Prescott, 226, 334.
Fitzgerald v. Spain, 502.
Fix v. Succession of Dierker, 396, 547.
Flagg v. Palmyra, 735.
Flanagan v. Grimmer, 462, 515, 569.
Flanders v. Cross, 367.
 v. Merrimack, 313.
Flatbush, In re, 104, 160, 615.
Fleece v. Goodrum, 261.
Fleischauer v. Hoboken, 899.
Fleming v. Mershon, 768.
 v. Roverud, 477.
Fletcher v. Oliver, 170, 177, 245.
 v. Oshkosh, 669.
 v. Trewalla, 415, 792.
Flinn v. McKinley, 502.
 v. Parsons, 546.
Flint v. Boston, 84.
 v. Sawyer, 454, 471, 483, 484.
 v. Webb, 615.
Flint, etc., Plank Road Co. v. Woodhull, 71, 112.
Flint, etc., R. Co. v. Auditor-General, 284, 341, 783.
Flora v. Kline, 821.
Florida Savings Bank v. Brittain, 516, 556.
Floyd v. Barker, 787.
 v. Eatonton, 573.
 v. Gilbreath, 759, 770, 779.
Flud v. Pennington, 260.
Foley v. Kirk, 501.
Folkerts v. Power, 239, 428, 783.
Folsom v. Carli, 260, 261.
Fonda v. Sage, 784.
Foote v. Howard Co. Court, 77, 737.
Foote v. Linck, 773.
 v. Milwaukee, 774.
Forbes v. Appleton, 810.
 v. Gracey, 87.
 v. Halsey, 520.
Ford v. Clough, 705, 708, 797.
 v. Kolb, 546.
Foresman v. Byrns, 371.
 v. Chase, 448, 777.
Forey v. Bigelow, 547, 562.
Forqueran v. Donnally, 476, 545.
Forster v. Forster, 300, 302, 307.
Fort De Moins Lodge v. Polk Co., 208.
Fort Leavenworth R. Co. v. Lowe (27 Kan.), 56, 87.
 v. Lowe (114 U. S.), 56.
Fortman v. Ruggles, 523.
Fort Wayne v. Lehr, 43.
Fort Worth v. Davis, 333.
Fosdick v. Perrysburg, 294.
Foss v. Chicago, 66.
Foster v. Bowman, 539.
 v. Commissioner, 95, 816.
 v. Davenport, 92.
 v. Hall, 370.
 v. McDivitt, 559.
 v. Park Commissioners, 616, 667.
 v. Pierce Co., 809.
 v. Thurston, 434.
Fournier v. Municipality, 668.
Foust v. Ross, 559.
Fowler v. Beebe, 250, 253, 254.
 v. Danvers, 136.
 v. Halbert, 554.
 v. People, 407.
 v. St. Joseph, 645, 772, 781.
Fox v. Cash, 492.
 v. Commonwealth, 295.
 v. Fox, 259.
 v. New Orleans, 311.
 v. Rockford, 15.
 v. Turtle, 527, 528.
Foxcroft v. Nevins, 413, 709.
Fractional School District v. Joint Board, 754.
Francis v. Railroad Co., 184.
 v. Washburn, 451, 526, 528.
Frank, Ex parte, 177, 600.
Frank v. San Francisco, 735.
Frankford, etc., R. Co. v. Philadelphia, 598, 603.
Frankfort v. Winterport, 135.
Franklin v. Mayberry, 589.
Franklin Bank v. State, 69.
Franklin Co. v. Pennock, 393.
 v. Railroad Co., 384.
Franklin Ins. Co. v. State, 170, 199.
Franklin St. Soc. v. Manchester, 205.
Frary v. Dakin, 722.
Fratz v. Mueller, 420.
Frazer v. Siebern, 763, 764.
Frederick v. Augusta, 279.
Frederick Co. v. National Bank, 213.
Freedman v. Seigel, 86.

Freedom v. County Com'rs, 749.
 Freeholders v. Barber, 598.
 Freeland v. Hastings, 104, 105, 137,
 336, 698.
 Freeleigh v. State, 604.
 Freeman v. Cornwall, 787.
 v. Davis, 706.
 v. Holcombe, 727.
 v. Kenney, 789, 791.
 v. Mayor of Atlanta, 441, 446.
 v. Ogden, 756.
 v. Thayer, 477, 520.
 Freeport v. Marks, 118.
 Fremont v. Mariposa Co., 777.
 French v. Baker, 584.
 v. Edwards (13 Wall.), 284, 365,
 401, 496.
 v. Edwards (5 Sawy.), 323.
 v. Kirkland, 617.
 v. Ladd, 510.
 v. Patterson, 471, 496, 517.
 v. State, 18.
 v. Wilmington, 195.
 Frentz v. Klotzsch, 502.
 Fretwell v. Troy, 579.
 Frew v. Taylor, 526, 529.
 Frick v. Sterrett, 553.
 Friend v. Gilbert, 128.
 v. Hamill, 788.
 Frier v. State, 711.
 Frierson v. Branch, 506.
 Frommer v. Richmonnd, 580.
 Frost v. Belmont, 135.
 v. Flick, 760, 776.
 v. New Orleans, 749.
 Fry v. Booth, 290.
 Frye v. Bank of Illinois, 501.
 v. Milwaukee, 501.
 Fullam v. Down, 812.
 Fuller v. Armstrong, 520.
 v. Dane, 135.
 v. Gould, 219, 258, 787.
 v. Grand Rapids, 292, 453.
 v. Groton, 128.
 v. Hodgdon, 501.
 Fulton v. Davenport, 158.
 Furman v. Nichol, 81.
 Furman St., Matter of, 636, 639, 660.

G.

Gaar v. Hurd, 440, 441, 809.
 Gabe v. Root, 514, 557.
 Gachet v. McCall, 459, 485.
 Gaertner v. Fond du Lac, 757.
 Gage v. Bailey, 310, 342, 482, 538, 774.
 v. Billings, 781.
 v. Busse, 536, 782.
 v. Chapman, 781.
 v. Currier, 789, 791.
 v. Evans, 785.
 v. Graham, 59, 654, 687.
 v. Lightburn, 530.

Gage v. Parker, 536.
 v. Rohrbach, 781.
 v. Rumsev, 407.
 v. Scales, 541.
 v. Schmidt, 513.
 Gaither v. Lawson, 547, 555.
 Galbreath v. Drought, 505.
 Gale v. Mead, 290, 424, 790, 800.
 Galena v. Amy, 76, 282, 735, 736.
 Galesburg v. Hawkinson, 59, 162.
 Gallatin v. Alexander, 376.
 Galloway v. Jenkins, 770.
 Galveston v. Sydnor, 805.
 Gamble v. East Saginaw, 261, 410,
 481, 782.
 v. Horr, 519, 550.
 v. Witty, 286, 290.
 Games v. Stiles, 473, 475, 487.
 Gammel v. Potter, 115.
 Gandy v. Commissioners, 763.
 Gantz, Petition of, 752.
 Gardenhire v. Mitchell, 295, 513, 518.
 Gardiner v. Gerrish, 501.
 Gardiner, etc., Co. v. Gardiner, 201,
 375, 584, 585, 790.
 Gardner v. Brown, 498.
 v. Haney, 738.
 v. Hosmer, 260, 261.
 v. People, 602.
 v. State, 69, 198, 210, 214, 234.
 Garibaldi v. Jenkins, 397, 426, 482,
 542.
 Garland v. Garland, 399.
 Garner v. Anderson, 463.
 Garnett v. Farrand, 787, 788.
 Garrett v. St. Louis, 625, 632, 639.
 v. White, 517.
 v. Wiggins, 473.
 Garrettson v. Scofield, 444, 505.
 Garrick v. Chamberlain, 485, 523.
 Garrigan v. Knight, 547.
 Gartside v. East St. Louis, 582.
 Garvey, Petition of, 614.
 Garwood v. Hastings, 408, 500, 501.
 Gass v. Stinson, 712.
 Gatchet v. McCall, 812.
 Gates v. Barrett, 761.
 v. Lawson, 499.
 Gatlin v. Tarboro, 186, 194, 579.
 Gatzweiler v. People, 604.
 Gault's Appeal, 45, 533, 543, 545, 624.
 Gavin v. Shuman, 473.
 Gay v. Assessors, 752.
 Gaylord v. Scarif, 452, 473, 546.
 Gearhart v. Dixon, 290, 340, 475.
 Geekie v. Kirby, etc., Co., 515, 564.
 Gelpcke v. Dubuque, 77.
 Gendrey v. Broussard, 510.
 Genessee, etc., Bank v. Livingston
 Co., 758.
 Genther v. Fuller, 309, 520.
 Genthner v. Lewis, 497.
 George v. Messenger, 394.
 v. School District, 217, 336, 814.

- George's Creek, etc., Co. v. Com'rs of Allegany Co., 748.
 Georgetown College v. District of Columbia, 809.
 Georgia v. Atkins, 86.
 v. Atlantic, etc., R. Co., 441, 450.
 Geren v. Gruber, 351, 463.
 Gerke v. Purcell, 203.
 German-American Bank v. Burlington, 84, 421.
 Germania, The, v. State, 601.
 Germania L. Ins. v. Commonwealth, 197, 386, 387.
 Germania Savings Bank's Appeal, 445.
 Gerry v. Stoneham, 129, 292, 293, 429.
 Gest v. Cincinnati, 674.
 Getchell v. Supervisors, 418.
 Gibb v. Washington, 251.
 Gibbons v. Ogden, 92.
 Gibbs v. County Com'rs, 730, 734, 759, 822.
 v. Gale, 298.
 v. Green, 247.
 v. Sawyer, 561.
 Giboney v. Girardeau, 159.
 Gibson v. Bailey, 319, 481.
 v. Howe, 173.
 v. Mason, 6, 45.
 v. Robbins, 555.
 Gifford v. New Jersey R. Co., 768.
 Gilbert v. Dougherty Co., 708.
 v. Havemeyer, 676.
 v. Lyon Co., 442.
 v. Turnpike Co., 487.
 Gilchrist v. Shackelford, 471.
 Gilkerson v. Scott, 635.
 Gilkeson v. Frederick Justices, 198, 584, 769.
 Gilkey v. Cook, 568.
 Gillett v. Treas. of Lyon Co., 418, 422.
 Gillette v. Denver, 642, 649, 660, 760.
 v. Hartford, 157, 816.
 Gilliam v. Reddick, 251, 254.
 Gilman v. Riopelle, 408, 564.
 v. Sheboygan, 70, 142, 199, 216, 245, 651.
 v. Van Brunt, 780.
 Gilmore v. Holt, 254.
 v. Thompson, 555.
 Gilpatrick v. Saco, 749, 799.
 Girdner v. Stevens, 569.
 Glasgow v. Rowse, 1, 191, 209, 238, 797, 799.
 Glass v. Gilbert, 406, 408.
 v. White, 460, 523, 551.
 Glass Co. v. Boston, 228.
 Glassford v. Dorsey, 778.
 Gleason v. McKay, 380.
 Gledney v. Deavors, 441.
 Gloucester Ferry Co. v. Pennsylvania, 97, 373.
 Godard, Petitioner, 589.
 Goddard v. Jacksonville, 602.
 v. Seymour, 372, 812.
 Goddin v. Crump, 112, 133, 163.
 Goenen v. Schroeder, 545.
 Goetchens v. Matthewson, 783.
 Goewey v. Urig, 473.
 Goff v. Supervisors, 410.
 Gold v. Flite, 264.
 Goldgart v. People, 22, 371.
 Gold Hill v. Caledonia, etc., Co., 206.
 Goldsmith v. Augusta, etc., R. Co., 382, 749.
 v. Central R. Co., 221, 749.
 v. Georgia R. Co., 69, 226, 749.
 v. Kemp, 712.
 v. New Orleans, 593, 778.
 v. Rome R. Co., 226, 429.
 v. Southwestern R. Co., 749.
 Goldthwaite v. Montgomery, 577.
 Gomer v. Chaffee, 267, 488, 564.
 Gonzales v. Sullivan, 67, 213.
 Gooch v. Gregory, 735.
 Goodal v. Stuart, 261.
 Goodale v. Fennell, 787.
 Goodell v. Harrison, 409.
 Goodnow v. Litchfield, 463.
 v. Moulton, 468, 806.
 v. Stryker, 451.
 v. Wells, 806.
 Goodrich v. Detroit, 670.
 v. Florer, 540.
 v. Kimberly, 505.
 v. Lunenburg, 311, 348, 429.
 v. Omaha, 613.
 v. Turnpike Co., 613, 630, 695.
 Goodrum v. Carroll, 707.
 Goodwin v. Perkins, 291, 425, 800.
 v. Savannah, 179, 187, 582, 769.
 Gordon v. Appeal Tax Court, 68, 69.
 v. Baltimore, 193, 205, 225, 227, 229, 230.
 v. Cornes, 123, 149, 155, 651, 697.
 v. Farrar, 787.
 v. New Brunswick Bank, 239.
 Gore v. Mastin, 797.
 Gorgas v. Blackburn, 735.
 Gorham v. Hall, 709.
 Gorley v. Sewell, 19, 295.
 Gormley's Appeal, 447.
 Gosler v. Tearney, 563.
 Gossett v. Kent, 481, 526.
 Gould v. Atlanta, 99, 580, 764.
 v. Baltimore, 563, 674.
 v. Day, 469.
 v. Hammond, 794.
 v. Sterling, 333.
 v. Thompson, 516.
 Gouveneur v. New York, 676.
 Gove v. Epping, 105, 136.
 v. Newton, 799.
 Governor v. Allen, 707.
 v. Humphreys, 707.
 v. Montgomery, 257.
 v. Powell, 719.
 Gow v. Tidrick, 783.
 Grace v. Board of Health, 660, 751.

- Grace v. Mitchell*, 798.
Graceland v. People, 526.
Grafton Bank v. Kimball, 790.
Graham v. Chatauqua Co., 167.
 v. Horton, 766.
 v. Parham, 711, 726, 727.
 v. Reynolds, 719.
Granby v. Thurston, 240.
Grand Chute v. Winegar, 331.
Grand Gulf, etc., Co. v. Buck, 213.
Grand Rapids v. Blakely, 412, 659, 807, 815.
Granger v. Parsons, 353.
Grant v. Davenport, 201, 768.
 v. Jones, 370, 373, 374.
 v. Railroad Co., 89.
Gravel Road Co. v. Black, 749.
Graves v. Bruen, 475.
Gray v. Bolles, 526.
 v. Chapin, 768.
 v. Coan, 535, 543.
 v. Mount, 132.
Great Barrington v. County Com'rs, 23, 56, 221.
Great Falls Manuf. Co. v. Fernald, 114.
Greedup v. Franklin Co., 771, 781.
Green v. Biddle, 80.
 v. Craft, 396, 435.
 v. Gruber, 445.
 v. Holway, 268.
 v. Van Buskirk, 56.
 v. Watson, 394.
Greenabaum v. King, 814.
Greenbanks v. Boutwell, 139, 338, 339.
Greene v. Burke, 253.
 v. Gardiner, 370.
 v. Lowry, 460.
 v. Lunt, 408, 486.
 v. Mumford, 375, 772, 776, 778, 799.
 v. Walker, 256, 395, 400.
Greenough v. Fulton Coal Co., 354, 423,
 v. Greenough, 43, 300.
Greensburg v. Young, 589, 639.
Greenwalt v. Tucker, 398, 499.
Greenwell v. Commonwealth, 715.
Greer v. Wheeler, 494, 495.
Gregg v. Jamison, 137, 254.
 v. Strange, 261.
Gregory v. Brooks, 787, 794.
 v. Wilson, 436.
Greve v. Coffin, 519.
Gridley v. Clark, 791.
Griffin, In re, 256.
Griffin v. Crippen, 408, 409.
 v. Cunningham, 302.
 v. Dogan, 523, 625.
 v. Mixon, 462.
 v. Powell, 588.
 v. Rising, 459, 791, 792.
Griffith v. Carter, 56.
 v. Watson, 371, 421.
Griggs v. St. Croix Co., 412, 413, 774.
Grim v. School District, 2, 136, 168, 303, 305, 814.
Grimm v. O'Connell, 398, 515.
Grimmell v. Des Moines, 642, 643, 649, 762.
Grimmer v. Sumner, 730.
Grindley v. Barker, 259.
Griswold v. Pelton, 645.
 v. School District, 421, 428.
Griswold College v. Iowa, 203.
Groesbeck v. Seeley, 299, 520, 557.
Grotefend v. Ultz, 398.
Grumon v. Raymond, 797.
Gudger v. Bates, 444.
Guenther v. Baltimore, 91.
Guest v. Brooklyn, 326, 623, 781.
Guidry v. Broussard, 521, 783.
Guild v. Chicago, 654.
Guilford v. Supervisors of Chenango, 107, 128, 686.
Guisebert v. Etchison, 470, 526.
Guittard v. Marshall Co., 468.
Gulf R. Co. v. Morris, 185, 414.
Gulick v. Ward, 135.
Gunn v. Barry, 73.
Gunn's Adm'r v. Pulaski Co., 730.
Gunnison v. Hoehne, 560.
Gunnison Co. v. Owen, 179, 192.
Gunter v. Leckey, 585.
Gurnee v. Chicago, 614.
Gurr v. Scudds, 268.
Gusten v. School District, 349.
Gutzwiller v. Crowe, 412.
Guy v. Baltimore, 93.
 v. Washburn, 814.
Guyun v. McCauley, 507.
Gwin v. Van Zant, 487.

H.

- Haas v. Misner*, 14, 16.
Hadley v. Chamberlain, 320.
 v. Tankersley, 518.
Hadsell v. Hancock, 128.
Haffin v. Mason, 804.
Hagaman v. Cloud Co., 763.
Hagar v. Reclamation District, 14, 48, 51, 363, 609, 618, 684.
 v. Supervisors of Yolo, 4, 48, 50, 616, 617, 659, 820.
Hagenbuch v. Howard, 772.
Hager v. Burlington, 643.
Haight v. Railroad Co., 231, 382, 430.
Haines v. School District, 335.
Hairston v. Stinson, 161.
Halbert v. Sparks, 121.
Hale v. Branscum, 462.
 v. County Com'rs, 372.
 v. Cushing, 256, 257, 289, 290.
 v. Kenosha, 142, 199, 207, 245, 294, 609, 636.
 v. Penn's Heirs, 533.
Haley v. Philadelphia, 300.

- Hall v. Benton**, 368.
 v. Collins, 473.
 v. Dodge, 494, 560.
 v. Dowling, 88.
 v. Greenwood Co., 388, 749.
 v. Guthridge, 537.
 v. Hall, 437.
 v. Kellogg, 481, 520.
 v. Theisen, 398.
 v. Wisconsin, 67.
Halleck v. Boylston, 311, 317, 340.
Haller v. Blaco, 515.
Hallo v. Helmer, 412, 414, 418, 422.
Halloway v. Clark, 567, 568.
Hallowell v. Saco, 370.
Halsey v. People, 149, 163, 310, 326, 419, 455, 616, 683.
 v. Rumsey, 163.
Halstead v. Adams, 373, 773.
Ham v. Sawyer, 160, 277.
Hamilton v. Amsden, 3, 42.
 v. Burum, 517.
 v. Fond du Lac, 308, 396, 400, 780.
 v. Rosenblatt, 785.
 v. State, 741.
 v. Valiant, 476.
 v. Wright, 568.
Hamilton Manuf. Co. v. Massachusetts, 84, 227, 230, 233, 379.
Hammersley v. Franey, 372.
Hammersmith Bridge Co. v. Overseers, 618.
Hammett v. Philadelphia, 46, 141, 612, 613, 622, 636.
Hammon v. Sexton, 400.
Hammond v. Hannin, 452.
Hammontree v. Lott, 429.
Hampden's Case, 41, 58.
Hampshire v. Franklin, 60, 162, 690.
Hampton v. Rouse, 538.
Hancock v. Bowman, 673.
 v. Whittemore, 372.
Hancock St., Extension of, 4, 613, 639, 666.
Hand v. Ballou, 520, 537.
 v. Savannah, etc., R. Co., 67, 206, 213.
Haney v. Cole, 554.
Hankins v. Lawrence, 115.
Hanlon v. Supervisors, 760, 781.
Hanna v. Allen Co., 5, 6.
Hannah v. Collins, 262, 409, 505.
Hannel v. Smith, 455, 481, 484.
Hannewinkle v. Georgetown, 760, 772, 779, 780.
Hannibal v. Guyott, 581, 601.
Hannibal, etc., R. Co. v. Shacklett, 205, 214, 225.
 v. State Board, 385, 386, 420, 759.
Hanscom v. Hinman, 401.
 v. Omaha, 664.
Hanson v. Haverhill, 808.
 v. Vernon, 1, 101, 104.
Hapgood v. Morton, 401.
Harbeson v. Jack, 395.
Harbor Commissioners v. Pashley, 92.
 v. State, 154.
Harbor Master v. Railroad Co., 92.
Hardaway v. County Court, 719.
Hardcastle v. State, 336, 339.
Hardenburg v. Kidd, 44, 497, 498, 781.
Hardesty v. Fleming, 99, 874, 802.
 v. Price, 443.
Hardie v. Chrisman, 515.
Hardin v. Crate, 567.
Harding v. Funk, 115.
 v. Goodlett, 115.
 v. Railroad Co., 182.
Hardy v. Yarmouth, 371, 375, 376.
Hare v. Carnall, 285, 492, 533, 763, 781.
Hargrove v. Lilly, 444.
Harkness v. Board of Public Works, 518, 772, 779.
Harkreader v. Clayton, 488, 502, 503.
Harlan's Heirs v. Seaton's Heirs, 462.
Harman v. New Marlborough, 239, 355.
 v. Tappenden, 788.
Harmer v. Boling, 781.
Harmon v. Stockwell, 455.
Harmony v. Osborne, 276.
Harney v. Applegate, 673.
 v. Supervisors, 422.
Harper v. Com'rs, 48, 50, 873, 720.
 v. McKeelhan, 308, 406.
 v. Mechanics' Bank, 304.
 v. Rowe, 50, 302, 305, 307, 497, 498, 499, 515, 547.
Harpswell v. Orr, 709.
Harriman v. School District, 443.
Harrington v. Com'rs, 787.
 v. Hiliard, 747.
 v. Plainview, 333.
 v. Taylor, 260.
 v. Worcester, 442, 454, 455.
Harris v. Drought, 489, 493.
 v. Dubuclet, 103, 327.
 v. Fremont Co., 777.
 v. Jays, 250.
 v. Roof, 135.
 v. Runnels, 434.
 v. State, 581, 714.
 v. Supervisors, 659.
 v. Tyson, 406.
 v. Wood, 18, 48, 438.
Harrison v. Bridgeton, 143, 162, 686.
 v. Haas, 763, 781, 783.
 v. Harrison, 502.
 v. Owens, 536.
 v. Roberts, 504.
 v. Vicksburg, 56, 63, 373.
 v. Vines, 776.
 v. Williams, 499.
 v. Willis, 32.
Harrison Co. Com'rs v. McCarty, 290.
Harrison Justices v. Holland, 60.
Harshaw v. Taylor, 526.

- Hart v. Brooklyn**, 589.
 v. Henderson, 304, 553.
 v. Holden, 136.
 v. Newsom, 722.
 v. Oceana Co., 707, 735.
 v. Plum, 205, 289.
 v. Smith, 483, 523, 547.
Hartford v. Chipman, 784.
 v. Franey, 706, 710, 714, 715.
 v. West Middle District, 653.
Hartford Bridge Co. v. East Hartford, 162, 240.
Hartford Fire Ins. Co. v. Hartford, 378.
Hartland v. Church, 56.
Hartley v. Boynton, 533.
 v. State, 721.
Hartman v. Bean, 446.
 v. Greenhow, 74, 79, 81.
Hartwell v. Armstrong, 137.
 v. Littleton, 323.
Harvard College v. Boston, 205, 209.
 v. Gore, 570.
Harvey v. South Chester, 207.
 v. Thomas, 114.
Harward v. Drainage Co., 59, 654, 692, 770.
Harwood v. Huntoon, 820.
 v. North Brookfield, 311, 356.
Hasbrouck v. Milwaukee, 689, 690, 735.
Haseltine v. Mosher, 561.
 v. Simpson, 513.
Haskell v. Bartlett, 17, 484.
 v. Putnam, 501, 503.
Hassan v. Rochester, 216, 644.
Hassett v. Walls, 15.
Hastings v. Columbus, 483, 633, 671.
Hatch v. Buffalo, 758, 759, 779, 781.
Hathaway v. Addison, 816.
 v. Elsbree, 394, 396.
 v. Fish, 375.
 v. Goodrich, 798.
 v. Phelps, 260.
Hatzfield v. Golden, 135.
Hawes v. Howland, 504, 539.
Hawkins v. Carrol, 264, 332.
 v. Jonesboro, 353, 775.
 v. Sumter Co., 18.
Hawks v. Baldwin, 260.
Hawley v. Fairbanks, 745.
 v. Mitchell, 473.
Haxton v. Harris, 493.
Hayden v. Atlanta, 609, 626, 633.
 v. Dunlap, 290.
 v. Foster, 401, 402, 493, 494.
Hayes v. Holly Springs, 332.
 v. Viator, 399.
Hayford v. Belfast, 809.
Hayne v. Delieasseline, 22, 373.
Haynes v. Butler, 707, 712.
 v. Heller, 515.
Hays v. Drake, 797, 801.
 v. Hill, 768.
Hays v. Hunt, 474.
 v. Steamship Co., 56, 92, 373.
Haywood v. Savannah, 344.
Hazen v. Essex Co., 114.
Hazzard v. Heacock, 676.
Head v. Amoskeag Manuf. Co., 115.
 v. Fordyce, 784.
 v. James, 779.
Head Money Cases, 97.
Heard v. Walton, 534.
Hearn, Petition of, 302, 310.
Hearst v. Egglestone, 398.
Heath, Ex parte, 290.
Heaton v. Knight, 513.
Hebard v. Ashland Co., 101, 764, 773.
Hecht v. Boughton, 339, 340, 399, 419.
Heffner v. Commonwealth, 741.
Heft v. Gephart, 308, 394, 453, 480.
Heine v. Levee Com'rs, 44, 45, 444, 744.
Heise v. Columbia, 573, 596.
Hellenkamp v. La Fayette, 820.
Hellman v. United States, 31.
Helm v. National Bank, 597.
Helvey v. Huntington, 704.
Hemmingway v. Brew, 512.
 v. Machias, 591.
Henderson v. Baltimore, 329, 657, 659, 665.
 v. Lambert, 157, 656, 671, 672.
 v. Mayor, 97, 99.
 v. Oliver, 309, 511, 556, 559.
 v. Starritt, 551.
 v. State (53 Ind.), 393, 727.
 v. State (58 Ind.), 368.
 v. Whitenger, 436.
Henderson's Distilled Spirits, 275, 465.
Hendrick v. West Springfield, 670.
Hendrie v. Kalthoff, 211.
Hendrix v. Boggs, 514, 537.
Henley v. Street, 559.
Hennan v. Stevens, 789.
Hennepin Co. v. Grace, 202, 203.
Henry v. Bell, 800.
 v. Chester, 215, 217, 243, 276, 812.
 v. Edson, 789.
 v. Gregory, 443, 773, 778, 781.
 v. Horstick, 440, 814.
 v. Sargeant, 797.
Henry Co. v. Murphy, 806.
Henshaw v. Foster, 265.
Hensler v. Drainage Com'rs, 703.
Hensley v. People, 123, 155, 697.
Hepburn v. Curtis, 305.
 v. School Directors, 390, 391.
Herrick v. Amerman, 404.
 v. Big Rapids, 376.
 v. Randolph, 70.
Herriman v. Stowers, 21, 371.
Herron v. Keeran, 57.
Hersey v. Supervisors (16 Wis.), 216, 763.
 v. Supervisors (37 Wis.), 410, 412.

- Herzog v. Gregg, 536.
 Hess v. Griggs, 500.
 v. Herrington, 559.
 Heesler v. Drainage Com'rs, 654, 703.
 Hewell v. Lane, 498, 742.
 Hewes v. Reis, 276, 284.
 Hewison v. New Haven, 689.
 Hewitt v. Butterfield, 549.
 v. New York, etc., R. Co., 72.
 v. Weatherby, 526.
 v. Week, 549.
 Hewitt's Appeal, 159.
 Hewlett v. Nutt, 32, 194.
 Heywood v. Buffalo, 758, 769, 781.
 Hibbard v. Brown, 512.
 v. Clark, 17.
 v. Garfield, 360.
 Hickey v. Hinsdale, 291.
 Hickman v. Dawson, 521, 547, 550, 555.
 v. Kempner, 450, 451, 454, 514, 515.
 Hicks v. Westport, 808.
 Hier v. Rullman, 541.
 Higgins v. Ausmuss, 674, 800.
 v. Casks of Lime, 90.
 v. Chicago, 629.
 v. Crosby, 501.
 v. Rinker, 274.
 High v. Shoemaker, 50, 409, 458.
 Hightower v. Freedle, 512.
 Hilbish v. Catherman, 1, 187.
 v. Hower, 424, 800.
 Hildreth v. Lowell, 590.
 Hiles v. La Flesh, 559.
 Hilgenberg v. Wilson, 225, 356.
 Hilgers v. Quinney, 484.
 Hill v. Decatur, 608.
 v. Figley, 797.
 v. Grant, 260.
 v. Higdon, 149, 195, 200, 345, 624, 633, 639, 676.
 v. Kricke, 560.
 v. Lund, 462.
 v. Mason, 483, 485.
 v. Mowry, 408.
 v. Sellick, 787.
 v. Supervisors of Livingston, 816.
 v. Vanderpool, 259.
 v. Wait, 799.
 v. Wright, 818.
 Mills v. Chicago, 523.
 v. Exchange Bank, 391, 452.
 v. Savings Bank, 766.
 Hilton v. Bender, 340, 518, 781.
 v. Fonda, 21, 57, 793.
 Himmelman v. Bateman, 666.
 v. Booth, 441.
 v. Cahn, 288, 483, 656, 660, 666.
 v. Carpenter, 449.
 v. Cofran, 350.
 v. McCreery, 659.
 v. Oliver, 17.
 v. Satterlee, 613, 656.
 Himmelman v. Spanagel, 17.
 v. Steiner, 899.
 v. Townsend, 441, 673.
 Hinchman v. Whetstone, 569.
 Hinckley v. Buchanan, 260.
 v. Cooper, 413.
 Hindman v. Aledo, 705.
 Hines v. Leavenworth, 209, 345, 680, 648, 649.
 Hingham, etc., Co. v. Norfolk Co., 130, 149, 151, 223, 682.
 Hinman v. Pope, 553.
 Hinson v. Lott, 90, 95.
 Hintrager v. Hennessy, 561.
 v. Kiene, 340, 550.
 Hinze v. People, 692.
 Hirn v. State, 581, 604.
 Hirsh v. Commonwealth, 575, 579.
 Hitchcock v. Galveston, 609, 789.
 v. Springfield, 658.
 Hittinger v. Westford, 375.
 Hoadley v. County Com'rs, 374.
 Hobart v. Detroit, 236.
 Hobbs v. Clements, 454, 484, 486.
 v. Shumates, 515.
 Hobson v. Commonwealth, 720.
 v. Dutton, 469, 515.
 Hodgdon v. Burleigh, 87, 304, 409, 486, 514, 545.
 v. Wright, 462, 463.
 Hodges v. Buffalo, 129.
 v. Nashville, 601.
 Hodgkin v. Fry, 335, 342.
 Hodgman v. Chicago, etc., R. Co., 341, 768.
 Hodgson v. New Orleans, 186.
 Hoffer v. Matteson's Ex'rs, 480.
 Hoffman v. Bell, 281, 288, 308, 394, 514, 520.
 v. Harrington, 560.
 Hoffmire v. Rice, 547.
 Hogan v. Smith, 449.
 Hoge v. Railroad Co., 69, 206.
 Hogelskamp v. Weeks, 342, 418, 425, 427, 455.
 Hogg v. Longstreth, 466.
 Hoggatt v. Bigley, 787.
 Hogins v. Brashears, 488.
 Hoglen v. Cohan, 438.
 Holcombe v. Commissioners, 273.
 v. Holcombe, 376.
 Holden v. Eaton, 449, 797, 799.
 v. James, 569.
 Hole v. Rittenhouse, 478, 559.
 Holland v. Baltimore, 276, 784.
 v. Chicago, 582.
 v. Davis, 337.
 v. Eldredge, 822.
 v. Isler, 577.
 v. Osgood, 290.
 v. San Francisco, 689.
 Hollida v. Hunt, 597.
 Hollinger v. Devling, 535.
 Hollister v. Sherman, 780.

- Holly Springs, etc., Co. v. Marshall Co., 70, 380, 417.
 Holman v. Johnson, 434.
 Holmes v. Andrews, 547.
 v. Baker, 349, 768, 770.
 v. Carley, 646.
 v. Jersey City, 613.
 v. Taber, 448.
 Holroyd v. Bean, 787.
 Holst v. Roe, 602.
 Holton v. Bangor, 221, 749, 799.
 v. Milwaukee, 612, 625, 639.
 Holt v. Somerville, 638, 656.
 Holt's Appeal, 335.
 Holt's Heirs v. Hempfield's Heirs, 473.
 Holyoke Co. v. Lyman, 72.
 Home Ins. Co. v. Augusta, 179, 573, 574, 596.
 v. Sweigert, 175, 181, 186, 387.
 Home of the Friendless v. Rouse, 68, 71.
 Homer v. Cilley, 455, 481.
 v. Dellinger, 505.
 Home Savings Bank v. Boston, 16, 504.
 Homestead Co. v. Valley R. Co., 468.
 Hood v. Lynn, 129.
 Hood's Estate, 56.
 Hooper v. Baltimore, 56.
 v. Ely, 768, 770.
 v. Emery, 104, 105, 127.
 Hooser v. Buckner, 441, 442.
 Hope v. Deaderick, 63, 64.
 v. Sawyer, 488, 553.
 Hope Mining Co. v. Kennon, 205, 218.
 Hopkins v. Lovell, 772.
 v. Mason, 655.
 v. Sandige, 455, 464, 465.
 v. Succession of Dannoy, 783.
 Horn v. Garry, 512.
 v. New Lots, 807.
 v. Whittaker, 256, 707.
 Horne v. Green, 85, 371.
 Horrigan v. Wellmuth, 466.
 Horton v. Arnold, 506.
 v. Hendershot, 799.
 v. School Com'rs, 120, 684.
 v. Thompson, 132.
 Hostbrook v. Schooley, 546.
 Hosmer v. People, 293, 529.
 Hospers v. Wyatt, 767.
 Hospital v. Philadelphia, 204, 809, 810.
 Hough v. Easley, 511.
 Houghton v. Austin, 43, 66, 346, 419, 772, 781.
 v. Davenport, 336, 436.
 v. Hall, 414.
 Houghton Co. v. Auditor-General, 281, 740, 742.
 House v. State, 294.
 Houston Co. v. Dwyer, 714.
 Houston Co. Com'rs v. Jessup, 436.
 Houston, etc., R. Co. v. State, 435.
 Howard v. Augusta, 444, 450, 814.
 v. Bristol, 657.
 v. First Church, 434.
 v. Independent Church, 624, 639, 657.
 v. Proctor, 257, 259, 797.
 v. Stevenson, 526.
 v. Zeyer, 554.
 Howard Co. v. Armstrong, 806.
 Howe v. Boston, 748, 799, 803.
 v. Cambridge, 48, 52.
 v. Genin, 561.
 v. People, 401.
 v. Russel, 471.
 Howell v. Bristol, 142, 168, 247, 625, 639, 696.
 v. Buffalo, 149, 329, 350, 624, 665, 817.
 v. Cassopolis, 391.
 v. Maryland, 205.
 v. State, 5, 56, 205.
 Howes v. Bassett, 359, 798.
 Howland v. Eldredge, 728, 732, 822.
 Hoyt v. Com'rs of Taxes, 56.
 v. East Saginaw, 150, 624, 631, 639, 658.
 Hubbard v. Brainard, 274, 429, 812.
 v. Garfield, 311, 801.
 v. Johnson, 568.
 v. Kelley, 802.
 v. Winsor, 361, 397, 422, 428.
 Hubbell v. Campbell, 515.
 Hubley v. Keyser, 406.
 Huck v. Chicago, 384, 935.
 v. Railroad Co., 777.
 Huckins v. Boston, 816.
 Hudler v. Golden, 589.
 Hudson v. Atchison Co., 769.
 v. Daily, 729.
 Hudson R. Bridge Co. v. Patterson, 367.
 Huey v. Police Jury, 740.
 v. Van Wie, 291.
 Huggins v. Hinson, 791.
 Hughes, Petition of, 811.
 Hughes v. Cairo, 181, 186, 199.
 v. Kline, 671, 748, 750, 775, 776.
 Hughey's Lessee v. Horrell, 160, 473, 486.
 Huiscamp v. Albert, 444.
 Hull v. Supervisors of Oneida, 729, 730.
 Hume v. Wainescott, 105, 397, 398.
 Humphrey v. Pegues, 68, 71.
 Humphries v. Huffman, 516, 569.
 Hungerford v. Hartford, 619, 642.
 Hunnewell v. Cass Co., 88, 89.
 v. Charlestown, 772, 773.
 Hunsaker v. Wright, 180, 182, 284.
 Hunt v. Chapin, 290, 514.
 v. Curry, 546.
 v. Easterday, 764.

Hunt v. Gaines, 506.
 v. McFadgen, 453.
 v. McMahan, 554.
 v. School District, 839.
 v. Utica, 670.
 Hunter v. Cochran, 450.
 v. Kirk, 260, 261.
 Huntington v. Brantley, 454.
 v. Cent. Pac. R. Co., 85, 89, 414, 781.
 v. Smith, 785.
 Hurford v. Omaha, 633.
 Hurlburt v. Green, 372, 448, 803.
 Hurley v. Powell, 309.
 v. Street, 488.
 v. Texas, 814, 816.
 v. Woodruff, 520.
 Hurt v. Hamilton, 338.
 Huse v. Glover, 94.
 v. Merriam, 429, 430.
 Huston v. Markley, 491.
 Hutchins v. Doe, 429, 497.
 v. Moody, 447, 448.
 Hutchinson v. Pittsburgh, 775.
 Hyatt v. Allen, 733.
 Hyde v. Joyes, 65, 589.
 v. Supervisors, 476.
 Hyde Park v. Ingalls, 846.
 v. Waite, 813.
 Hylton v. United States, 8.

I.

Iddings v. Cairns, 308.
 Ide v. Finneran, 175, 182, 185, 196, 514.
 Illinois Cent. R. Co. v. Bloomington, 609.
 v. Goodwin, 211.
 v. Irvin, 211, 232.
 v. McLean Co., 175, 182, 185, 196, 234, 777.
 v. Rucker, 729.
 Illinois Conference Female College v. Cooper, 344.
 Illinois Mutual Ins. Co. v. Peoria, 280.
 Immegart v. Gorgas, 407, 522.
 Incher v. Raleigh, 334.
 Independence v. Noland, 601.
 Indiana v. Am. Exp. Co., 98.
 v. Pullman Car Co., 98.
 Indiana Co. v. Agricultural Society, 196.
 Indianapolis v. Mansur, 276, 613.
 v. M'Avoy, 282, 727, 805.
 v. Sturdevant, 200.
 Industrial University v. Champaign Co., 172, 173.
 Ingersoll v. Des Moines, 421, 752.
 v. Jeffords, 468, 547.
 Inglee v. Bosworth, 216, 789, 791, 815, 816.
 Ingraham, Matter of, 643.

Ingraham v. Doggett, 791.
 v. McGraw, 261.
 Inman Steamship Co. v. Tinker, 92, 93.
 Insurance Co. v. Baltimore, 245, 744.
 v. Cappellar, 174.
 v. Commonwealth, 336.
 v. Lott, 220.
 v. New Orleans, 178, 181, 186, 199.
 v. Saltwell, 341.
 v. Yard, 217, 286, 365, 401.
 Int. Nav. Co. v. Commonwealth, 887.
 International, etc., R. Co. v. Anderson Co., 213.
 v. Smith Co., 325, 749.
 Iowa Homestead Co. v. Webster Co., 88, 184.
 Iowa, etc., Co. v. Guthrie, 452.
 Iowa R. Land Co. v. Carroll Co., 342, 453, 776.
 v. Sac Co., 328, 330, 485, 776.
 v. Soper, 305.
 v. Woodbury Co., 383.
 Iron City Bank v. Pittsburg, 72, 230.
 Irvin v. New Orleans, etc., R. Co., 57.
 Irving v. Brownell, 473.
 Irwin v. Bank of United States, 499.
 v. Lowe, 337.
 v. Miller, 340.
 v. Trego, 499.
 Irwin, Succession of, 16.
 Isaacs v. Decker, 445.
 v. Shattuck, 287, 484.
 v. Wiley, 255.
 Isbell v. Crawford Co., 806.
 Isle of Ely, Case of, 618.
 Iverslie v. Spaulding, 475, 481, 487.
 Ives v. Kimball, 518.
 v. Lynn, 441, 442, 538.
 Iverson v. Hance, 87, 760.

J.

Jackman v. School District, 346.
 Jacks v. Chaffin, 5, 516.
 v. Dyer, 356, 453, 501, 515, 555.
 Jackson v. Atlanta, 805.
 v. Babcock, 411, 494.
 v. Bullock, 99.
 v. Esty, 537.
 v. Jacksonport, 518.
 v. Morse, 450.
 v. Newman, 600, 810.
 v. People, 757.
 v. Sassaman, 394.
 v. Shepard, 262, 473.
 v. Stoetzel, 394.
 v. Young, 290.
 Jacksonville v. Basnett, 270, 292.
 v. Holland, 602.
 Jacob v. Preston, 446.
 Jacobs v. Porter, 540.
 James v. Bucks Co., 734.
 v. Hicks, 804.

- James v. New Orleans**, 816.
Jaques v. Kopman, 409.
Jaquith v. Putney, 320, 322, 398, 496.
Jarvis v. Silliman, 487.
Jasper v. Sheridan, 240.
Jefferson Bank v. Shelly, 69.
Jefferson City v. McCarty, 449.
 v. Mock, 397.
 v. Whipple, 409, 444.
Jefferson Co. Com'rs v. Johnson, 840, 409, 414.
Jeffersonville v. Patterson, 760.
Jeffery v. Hursh, 500.
Jeffrey v. Brokaw, 299, 309, 559.
Jeffries v. Clark, 405, 547.
 v. Lawrence, 328.
Jenkins v. Andover, 122, 848.
 v. McIngree, 516.
 v. McTigue, 409, 411.
 v. Rice, 546.
 v. Rock Co., 780.
 v. Scharpf, 409.
 v. Waldron, 787, 788.
Jenks v. Hatheway, 782.
 v. Lima, 810.
 v. Wright, 476, 483, 484, 489, 510, 537, 543.
Jennings v. Collins, 401, 402, 408.
 v. Stafford, 526.
Jensen v. Supervisors, 695.
Jesse v. Preston, 471, 487.
Jewell v. Van Steenburgh, 836, 866, 792.
Jewett v. Alton, 259.
Jiska v. Ringgold Co., 448, 450.
Job v. Tebbetts, 455, 475.
Jodon v. Brenham, 329, 444, 445.
John and Cherry Sts., Matter of, 535.
John M. Welch, The, 93, 94.
Johns v. Thomas, 491.
Johnson, Petition of, 446.
Johnson v. Ballou, 566.
 v. Briscoe, 474.
 v. Campbell, 137.
 v. Christie, 450.
 v. Colburn, 429.
 v. Commonwealth, 212, 229, 280.
 v. Drummond, 92, 93, 770.
 v. Elwood, 418, 520.
 v. Fritch, 330.
 v. Goodridge, 259, 418, 705, 708, 779, 790, 799.
 v. Hahn, 454, 455, 777, 781.
 v. Higgins, 112.
 v. Howard, 17.
 v. Indianapolis, 670.
 v. Lexington, 279.
 v. Lumber Co., 409.
 v. Lyon, 355.
 v. McIntire, 397, 442.
 v. Milwaukee, 615, 640, 661.
 v. Oregon City, 56, 376.
 v. Payne, 466.
 v. Philadelphia, 598, 599, 603.
Johnson v. Roberts, 368, 763, 775.
 v. Royster, 354.
 v. Sanderson, 66.
 v. Stark Co., 345.
 v. Steadman, 254.
 v. Stewart, 477.
 v. Thompson, 718.
 v. United States, 710.
 v. Van Horn, 782.
 v. Wilson, 256.
Johnston v. Jackson, 559.
 v. Louisville, 16, 435.
 v. Macon, 15, 179, 180, 284, 576, 582, 583.
 v. Smith's Adm'rs, 503, 512.
Johnstone v. Scott, 450, 452, 750.
Jonas v. Cincinnati, 275, 621.
Jones v. Board of Public Instruction, 120, 182, 727, 733.
 v. Boston, 591, 613, 625, 636, 639, 659, 660, 666, 756, 757, 758.
 v. Burford, 450, 453.
 v. Carter, 554.
 v. Collins, 533, 534, 560.
 v. Columbus, 57, 219, 412.
 v. Commissioners, 749.
 v. Davis, 507, 778.
 v. Dills, 450, 513.
 v. Duras, 534.
 v. Gibson, 254.
 v. Gillis, 526, 529, 580.
 v. Johnson, 496, 535.
 v. Keep's Estate, 86.
 v. Kolb, 678.
 v. McLain, 454, 455.
 v. Miami Co., 543.
 v. New Haven, 689.
 v. Page, 576.
 v. Perry, 43.
 v. Raines, 187, 201, 206.
 v. Randle, 499, 564.
 v. Savings Bank, 379.
 v. Scanland, 256.
 v. Seward Co., 355, 415, 417.
 v. Summer, 776.
 v. Tiffin, 323.
 v. Water Com'rs, 4, 146, 190, 642.
 v. Welsing, 451.
 v. Wright, 710, 743.
Jones, etc., Manuf'g Co. v. Commonwealth, 70, 224, 232.
Jordan v. Brown, 585, 562.
 v. Kyle, 489, 564.
 v. Rouse, 517.
 v. School District, 839.
 v. Woodward, 115.
Jordan, etc., Association v. Wagoner, 409, 616.
Joyce v. East St. Louis, 582.
Joyner v. School District, 3, 14, 429, 790, 814, 816.
Judd v. Anderson, 409, 516.
 v. Driver, 1, 14.
 v. Fox Lake, 780, 816.

Judd v. Thompson, 790, 791.
 Judevine v. Jackson, 289, 322.
 Judkins v. Reed, 161, 371, 797.
 Julien v. Ainsworth, 453.
 Jurey v. Allison, 519.
 Jury v. Day, 491, 505.
 Jussen v. Board, etc., 832.
 Justice v. Logansport, 444.
 Justices of Cannon Co. v. Hooden-
 pyle, 45.
 Justices of Christian Co. v. Smith,
 707, 708.
 Justices of Clark Co. v. Railroad Co.,
 282.
 Justices of Jefferson v. Clark, 254.

K.

Kaehler v. Dobberpuhl, 811, 763, 776,
 819.
 Kahl v. Love, 452.
 Kansas v. Johnson, 295.
 Kansas City v. Railroad Co., 446.
 Kansas, etc., R. Co. v. Ellis Co., 45,
 357.
 v. Ridley Co., 419.
 v. Russell, 776.
 v. Tontz, 317, 340.
 v. Wyandotte Co., 877, 815.
 Kansas Indians, 893.
 Kansas Pacific R. Co. v. Russel, 364,
 365, 421.
 Karr v. Washburn, 533, 534.
 Keane v. Cannovan, 473.
 Kearney v. Covington, 669.
 v. Taylor, 800.
 Keasy v. Bricker, 59, 60.
 Keck v. Keokuk Co., 420.
 Keeler v. Newburn, 251.
 Keely v. Sanders, 495, 533.
 Keene v. Houghton, 471, 493.
 Keepfer v. Force, 514, 521.
 Kefferstein v. Knox, 328.
 Kehrig v. Peters, 596.
 Keighley's Case, 618, 662.
 Keith v. Boston, 687.
 v. Clark, 73, 81.
 v. Hayden, 409.
 v. Keith, 500, 507, 569.
 Kellar v. Savage, 413, 708, 790, 797.
 Keller v. State, 579, 602.
 Kelley v. Dwyer, 578.
 v. Marshall, 137.
 v. Noyes, 797.
 Kellogg, *Ex parte*, 530.
 Kellogg v. Ely, 819.
 v. Higgins, 861.
 v. McLaughlin, 473, 475, 481, 484,
 517.
 v. Supervisors, 371, 308.
 Kelly v. Atlanta, 575.
 v. Cleveland, 640.

Kelly v. Corson, 430, 752.
 v. Craig, 284, 288, 413, 424, 454,
 481, 485.
 v. Herrall, 404, 409, 498, 521, 522.
 v. Medlin, 473, 523.
 v. Pittsburgh (104 U. S.), 48, 52,
 159, 775.
 v. Pittsburgh (85 Pa. St.), 159.
 v. Sanders, 406, 520.
 Kelsey v. Abbott, 281, 399, 471, 501,
 503.
 Kelso v. Boston, 488, 753.
 Kemper v. King, 615.
 v. McClelland, 429.
 Kendall, Petition of, 255, 663.
 Kendall v. United States, 61.
 Kendig v. Knight, 399, 641, 643, 677.
 Kendrick v. Farquar, 207.
 Keniston v. Little, 797.
 Kennedy v. Bigelow, 547.
 v. Dailey, 394.
 v. Troy, 218, 620, 642, 753.
 Kenny v. Harwell, 98.
 Kensett v. Stivers, 762.
 Kent v. Agard, 561.
 v. Atlantic Delaine Co., 253.
 v. Kentland, 133.
 Keokuk v. Packet Co., 93.
 Keokuk, etc., R. Co. v. Lindly, 562.
 Kepley v. Jansen, 446.
 Kern v. Towsley, 448.
 Kerr v. Lansing, 769, 770.
 Kerwer v. Allen, 491.
 Ketchum v. Pacific R. Co., 18, 44, 45.
 Keyser v. McKissam, 254.
 Kezer v. Clifford, 501.
 Kiernan, Matter of, 657.
 Kilbourne v. St. John, 766.
 Kilburn v. Bennett, 370.
 Kiley v. Cranor, 321.
 Kilpatrick v. Sisneras, 568.
 Kimball v. Alcorn, 251, 254.
 v. Corn Exchange Bank, 802.
 v. Merchants', etc., Co., 413.
 v. Milford, 227, 228.
 v. National Bank, 769.
 Kimber v. Rosendale, 300, 302, 325.
 v. Schuylkill Co., 748, 750, 775.
 King v. Arcostook Co., 130.
 v. Cappeller, 581.
 v. Harrington, 554, 563.
 v. Hepswell, 283.
 v. King, 759.
 v. Madison, 183.
 v. Portland, 45, 624, 633, 645.
 v. United States, 353.
 v. Whitcomb, 426, 442, 801.
 v. Wilson, 770.
 King, The, v. Barlow, 282.
 v. Beeston, 259.
 v. Bradford Level, 249.
 v. Calder, 214.
 v. Commissioners, 173.
 v. Derby, 282.

King, The, v. Elkins, 260.
 v. Hodge, 646.
 v. Justices of London, 450.
 v. Liverpool, 173.
 v. Manning, 722.
 v. Mayor of Liverpool, 722.
 v. Moreley, 757.
 v. St. Gregory, 283.
 v. Terrott, 173.
 v. Tower Hamlets, 618, 643, 662.
Kingman v. Glover, 437.
Kingsbury v. Buchanan, 261.
Kingsley v. Supervisors, 312, 774.
Kinmundy v. Mahan, 581.
Kinney v. Beverly, 462, 464, 465.
 v. Doe, 258.
 v. Etheridge, 708.
 v. Zimpleman, 63, 121, 664.
Kinsworthy v. Austin, 451, 453.
 v. Mitchell, 361, 397, 429, 436, 482, 498.
Kinyon v. Duchene, 259, 616, 781.
Kipp v. Dawson, 284, 523.
 v. Johnson, 557, 569.
 v. Patterson, 574, 598.
Kirby v. Shaw, 6, 154, 159, 167, 223, 224, 273, 280, 608, 651.
Kirkland v. Whatley, 377.
Kirkpatrick v. Mathiot, 502.
Kirtland v. Hotchkiss, 52, 79, 178, 371, 373.
Kitchen v. Smith, 332.
Kitson v. Ann Arbor, 190, 580, 598, 631.
Kittaning Coal Co. v. Commonwealth, 196, 380.
Kittle v. Shervin, 199, 454, 535, 749.
Kline v. Ascension, 740.
Klokke v. Stanley, 742.
Knapp v. Grant, 691.
Kneeder v. Lane, 230.
Kneeland v. Milwaukee, 199, 216.
Knight v. Flat Rock, 774.
Kniper v. Louisville, 276, 288, 343, 574, 598.
Knowles v. Boston, 813.
Knowlton v. Moore, 485, 514.
 v. Supervisors, 2, 142, 157, 199.
Knox v. Cleveland, 560, 569.
 v. Dunn, 763.
 v. Huidenkoper, 397.
 v. Shawnee Co., 221.
Knox Co. v. Aspinwall, 331, 735, 744.
Knox Co. Court v. United States, 737.
Koon v. Snodgrass, 536.
Kraft v. Keokuk, 810.
Kregelo v. Flint, 493.
Kreidler v. State, 251.
Kreiss v. Seligman, 434.
Kroop v. Forman, 754.
Krutz v. Fisher, 501, 503.
Auhn v. Board of Education, 63, 348.
Kunkle v. Franklin, 137.
Kyle v. Fayetteville, 392.
 v. Malin, 276, 329, 517.

L.

Lacey v. Davis, 340, 341, 429, 458, 488, 501, 507, 520.
Lackawana County v. National Bank, 227.
Lackawana Iron, etc., Co. v. Fales, 394, 479.
Lackawana Iron Co. v. Luzerne Co., 214, 223, 232.
Lacy v. Johnson, 506, 512.
Ladd v. Dubroca, 568.
 v. Wiggins, 260.
La Fayette v. Cox, 132, 768, 770.
 v. Fowler, 613, 639, 819, 820.
 v. Jenners, 122, 630.
 v. Orphan Asylum, 207, 652.
Lafferty v. Byers, 408, 409, 473.
Lagroue v. Rains, 287, 483.
Lague v. Boagni, 521.
Lain v. Shepardson, 560.
Laing v. McKee, 536.
Laird v. Heister, 308, 396, 406, 450, 480.
Lake v. Williamsburg, 665.
Lake Shore, etc., R. Co. v. People, 381, 387, 388, 399, 437.
 v. Roach, 440, 816.
Lamar v. Palmer, 220.
Lamb v. Anderson, 183.
 v. Burlington, 239.
 v. Irwin, 541.
 v. Railroad Co., 821.
Lambertson v. Hogan, 299, 300, 305, 555.
Lamborn v. Commissioners, 812.
 v. County Courts, 501.
Lamoille V. R. Co. v. Fairfield, 332.
Lampson v. Drain Com'rs, 754.
Lancaster v. County Auditor, 538.
Lander v. School District, 339.
Lane v. Bommelman, 411, 423, 529.
 v. Burnap, 754.
 v. Gorman, 300.
 v. James, 281, 289.
 v. Succession of March, 403, 494.
Lane County v. Oregon, 14, 17, 83, 101.
Lanesborough v. County Com'rs, 357, 374.
Lanier v. Macon, 577.
Langdon v. Poor, 289, 322, 484, 496.
Langhorne v. Robinson, 149, 196.
Langley v. Chapin, 499, 506.
Langohr v. Smith, 469, 481, 521.
Languille v. State, 577, 581.
Langworthy v. Dubuque, 158.
Lannes v. Workingmen's Bank, 519.
La Norris v. State, 581.
Lansing v. Van Gorder, 670.
Lantis, Matter of, 755.
Lapp v. Morrill, 781.
Lappin v. Nenaha Co., 350, 416.
Laramie Co. v. Albany Co., 240.

- Large v. Fisher, 514.
 Larimer v. McCall, 304, 306, 364, 394, 396.
 Larkin v. Wilson, 510.
 Larned v. Andrews, 572.
 Larrabee v. Hodgkins, 409.
 Lassiter v. Lee, 460, 554, 557.
 Latchman v. Clark, 409.
 Lathrop v. Hawley, 473, 482.
 Latimer v. Lovett, 473, 518.
 Latrobe v. Baltimore, 56, 375.
 Latta v. Williams, 574, 578, 579.
 Lauman v. Des Moines Co., 816.
 Laurent v. Muscatine, 203.
 Laver v. McGlachlin, 256.
 Lavergne v. New Orleans, 399.
 Law v. People (80 Ill.), 407.
 v. People (84 Ill.), 404, 409.
 v. People (87 Ill.), 180, 219, 810, 883, 423.
 Lawrence v. Fast, 411, 529.
 v. Janesville, 357, 749.
 v. Kenney, 560, 569.
 v. Killam, 763, 776.
 v. Miller, 498.
 v. Pond, 260.
 v. Sherman, 254.
 v. Speed, 290.
 v. Zimpleman, 515, 780.
 Layton v. New Orleans, 162, 243, 686, 687.
 Leach v. Cassidy, 254.
 Leachman v. Dougherty, 798.
 Leavenworth v. Booth, 185, 596, 603.
 v. Lang, 657, 673.
 v. Mills, 669.
 v. Norton, 276, 278.
 v. Rankin, 669.
 v. Stille, 672.
 Leavenworth, etc., R. Co. v. Platte Co., 132.
 Leavenworth Co. v. Lang, 421.
 Lebanon v. Railway Co., 342, 354, 774.
 Le Blanc v. Blodgett, 518.
 Lee v. Boston, 370, 816.
 v. Commonwealth, 357, 458.
 v. Jeddo Coal Co., 515.
 v. New Orleans, 203.
 v. Parry, 258.
 v. Ruggles, 609, 781.
 v. Templeton, 748, 812.
 v. Thomas, 157.
 Lee County v. Abrahams, 32.
 Lee Mut. Fire Ins. Co. v. State, 387.
 Le Favour v. Bartlett, 442.
 Lefevre v. Detroit, 207, 409, 631, 652, 676.
 Lefferts v. Supervisors of Calumet, 219, 785.
 Leffingwell v. Warren, 560.
 Leggett v. Humphreys, 712.
 Lehigh Crane Iron Co. v. Commonwealth, 232, 381.
 Lehigh Co. v. Northampton, 213.
 Lehigh Iron Co. v. Lower Macungie, 190, 196, 295.
 Lehman v. Grantham, 412.
 v. Robinson, 363.
 Leigh v. Everhart's Executors, 781.
 Leindecker v. People, 289.
 Leitzback v. Jackman, 452.
 Leland v. Bennett, 482.
 Lemly v. Com'rs, 390, 750.
 Lemmon v. People, 99.
 Lemont v. Singer, etc., Co., 776.
 Leonard v. Canton, 276.
 v. Cincinnati, 615.
 v. New Bedford, 56.
 Leppo v. Gilbert, 501.
 Leroy v. East Saginaw City R. Co., 69, 797, 801.
 v. New York, 759.
 v. Reeves, 501, 526, 580.
 Leslie v. St. Louis, 772, 782.
 Lester v. Baltimore, 810.
 Levee District v. Huber, 620, 641.
 Leverick v. Adams, 261.
 Levick v. Brotherline, 539.
 Levy v. Smith, 171.
 Lewellen v. Lockharts, 571, 584, 601.
 Lewis v. Blair, 260, 261.
 v. Chester Co., 376.
 v. Disher, 561.
 v. Garrett's Adm'r, 717.
 v. Spencer, 773.
 v. Soule, 563.
 v. Ward, 502.
 v. Webb, 300, 569.
 Lewis Co. v. Tate, 802.
 Lexington v. Butler, 331.
 v. Headley, 658.
 v. McQuillan's Heirs, 3, 60, 142, 151, 242, 244, 624, 625, 636, 647.
 Libby v. Burnham, 350, 429, 790.
 v. West St. Paul, 758.
 Liberty v. Hurd, 817.
 License Cases, 91, 602.
 License Tax Cases, 8, 20, 572, 602.
 Lick v. Austin, 177, 178.
 Lieb v. Wheeling, 77.
 Life Association v. Assessors, 281, 287.
 Light v. West, 512, 547, 562.
 Lightburne v. Taxing District, 98.
 Lightfoot v. Tenant, 434.
 Lightly v. Clouston, 253.
 Lightner v. Mooney, 543.
 Ligonier v. Ackerman, 809.
 Lillenthal v. Campbell, 789.
 Lilly v. Taylor, 101, 737.
 Lima, *In re*, 807.
 Lima v. Cemetery Ass'n, 205, 636, 652.
 v. McBride, 295.
 Lincoln v. Chapin, 256, 257, 705, 789, 795.
 v. Worcester, 360, 457, 748, 759, 797, 799, 808, 814, 816.
 Lincoln Co. Com'rs v. Faulkner, 547.
 Lindsay v. Fay, 560, 568.

- Lindsley v. Sinclair, 503.
 Link v. Doerfer, 509, 561.
 Linseed Oil Co. v. Palmer, 781.
 Lin Sing v. Washburn, 170.
 Linton v. Athens, 159.
 Lionberger v. Rowse (43 Mo.), 391, 433.
 v. Rowse (9 Wall.), 392.
 Lipps v. Philadelphia, 619.
 Lisbon v. Bath, 279, 324, 339.
 Litchfield v. Hamilton Co., 88, 427, 488, 775, 776.
 v. McComber, 152, 676.
 v. Vernon, 150, 275, 277, 324, 606, 613, 622, 624, 640.
 v. Webster Co., 89, 459, 775.
 Little, *In re*, 656.
 Little v. Greenleaf, 799.
 v. Herndon, 473, 514, 530.
 v. Merrill, 336, 339, 790, 791.
 Littlewort v. Davis, 121.
 Livermore v. Bagley, 260, 261.
 Liverpool Ins. Co. v. Massachusetts, 57, 100, 387.
 Livingston v. Albany, 179, 187.
 v. Hollenbeck, 779.
 v. Paducah, 228.
 v. New York, 612, 613, 636, 639.
 Livingston County v. Darlington, 123, 155, 697.
 v. Weider, 144, 697.
 Livingston St., Matter of, 525, 666.
 Lloyd v. Bunce, 539, 540.
 v. Lynch, 502.
 v. New York, 173, 689.
 Loan Association v. Topeka, 1, 104, 105, 117, 127, 169, 736.
 Locke v. Cattell, 784.
 v. Dane, 800.
 v. New Orleans, 291.
 Lockhart v. Harrington, 63.
 v. Houston, 436.
 Lockridge v. Daggett, 562.
 Lockwood v. Johnson, 374.
 v. St. Louis, 207, 608, 620, 623, 650, 772, 781.
 Lodi Water Co. v. Costar, 608.
 Loeser v. Redd, 313.
 Loftin v. National Bank, 183, 390.
 v. Watson, 710.
 Logan v. Pyne, 598.
 Logan County v. Lincoln, 291, 633, 684.
 Logansport v. Carroll, 262.
 v. Humphrey, 476, 509, 808, 818.
 v. La Rose, 622.
 v. Seybold, 63, 159.
 Lohrs v. Miller's Lessee, 463.
 Lohrum v. Eyermann, 608.
 Lombard v. Antioch College, 551.
 v. Culbertson, 561.
 London v. Wilmington, 194, 776, 777.
 Londonderry v. Derry, 240.
 Long v. Com'rs of Richmond, 107, 113, 325, 767.
 v. Culp, 89, 363.
 v. Long, 408.
 v. Smith, 537.
 v. Wolf, 537.
 Longfellow v. Quimby, 498.
 Longworth v. Cincinnati, 664.
 v. Wolfington, 534.
 Look v. Industry, 815.
 Loomis v. Los Angeles Co., 476.
 v. Pingree, 453, 471, 496, 517, 539.
 v. Rogers, 276, 277, 738.
 v. Spencer, 789.
 Lorain v. Smith, 488.
 Lord, Matter of, 752, 755.
 Lord v. Lancey, 708.
 v. Litchfield, 70, 214, 367.
 Lord Colchester v. Kewney, 304.
 Lord Dacre's Case, 256.
 Lord Foley v. Com'rs of Revenue, 374.
 Lorenz v. Armstrong, 657.
 Lorillard v. Monroe, 817.
 Loring v. St. Louis, 807.
 Los Angeles v. Railroad Co., 421, 573, 584.
 Lose v. State, 371.
 Lothrop v. Ide, 261, 437.
 Lott v. Cox, 93.
 v. Dysart, 460.
 v. Hubbard, 221, 360, 457, 797.
 v. Morgan, 92.
 v. Ross, 276, 324, 371, 577.
 v. Trade Co., 93.
 Loud v. Charlestown, 772.
 v. Penniman, 495, 498.
 Loudon v. East Saginaw, 806, 807, 809.
 Loughborough v. Blake, 61, 570.
 Loughbridge v. Harris, 115.
 Loughridge v. Huntington, 384, 656.
 Louisiana v. Jumel, 74.
 v. Miller, 674.
 v. New Orleans, 77.
 v. Pillsbury, 67, 186, 347.
 v. United States, 739.
 Louisiana Canal Co. v. Commonwealth, 205.
 Louisiana Cotton Manuf. Co. v. New Orleans, 175, 187, 195.
 Louisiana Lottery Co. v. New Orleans, 175, 187, 196.
 Louisiana Oil Co. v. Assessors, 389.
 Louisville v. Bank of Kentucky, 448.
 v. Commonwealth, 86, 172, 178, 174.
 v. Henderson, 669.
 v. Henning, 279, 372.
 v. Nevin, 174, 652, 669.
 v. Rolling Mill Co., 609, 622, 625.
 v. Sherley, 377.
 v. Zanone, 810.
 Louisville, etc., Co. v. Gaines, 68, 206.

Louisville, etc., R. Co. v. Bate, 754, 778.
 v. Commonwealth (1 Bush), 377.
 v. Commonwealth (10 Bush), 212.
 v. Gaines, 771.
 v. Louisville, 71, 598.
 v. Palmer, 212, 213.
 v. State, 183, 197, 358, 884.
 Love v. Gates, 517.
 v. Howard, 209.
 v. Shartzer, 554.
 v. Welch, 488.
 v. Wellbourn, 496.
 Lovell v. St. Paul, 670, 676.
 Lovejoy v. Lunt, 286, 395, 471, 487, 496, 517.
 Lovingson v. Trustees, 182, 581, 705.
 v. Weider, 692, 703.
 Low v. Austin, 91, 95, 98.
 v. Galena, 757.
 v. Lewis, 174.
 v. Little, 566.
 Lowden, Petition of, 664, 667.
 Lowe, *Ex parte*, 729.
 Lowe v. Weld, 259.
 Lowell v. Boston (106 Mass.), 872.
 v. Boston (111 Mass.), 117, 127.
 v. County Com'rs, 360.
 v. French, 676.
 v. Hadley, 291, 589, 671.
 v. Oliver, 136, 168, 303.
 v. Wentworth, 363, 365.
 Lowther v. Radnor, 787.
 Lucas v. Lottery Com'rs, 68, 572.
 v. San Francisco, 670.
 v. Tucker, 300.
 Ludeling v. McGuire, 550.
 Ludlow v. Gilman, 506.
 v. Trustees, 646, 652, 657.
 Ludlow's Heirs v. Johnson, 264.
 Luehrman v. Taxing District, 78, 118.
 Luffborough v. Parker, 406.
 Lufkin v. Galveston, 615.
 Luling v. Labranche, 579.
 Lumber Co. v. Hayward, 761.
 Lumsden v. Cross, 520, 634.
 Lunenburg v. Walter, etc., Co., 515.
 Lunt v. Wormell, 395.
 Lusher v. Scites, 165.
 Lusk v. Harber, 553.
 Lutterloh v. Commissioners, 735.
 Lybrand v. Haney, 508, 516.
 Lycoming v. Union, 128, 687.
 Lycoming Co. v. Gamble, 282.
 Lydecker v. Palisade Tax Co., 445.
 Lyford v. Dunn, 496.
 Lyle v. Jacques, 310, 374, 393, 442, 780.
 Lyman v. Anderson, 359, 412, 535.
 v. Fiske, 371, 789, 791.
 v. People, 401.
 Lynch, *Ex parte*, 354, 358, 458, 728.
 Lynch v. Brudie, 534, 554, 556.
 Lynde v. Melrose, 476, 818.

Lyndon v. Miller, 705.
 Lyon v. Guthard, 440.
 v. Hunt, 484, 517.
 v. Morris, 112.
 v. State Bank, 254.
 Lyon Co. v. Goddard, 818.
 Lyons v. Cook, 805.

M.

Mabry v. Tarver, 571, 582, 601, 719.
 Macay, *Ex parte*, 499.
 Machine Co. v. Gage (100 U. S.), 95, 100.
 v. Gage (9 Bax.), 96.
 Mackall v. Canal Co., 214, 522.
 Macklot v. Davenport, 184, 756, 776, 789, 819.
 Macomb v. Twaddle, 15.
 Macomber v. Center, 798.
 Macon v. Cent. Railroad, etc., Co., 70.
 v. National Bank, 391.
 v. Patty, 65, 237, 589, 607, 618, 632, 640, 674.
 v. Savings Bank, 576.
 Macon, etc., R. Co. v. Goldsmith, 72, 749.
 Macy v. Nantucket, 786.
 Madison v. Fitch, 205.
 v. Whitney, 389.
 Madison Co. v. People, 60, 142, 180, 181, 703.
 v. Smith, 743, 751.
 Madland v. Benland, 516.
 Madson v. Sexton, 522.
 Maenhaut v. New Orleans, 767.
 Magee v. Commonwealth, 284, 289, 485, 644, 648.
 v. Cutler, 755.
 v. Denton, 778.
 Mager v. Grima, 97.
 Magill v. Martin, 510, 515.
 Magner v. Ins. Co. 501.
 Magruder v. Esmay, 463.
 Maguire v. Board, etc., of Mobile, 324, 356, 391.
 v. State Savings Inst., 809.
 Mahanoy v. Comry, 682.
 Maher v. Chicago, 668.
 Mahew v. Davis, 455, 517.
 Maina v. Elliott, 397, 498, 533.
 Malchus v. Highlands, 149, 152.
 Mallett v. Uncle Sam Co., 251, 256.
 Mallory v. Miller, 707, 719.
 Malloy v. Marietta, 345, 624, 636.
 Maltby v. Reading, etc., Co., 45, 56, 79, 433.
 Maltus v. Shields, 60.
 Manchester Mills v. Manchester, 751, 764.
 Mandeville v. Riggs, 767, 770.

- Manhattan Sav. Inst., Petition of, 264.
 Manice v. New York, 665, 676.
 v. White, 275.
 Manistee River Imp. Co. v. Sands, 4.
 Mankato v. Fowler, 268, 587.
 Manly v. Raleigh, 770.
 Manning v. Tuthill, 466.
 Manor v. McCall, 735.
 Manseau v. Edwards, 512.
 Mansfield v. Martin, 397.
 Manufacturers' Ins. Co. v. Lord, 379.
 Marathon v. Oregon, 240, 726.
 Marble v. McKenney, 349.
 Marchant v. Langworthy, 335, 336.
 Margate Pier v. Hannam, 256.
 Margraff v. Cunningham, 496.
 Marion v. Epler, 633, 639.
 Marion Co. v. Barker, 335, 418.
 v. Harvey Co., 239, 358, 481.
 Marion, etc., Gravel R. Co. v. Sheeth, 18.
 Market St., Matter of, 105, 607, 628.
 Marks v. Pardue University, 123, 155, 651.
 v. Woodbury Co., 152.
 Marlar v. State, 717.
 Marlow v. Adams, 554.
 Marquette v. Ishpeming, 468.
 Marquette, etc., R. Co. v. Marquette, 781.
 Marquis of Chandos v. Com'rs, 267.
 Marr v. Enloe, 60, 64.
 Marsh v. Bird, 440.
 v. Borroughs, 73.
 v. Brooklyn, 520, 807.
 v. Chestnut, 292, 305, 365, 473, 527.
 v. Supervisors, 200, 410, 413, 429, 554, 560, 752, 774, 777.
 Marshall, *Ex parte*, 142, 170, 603.
 Marshall v. Benson, 218, 414, 516.
 v. Davies, 466.
 v. Donovan, 122, 185.
 v. Grimes, 93, 584.
 v. McDaniel, 462.
 v. Snediker, 585, 805.
 v. Vicksburg, 93, 576.
 Marshall Co. Ct. v. Calloway Co. Ct., 162, 240.
 Marshalltown v. Blum, 99.
 Martin, *Ex parte*, 91.
 Martin v. Aston, 130.
 v. Barney, 260.
 v. Carron, 455.
 v. Charleston, 171, 205.
 v. Cole, 340, 401, 402, 491, 493, 523.
 v. Dix, 159, 242.
 v. Mansfield, 789.
 v. Martin, 569.
 v. Ragsdale, 491.
 v. Snowden, 451, 471, 496.
 v. Swofford, 506.
 v. Tax Collector, 404.
 Martz v. Newton, 516.
 Marye v. Parsons, 74, 742, 771.
 Maryland v. Baltimore, etc., R. Co., 459.
 Mason v. Fearson, 282, 496.
 v. Johnson, 353, 813.
 v. Lancaster, 219, 233, 343, 574, 598.
 v. Roe, 429.
 v. Rollins, 461.
 v. Sargent, 81.
 v. Thurber, 377.
 Mass. General Hospital v. Somerville, 206.
 Massie v. Long, 408.
 Massing v. Ames, 398.
 Masters v. Scroggs, 618, 663.
 Masterson v. Beasley, 533.
 Matheson v. Mazomanie, 421, 807, 816.
 Mathews v. Buckingham, 452, 494.
 Mathis v. Cameron, 765.
 Matter v. Campbell, 174.
 Matteson v. Rosendale, 342, 807.
 Matthews v. Light, 471, 501, 503.
 Mattingly v. District of Columbia, 306, 307, 311.
 Mauch Chunk v. Shortz, 619.
 Maul v. Rider, 502.
 Maus v. Railroad Co., 384.
 Maxfield v. Willey, 504.
 Maxson v. Huston, 564.
 Maxwell v. Griswold, 804.
 Maxwell v. Paine, 419.
 May v. Holdridge, 311.
 Mayall v. St. Paul, 643, 781.
 Mayenko v. Millaudon, 549.
 Mayes v. Erwin, 220, 221.
 Mayo v. Ah Loy, 528, 529.
 v. Carrington, 400.
 v. Foley, 529.
 v. Haynie, 521.
 Mayor, Matter of, 652, 663.
 Mayor v. McKee, 16.
 Mayor, etc., v. Lord, 735, 745.
 Mayor of Albany, *Ex parte*, 666, 768.
 Mayor of Macon v. Jones, 22.
 Mayor of New York, Matter of, 1, 207, 603, 636.
 Mayor of New York v. Bailey, 184.
 Mays v. Cincinnati, 275, 579, 598, 809.
 Mayson v. Banks, 510.
 McAdoo v. Benbow, 264.
 McAfee's Heirs v. Kennedy, 115.
 McAllister v. Anderson, 446.
 McArthur v. Pease, 260, 261.
 McBee v. State, 261.
 McBride v. Chicago, 207.
 v. Hoey, 538.
 McCall v. Larimer, 17, 306, 352, 406.
 v. Neeley, 568.
 v. The Justices, 359, 458.
 McCallie v. Chattanooga, 163.
 McCallum v. Bethany, 414, 435.

- McCann v. Merriam, 497, 514.
 McCardle, *Ex parte*, 112, 305.
 McCarlin v. State, 86.
 McCarroll v. Weeks, 438.
 McCaskell v. State, 18, 176, 576, 577.
 McCaughan v. Tatman, 563, 563.
 McCauley v. People, 527.
 McCauslin v. McGuire, 512, 515.
 McCleesney v. People, 173.
 McClaughry v. Cratzenburgh, 819.
 McClellan v. Railroad Co., 292.
 McClenachan v. Curwen, 133.
 McClung v. Livesay, 760, 771.
 v. Ross, 478, 517, 526, 528.
 McClure v. Warner, 412, 414, 546.
 McClusky v. Cromwell, 264.
 McComb, *Ex parte*, 372, 376.
 McComb v. Bell, 209, 329.
 McConkey v. Smith, 419, 421, 774.
 McConnel v. Bowdry's Heirs, 290.
 v. Hamm, 127.
 v. Konepel, 502.
 McCoppin v. McCartney, 178.
 McCord v. Bergautz, 308.
 McCormack v. Patchin, 614.
 v. Russell, 534.
 McCormick v. Fitch, 190, 254, 278, 358, 457.
 McCoy v. Anderson, 375, 801.
 v. Chillicothe, 772.
 v. Curtice, 259.
 v. Michew, 300.
 McCracken v. Eder, 17, 453.
 McCreedy v. Sexton, 299, 309, 353, 511, 522, 559.
 v. Virginia, 100.
 McCrickart v. Pittsfield, 812.
 McCrillis v. Mansfield, 496.
 McCullough v. Brooklyn, 665, 676.
 v. Maryland, 5, 12, 45, 83, 84, 94.
 McCutchen v. Rice Co., 371.
 McDaniel v. Correll, 300.
 v. Tebbetts, 789, 792.
 McDermott v. Hoffman, 480, 567.
 v. Scully, 482, 488, 590.
 McDonald v. Daniels, 561.
 v. Leewright, 260, 261.
 v. Maus, 495.
 v. Murphree, 760.
 McDonough v. Gravier, 284.
 McDougal v. Brazil, 183.
 McFadden v. Longham, 48, 54.
 McFerron v. Alloway, 150, 151.
 McGahen v. Case, 473, 528, 546.
 McGavock v. Pollock, 498.
 McGee v. Mathis, 68.
 McGehee v. Columbus, 809.
 v. Martin, 488.
 v. Mathis, 177, 591, 627, 648.
 McGonigle v. Allegheny City, 608, 644.
 McGoon v. Scales, 88.
 McGough v. Wellington, 260, 261.
 McGrath v. Newton, 769.
 McGregor v. Balch, 254.
 v. Montgomery, 439.
 McGregor's Ex'r v. Vanpel, 376.
 McGregor, etc., R. Co. v. Brown, 89.
 McGruder v. Eamay, 463.
 McGuinty v. Herrick, 797.
 McGuire v. Commonwealth, 596, 605.
 v. Parker, 99.
 McIndoe v. Moorman, 506.
 McInerny v. Reed, 17, 66, 450, 470, 678.
 McInstry v. Tanner, 254.
 McIntosh v. People, 777.
 McIntyre v. White Creek, 749, 777, 778.
 McIver v. Robinson, 393.
 McKay v. Batchellor, 441, 801.
 McKee v. Supervisors of Champaign, 418, 528.
 v. Lamberton, 555.
 McKeen v. Del. Div. Canal Co., 2, 5, 24.
 v. Northampton Co., 56, 221, 373, 389.
 McKim v. Somers, 254.
 McKinney v. Springer, 569.
 McKune v. Weller, 291.
 McLanahan v. Syracuse, 452.
 McLaren v. Sheble, 447.
 McLaughlin v. Green, 501, 505.
 v. Kain, 401, 411.
 McLean v. Cook, 797.
 McLean Co. v. Bloomington, 629, 653, 674.
 McLeod v. Burkhalter, 492.
 McLewis v. Furgerson, 715.
 McMahon v. McGraw, 502, 560, 561.
 v. Welsh, 367.
 McMasters v. Commonwealth, 612, 639, 672.
 McMichael v. Carlyle, 514.
 McMillen v. Anderson, 51, 368, 482.
 McMillan v. Lee County, 768, 770.
 v. Robbins, 517.
 v. Wehle, 409, 568.
 McMinn v. Wheelan, 500, 501, 507.
 McNair v. Jenson, 238, 487.
 McNamara v. Estes, 559.
 McNiel v. Farneman, 443.
 McNish v. Perrine, 412, 444, 546.
 McNutt v. Lancaster, 254.
 McPhail v. Burris, 292.
 McPherson v. Foster, 431, 764.
 McPike v. Pew, 335, 760, 772.
 McQuesten v. Swope, 494, 497.
 McQuilkin v. Doe, 18, 295, 497.
 McReynolds v. Longenberger, 304, 340, 353, 400, 452, 480, 517, 559.
 McRory v. Manes, 475.
 McVeagh v. Chicago, 483.
 McWhinney v. Brinker, 262, 546, 783.
 v. Indianapolis, 476, 806, 808.
 McWilliams v. Phillips, 443.

- Meacham v. Fitchburg, etc., R. R. Co.**, 660.
Mead, Matter of, 345.
Mead v. Gale, 790.
 v. Lansing, 808.
 v. Roxborough, 371.
Meador v. Lowry, 133.
Mechanics' Bank v. Debolt, 69.
 v. Kansas City, 781.
 v. Thomas, 69.
Mechanics', etc., Bank v. Townsend, 322.
Mecklem v. Blake, 506.
Medford v. Pratt, 162.
Mee v. Paddock, 774.
Meek v. Bayard, 136.
 v. McClure, 854, 818.
Meeker v. Ashley, 133.
 v. Koch, 446.
Meeks v. Whatley, 531.
Melcher v. Boston, 84, 584.
Melvin v. Weare, 363.
Memphis v. Brown, 739.
 v. Looney, 435, 450.
 v. United States, 739.
Memphis R. Co. v. Com'rs, 212, 213.
Mentz v. Hamman, 261.
Merced Mining Co. v. Fremont, 729.
Mercer Co. v. Hacket, 331.
Mercer Co. Court v. Navigation Co., 331.
Meredith v. Ladd, 257.
 v. United States, 16.
Meriwether v. Garrett, 4, 16, 17, 44, 46, 73, 78, 101, 143, 684, 688, 701, 728, 745.
Merriam, Petition of, 259, 666.
Merriam v. Coffee, 414.
 v. Moody's Executors, 678.
 v. Otoe Co., 813.
Merrick v. Amherst, 123, 155, 189, 235, 631, 651.
 v. Hutt, 397, 411, 432, 438, 518.
Merrill v. Austin, 812, 819.
 v. Dearing, 537, 545.
 v. Gorham, 776.
 v. Humphrey, 219, 764, 785.
 v. Plainfield, 768.
 v. Sherburne, 43.
 v. Webster, 133.
Merriman v. New Orleans, 186.
Merritt v. Farris, 217.
 v. Portchester, 655, 660, 781.
 v. Thompson, 398, 530.
Mesker v. Koch, 762.
Messeck v. Supervisors, 760.
Messenger v. Germain, 396.
Messerole v. Brooklyn, 779.
Methodist Church v. Ellis, 205.
Methodist Pr. Church v. Baltimore, 365.
Met. Gas Light Co., Matter of, 656, 666.
- Metropolitan Board of Works v. Vauxhall Br. Co.**, 618.
Metz v. Anderson, 776.
Meuser v. Risdon, 66.
Meyer v. Dubuque Co., 374, 393, 723.
 v. Fountain, 511.
 v. Rosenblatt, 749.
Miami Co. v. Brackenridge, 205.
Mich. Cent. R. Co. v. Porter, 389.
Michel v. Green, 535.
 v. Police Jury, 668.
Micheltree v. Swezey, 137.
Michigan Paving Co. v. Common Council, 733.
Middleport v. Ins. Co., 101.
Middlesex R. Co. v. Charleston, 226, 229.
Middleton v. Berlin, 258.
Middletown Bank v. Bacharach, 505.
Miles v. Ray, 761.
Milhau v. Sharp, 689.
Millar v. Douglass, 221.
Millbank v. Ostertag, 784.
Mille Lacs County Com'rs v. Morrison, 528.
Milledge v. Coleman, 560.
Miller v. Commonwealth, 31, 206, 272.
 v. Corey, 467.
 v. Corbin, 489, 547.
 v. Embree, 43.
 v. Gorham, 442.
 v. Gorman, 442, 611, 777.
 v. Graham, 305, 813.
 v. Grandy, 137, 765.
 v. Hale, 17, 304, 306, 352, 396, 400, 406.
 v. Heilbron, 391.
 v. Hurford (11 Neb.), 192, 531.
 v. Hurford (13 Neb.), 192, 414.
 v. Hurford (12 N. W. Rep.), 262, 447.
 v. Kirkpatrick, 70, 577.
 v. McCullough, 549.
 v. Montague, 536.
 v. Rucker, 737.
 v. State, 72.
 v. Stewart, 712.
 v. Twoost, 115.
 v. Ziegler, 505.
Millett v. Early, 443.
Milligan v. Drury, 367.
Millikan v. Patterson, 515.
Milliken v. Benedict, 304, 307, 394, 395, 396, 401.
Millikin v. Bloomington, 307, 763.
Mills v. Charleton, 312, 691, 763.
 v. Collett, 787.
 v. Gleason, 776.
 v. Hendricks Co., 805, 809.
 v. Johnson, 763, 776.
 v. Martin, 722.
 v. Thornton, 56.
Milner v. Clarke, 281, 485.
 v. Pensacola, 162.

- Miltenberger v. Cook, 710.
 v. St. Louis Co. Court, 732, 734, 822.
 Milton v. Drain Com'r, 754.
 Milwaukee v. Milwaukee, 162, 240.
 Milwaukee Iron Co. v. Hubbard, 219, 396, 779, 785.
 v. Schubel, 420.
 Milwaukee, etc., R. Co. v. Kossuth Co., 239, 338.
 v. Milwaukee, 211, 214.
 v. Supervisors of Crawford, 214, 234.
 Miner v. Fredonia, 875, 584.
 v. McLean, 455, 475, 481, 517.
 Miner's Bank v. Iowa, 61.
 Minn. Linseed Oil Co. v. Palmer, 662, 665.
 Minor v. Mechanics' Bank, 282.
 Minot v. Philadelphia, etc., R. Co., 70, 96, 204, 230, 233, 889, 433.
 Minturn v. Smith, 518, 781.
 Mississippi Mills v. Cook, 191.
 Missouri Riv., etc., R. Co. v. Blake, 384.
 v. Morris, 384.
 v. Wheaton, 770, 778.
 Mitchell v. Bratton, 308, 394, 400.
 v. Com'rs (91 U. S.), 417.
 v. Com'rs (9 Kan.), 317.
 v. Craven Co., 785.
 v. Deeds, 300.
 v. Green, 535.
 v. Milwaukee, 780.
 v. Plover, 374.
 v. Williams, 1, 602.
 Mitchum v. McInnis, 415.
 Mix v. Hotchkiss, 468.
 v. People (72 Ill.), 290, 365, 422, 430.
 v. People (81 Ill.), 262, 454, 456.
 v. People (106 Ill.), 529.
 v. Shaw, 589.
 Moale v. Baltimore, 397, 639, 645, 660, 677.
 Mobile v. Baldwin, 56, 373, 760.
 v. Dargan, 626.
 v. Ins. Co., 69, 176.
 v. Stein, 77, 588.
 v. St. Railway Co., 626.
 v. Yuille, 598.
 Mobile Co. v. Kimball, 94.
 Mobile, etc., R. Co. v. Moseley, 318, 763.
 v. Peebles, 779.
 Moers v. Smedley, 781.
 Mohawk & H. R. Co. v. Clute, 786.
 Moingona Coal Co. v. Blair, 563.
 Monk v. Corbin, 562, 563.
 Monroe v. Fort Howard, 312.
 v. New Canaan, 372, 410, 418, 420.
 Monroe Savings Bank v. Rochester, 233, 379.
 Montgomery v. Aydelotte, 449.
 v. Birge, 495.
 v. Burton, 539.
 v. Knox, 64, 65, 576.
 v. Meredith, 300, 450.
 v. Sayre, 760, 763.
 v. Shoemaker, 98.
 v. State, 276, 329.
 Montgomery Av. Case, 667.
 Montgomery Co. v. Elston, 85.
 Monticello Seminary v. People, 203.
 Montpelier v. East Montpelier, 163, 240.
 Mooers v. Smedley, 760.
 Moor v. Newfield, 340.
 Moore, Matter of, 762.
 Moore v. Albany, 777, 808.
 v. Allegheny City, 705, 709, 797, 798, 800.
 v. Baltimore, 563.
 v. Brown, 473, 484, 517, 563.
 v. Fayetteville, 61.
 v. Foote, 324.
 v. Graves, 254.
 v. Hamlin, 534.
 v. Holliday, 71.
 v. Holloway, 762.
 v. Luce, 569.
 v. Marsh, 439.
 v. Morledge, 178.
 v. People, 655, 657.
 v. Quirk, 86.
 v. School Directors, 766, 769, 818.
 v. State, 68.
 v. Street Com'rs of Boston, 357.
 v. Sweetwater Co., 160, 809.
 v. Titman, 504.
 v. Wayman, 763, 776.
 Mora v. Nunez, 498.
 Moran v. Com'rs, 331.
 Morange v. Mix, 396.
 Morbeck v. State, 711.
 Morey v. Brown, 602.
 Morford v. Unger, 104, 158.
 Morgan v. Beloit, 143.
 v. Bishop, 561.
 v. Commonwealth, 75, 785.
 v. Cree, 345.
 v. Dubuque, 670.
 v. Graham, 765, 769.
 v. Hale, 443.
 v. Miami Co. Com'rs, 545.
 v. Louisiana, 212, 218.
 v. Palmer, 818.
 v. Pueblo, etc., R. Co., 18.
 Morgan County v. Hendricks Co., 239.
 Morgan's R. Co. v. Board of Health, 93.
 Moriarty v. Boone Co., 89.
 Mork v. Commonwealth, 603.
 Morley v. Metamora, 714.
 Morrill v. Douglass (14 Kan.), 414, 515.
 v. Douglass (17 Kan.), 489, 510, 522.

- Morrill v. State, 579.
 v. Swartz, 527, 528, 529.
 v. Taylor, 281, 412, 413.
 Morris v. Douglass, 515.
 v. Sioux Co., 817.
 v. State, 708.
 v. Tinker, 248.
 Morris, etc., R. Co. v. Com'rs, 294.
 Morris Canal, etc., Co. v. Jersey City, 778, 781.
 Morrison v. Bank of Commerce, 454, 492, 506.
 v. Hershire, 608, 618, 639, 646, 673, 763.
 v. Kelly, 450.
 v. Larkin, 187, 215, 458, 463.
 v. McLauchlin, 897.
 v. Norman, 567.
 v. St. Paul, 781.
 Morristown v. King, 486.
 Morrow v. Dows, 439, 499.
 v. Green Bay, 812.
 Morse v. Calley, 254.
 v. Hodsden, 706.
 v. Smith, 260.
 Mortensen v. West Point Manuf. Co., 192.
 Morton v. Controller, 327, 328, 738, 740, 767.
 v. Harris, 406, 493.
 v. Reads, 473, 533.
 v. Sharkey, 569.
 Moseley v. Tift, 268, 871, 577.
 Moser v. White, 805, 839, 481.
 Mosher v. Robie, 429.
 Moss v. Cummings, 218, 410, 796.
 v. Shear, 239, 509.
 Mostyn v. Fabrigas, 787.
 Mott v. Pennsylvania R. Co., 770, 777.
 v. Reynolds, 321.
 Motz v. Detroit, 209, 631, 645, 647, 666, 770, 819.
 Moulton v. Blaisdell, 287, 442, 483, 498.
 v. Doran, 494.
 Mount Carbon, etc., R. Co. v. Andrews, 819.
 Mount Morris Square, Matter of, 743, 756, 757, 758, 759.
 Mount Pleasant v. Beckwith, 143, 684.
 Mount v. State, 18, 295.
 Mowery v. Salisbury, 602.
 Mt. Carmel v. Wabash Co., 581.
 Mulford v. Sutton, 802.
 Mulligan v. Hintrager, 458.
 v. Smith, 657, 821.
 Mullikin v. Bloomington, 831.
 v. Reeves, 398, 762.
 Mulroy v. Churchman, 208.
 Multnomah Co. v. State, 143, 463.
 Mundt v. Railroad Co., 264.
 Municipality v. Dubois, 186.
 v. Duncan, 186.
 v. Dunn, 156, 349, 614, 630.
 Municipality v. Guillothe, 630, 671.
 v. Millandon, 329.
 v. Pance, 276.
 v. Railroad Co., 205.
 v. White, 156, 636.
 Munn v. Illinois, 52.
 Munson v. Minor, 251.
 v. Munson, 784.
 Murphy, *In re*, 264.
 Murphy v. Campau, 499.
 v. Harbison, 754.
 v. Jacksonville, 65.
 v. State, 32.
 Murray v. Bridges, 499.
 v. Charleston, 79, 102, 160.
 v. Hoboken, 717.
 v. Lehman, 191.
 v. Tucker, 655, 671, 672.
 Murray's Lessee v. Hoboken Land Co., 438.
 Muscatine v. Railroad Co., 217.
 v. Packet Co., 98, 811, 818.
 Muscatine, etc., R. Co. v. Horton, 789, 796.
 Musselman v. Logansport, 300.
 Mut. Life Ins. Co., Matter of, 664.
 Mutual Ins. Co. v. Supervisors of Erie, 225, 336.
 Muzzy v. Shattuck, 711.
 v. White, 290, 426, 790, 801.
 Myers v. Coonrad, 564.
 v. Park, 458.
 Mygatt v. Washburn, 415, 789, 793.
 Myrick v. La Crosse, 763.

N.

- Nabors v. The Governor, 719.
 Nalle v. Fenwick, 471, 517.
 Naltner v. Blake, 408, 497.
 Names v. Highway Com'r, 754.
 Nance v. Hopkins, 404, 458, 529.
 Napier v. Hodges, 573, 596, 601.
 Napton v. Leaton, 550.
 Nashua Savings Bank v. Nashua, 56.
 Nashville, The, 42, 265.
 Nashville v. Althorp, 170, 219.
 v. Bank of Tenn., 89, 173.
 v. Cowan, 450, 499.
 v. Knight, 713.
 v. Lee, 509.
 v. Weiser, 365.
 Nashville Gas Light Co. v. Nashville, 232.
 Nason v. Dillingham, 254.
 v. Ricker, 401, 485, 515.
 v. Whitney, 354.
 Natchez v. Minor, 517.
 Nathan v. Louisiana, 5, 97, 577.
 National Bank v. Barber, 825, 766.
 v. Commonwealth, 84, 392, 483.
 v. Cook, 365, 421, 761, 774.

- National Bank v. Douglass Co., 390.**
 v. Elmira, 758, 791, 793, 800.
 v. Iola, 116, 127, 304.
 v. Kimball, 169, 391, 763.
 v. Mobile, 84, 390.
 v. Morrison, 392.
 v. Peterborough, 390.
 v. United States, 83.
 v. Wells, 391.
Neal v. Commonwealth, 579.
 v. Frazier, 500.
 v. Overseers, 254.
 v. Spooner, 514.
Neave v. Weather, 668.
Nebraska City v. Gas Light Co., 201.
Neenan v. Smith, 430, 632, 645, 647,
 673, 674, 675.
Neff v. Bates, 821.
Negley v. Breeding, 395, 396.
Nelson, Ex parte, 726.
Nelson v. Brodhack, 516.
 v. Carman, 804.
 v. Cheboygan Nav. Co., 94.
 v. Goebel, 473.
 v. La Porte, 135.
 v. Merriam, 802.
 v. Milford, 128, 791.
 v. Pierce, 389, 361, 393, 497.
 v. Rountree, 302.
 v. St. Martins, 75, 76, 77, 733.
Nesbitt v. Leggett, 469.
Neth v. Crofut, 797.
Netherton v. Ward, 618.
Neustadt v. Ill. Cent. R. Co., 210.
Nevada Bank v. Sedgwick, 79.
Nevins, etc., Draining Co. v. Alkire,
 616, 659.
New Albany v. Sweeny, 670.
Newark v. State, 305.
Newark City Bank v. Assessor, 23, 56.
Newark, etc., Inst. v. Panhorst, 745.
Newberg v. Munshower, 799.
New Brunswick Rubber Co. v. Com-
 missioners, 642.
Newburyport v. Co. Com'rs, 758, 759.
New Canaan v. Hoyt, 359.
Newcomb v. Police Jury, 668.
 v. Smith, 115.
Newell v. People, 264.
 v. Wheeler, 299, 396, 473, 779, 781.
New Hampshire v. Louisiana, 74.
New Haven v. City Bank, 226.
 v. Fair Haven, etc., R. Co., 367,
 651, 652.
 v. Sheffield, 203.
New Haven Sav. B'k v. Atwater, 466.
New Iberia v. Migues, 574.
New Jersey v. Wilson, 67.
 v. Yard, 69, 71.
Newland v. Marsh, 43.
New London v. Brainard, 129, 767.
Newman, Ex parte, 112.
Newman v. Supervisors of Living-
 ston, 807, 817.
- New Orleans v. Arthurs, 202.**
 v. Asylum, 70.
 v. Bank, 186.
 v. Becker, 778.
 v. Bienvenu, 576.
 v. Buckner, 749.
 v. Canal Bank, 187, 206.
 v. Canal, etc., Co., 206, 226, 232,
 750.
 v. Canal & Nav. Co., 187.
 v. Cannon, 438.
 v. Cassiday, 404.
 v. Cazelar, 157, 159.
 v. Clark, 128, 686.
 v. Cordeviollie, 483.
 v. Davenport, 143, 422, 463.
 v. Davidson, 18, 186.
 v. Day, 16, 411.
 v. Drainage Co., 661.
 v. Dubarry, 170, 580.
 v. Dunbar, 187.
 v. Eclipse Towboat Co., 92, 292.
 v. Elliott, 630.
 v. Estate of Burthe, 685.
 v. Estate of Stewart, 365.
 v. Ferguson, 376.
 v. Fossman, 221, 382.
 v. Fourchy, 28, 85, 186, 217.
 v. Graves, 277.
 v. Hart, 221, 382.
 v. Heirs of St. Romes, 365.
 v. Home Ins. Co., 186.
 v. Ins. Co. (27 La. An.), 187, 224,
 234.
 v. Ins. Co. (31 La. An.), 185, 187.
 v. Ins. Co. (33 La. An.), 387.
 v. Ins. Co. (28 La. An.), 195.
 v. Jackson, 14.
 v. Jané, 581.
 v. Kaufman, 64, 186, 579.
 v. Klein, 186, 254.
 v. Le Blanc, 187.
 v. L'Hote, 292.
 v. Mannessier, 583.
 v. Meister, 292, 438.
 v. Metropolitan, etc. Bank, 576.
 v. Metropolitan, etc. Co., 72.
 v. National Bank, 187, 206.
 v. Orphan Asylum, 187.
 v. People's Bank, 206.
 v. People's Ins. Co., 224.
 v. Railroad Co., 270, 423.
 v. Rhenish Westphalian Lloyds,
 291, 387.
 v. Russ, 203.
 v. Savings Co., 187, 206, 433.
 v. Savings Institute, 576.
 v. South Bank, 186.
 v. Staiger, 186.
 v. St. Charles, etc. Co., 187, 234.
 v. St. Romes, 290.
 v. Sugar Shed Co., 187, 201, 234.
 v. Turpin, 186.
 v. Vergnole, 292.

- New Orleans *v.* Water Works Co., 187, 201.
 v. Wilmot, 93.
 v. Wire, 669, 676.
 v. Wood, 436.
 New Orleans, etc., Co. *v.* Assessors, 339, 750.
 New Orleans Canal, etc., Co. *v.* New Orleans, 244, 809.
 New Orleans Sav. Inst. *v.* Leslie, 446.
 Newton *v.* Marshall, 504.
 v. Prather, 261.
 Newport, etc., Co. *v.* Douglass, 16.
 Newsmeier *v.* Railroad Co., 771.
 New York *v.* Colgate, 673, 676.
 v. Davenport, 143, 422, 468.
 v. Furz, 262.
 v. Louisiana, 74.
 v. Miln, 99.
 v. Second Av. R. Co., 598.
 New York Gas Light Co. *v.* Assessors, 339.
 New York, etc., R. Co. *v.* Lyon, 435.
 v. Marsh, 809.
 v. Yard, 368, 412.
 New York & Erie R. Co. *v.* Sabin, 45, 214.
 New York Indians, The, 55.
 New York Prot. Epis. School, Matter of, 524, 624.
 Nichol *v.* Nashville, 276.
 Nichols, *In re*, 352, 370, 437.
 Nichols *v.* Bridgeport, 612, 624, 636, 636, 637, 639, 676.
 v. McGlathery, 398, 522, 547.
 v. New Haven, etc., Co., 210, 379, 380, 389.
 v. School Directors, 118.
 v. Voorhis, 760.
 v. Walker, 722.
 Nicholson Pavement Co. *v.* Fay, 236.
 v. Painter, 236.
 Nicodemus *v.* East Saginaw, 816.
 Nielson *v.* Schuckman, 561.
 Nightingale's Case, 602, 605.
 Nill *v.* Jenkinson, 770.
 Nixon *v.* Ruple, 752.
 Noble *v.* Bullis, 511, 541.
 v. Cain, 510.
 Nolan *v.* Reese, 671, 750.
 Noland *v.* Busby, 290, 797.
 Nopson *v.* Horton, 466.
 Norridgewalk *v.* Walker, 415.
 Norris *v.* Crocker, 459.
 v. Russel, 824, 473.
 v. Waco, 20, 44, 52, 157.
 North *v.* Hammer, 668.
 Northampton Co. *v.* Lehigh Coal, etc., Co., 196, 210.
 North Beach, etc., R. Co., Appeal of, 651, 652.
 North Cape, The, 91, 373.
 North Car. R. Co. *v.* Alamance Co., 194, 293, 356.
 Nor. Ind. R. Co. *v.* Connelly, 165, 345, 646, 651, 652, 662, 678.
 Northern Liberties *v.* St. John's Church, 207, 621, 636, 652, 676.
 v. Swain, 621.
 Northern Missouri R. Co. *v.* Maguire, 3, 4, 70, 205.
 Northern Wisconsin R. Co. *v.* Supervisors, 88.
 North Hempstead *v.* Hempstead, 162, 163.
 North Reading *v.* Co. Com'rs, 756.
 Northrop *v.* Trask, 512.
 v. Shook, 575.
 Nor. West Packet Co. *v.* St. Louis, 93, 810.
 v. St. Paul, 93.
 Northwood *v.* Barrington, 490.
 North Yarmouth *v.* Skillings, 143.
 Norton *v.* Boston, 778.
 v. Couftney, 666.
 v. Friend, 510.
 v. Quimby, 526.
 Norwich *v.* Co. Com'rs, 130, 152, 662.
 Nougues *v.* Douglass, 138.
 Nowell *v.* Tripp, 797, 798, 799.
 Nowlin *v.* Burwell, 516.
 Noyes *v.* Hale, 356.
 v. Haverhill, 442, 485, 815.
 Nugent *v.* Bates, 870, 371.
 Nulle *v.* Zierle, 754.

O.

- Oakland *v.* Whipple, 293, 374.
 Oakley *v.* Trustees of Williamsburg, 781.
 Oates *v.* Buckley, 506.
 v. Darden, 723.
 Oatman *v.* Barney, 289.
 O'Brian *v.* Knivan, 250.
 O'Brien *v.* Coulter, 473, 496.
 v. Police Jury, 668.
 O'Bryne *v.* Savannah, 5.
 Oceana Co. *v.* Hart, 289, 707.
 Oceanic, etc., Co. *v.* Tappan, 813.
 Ockendon *v.* Barnes, 519.
 O'Conner, *In re*, 56.
 Oconto Co. *v.* Jerrard, 559, 568.
 Odiorne *v.* Rand, 251, 255, 414, 791.
 O'Donnell *v.* Bailey, 344.
 O'Donohue *v.* Hendricks, 498.
 Ogden *v.* Harrington, 486.
 v. Saunders, 80.
 v. Walker, 85, 416.
 Ogilvie *v.* Crawford Co., 96.
 O'Grady *v.* Barnhisel, 396, 430.
 Ohio, etc., R. Co. *v.* Lawrence, 758.
 v. Weber, 385.
 Ohio Trust Co. *v.* Debolt, 68, 69.
 Oil Works Case, 783.
 O'Kane *v.* Treat, 180, 181, 245, 430, 763.

- Olcott *v.* State, 409.
 v. Supervisors, 77.
 O'Leary *v.* Sloo, 589.
 Oldhams *v.* Jones, 411, 446, 501, 502.
 Olds *v.* Commonwealth, 359, 361, 458.
 Old South Society *v.* Boston, 203.
 Oldtown *v.* Blake, 255, 407.
 Oleson *v.* Railway Co., 294.
 Olive Cemetery Co. *v.* Philadelphia, 208, 209.
 Oliver *v.* Carsner, 349.
 v. Crowell, 503.
 v. Keightley, 768, 770.
 v. Liverpool, etc., Co., 887.
 v. Lynn, 374, 808.
 v. Memphis, etc., R. Co., 70.
 v. Montgomery, 502.
 v. Omaha, 159.
 v. Robinson, 398, 471, 486, 521.
 v. Washington Mills, 4, 22, 79, 80, 99, 230, 379, 631.
 v. White, 201.
 Olleman *v.* Kelgore, 502.
 Olmstead *v.* Camp, 115.
 Olmsted Co. *v.* Barber, 298, 453, 783.
 Olney *v.* Harvey, 162, 735.
 v. Pearce, 253.
 O'Maley *v.* Freeport, 603.
 O'Mulcahy *v.* Florer, 780.
 O'Neal *v.* Bridge Co., 170, 284, 286, 365, 396, 750.
 v. School Commissioners, 706, 799.
 v. Virginia, etc., Co., 776.
 Ontario Bank *v.* Bunnell, 294, 799.
 On Yuen Hai Co. *v.* Ross, 371, 611.
 Opening of Streets, Matter of, 209, 608, 630, 636.
 Opinions of Justices (1 Met.), 371.
 (5 Met.), 382.
 (126 Mass.), 265.
 (58 N. H.), 77.
 (58 Me.), 1, 115, 116, 117, 169.
 (67 Me.), 120.
 (52 Me.), 136.
 (53 N. H.), 28.
 Orange & Alexandria R. Co. *v.* Alexandria, 207, 210, 214, 276, 378.
 Ordinary *v.* Central R. Co., 210.
 v. Retailers of Liquors, 573.
 Ordway *v.* Ferrin, 802.
 Oregon Steam, etc., Co. *v.* Portland, 276, 277, 349.
 O'Reiley *v.* Good, 819.
 v. Kankakee Valley Draining Co., 616.
 O'Reilly *v.* Holt, 492, 540, 648.
 Ormsby *v.* Louisville, 483.
 Orono *v.* Veazie (57 Me.), 460, 520.
 v. Veazie (61 Me.), 409.
 v. Wedgewood, 705, 708, 799.
 Orphan Asylum *v.* School District, 202.
 Orphan Home, Matter of, 672.
 Orr *v.* Baker, 205, 214.
 v. Trevacrier, 482, 531.
 v. Wiley, 513.
 Ortman *v.* Dixon, 729.
 Orton *v.* Brown, 582, 601.
 v. Noonan (23 Wis.), 407.
 v. Noonan (25 Wis.), 401.
 Osborn *v.* Bank of United States, 84, 773.
 v. Danvers, 799.
 v. N. Y. & N. H. R. Co., 211, 227.
 v. Mobile, 63.
 Osborne *v.* United States, 717.
 Osterberg *v.* Union Trust Co., 445, 499.
 Osterhout *v.* Hyland, 766.
 v. Rigney, 767.
 v. Supervisors, 767.
 Osterman *v.* Baldwin, 568.
 Ostrander, *Ex parte*, 728, 729.
 Oswald *v.* Gilbert, 637.
 Oswalt *v.* Hallowell, 87.
 Oswego Starch Factory *v.* Dolloway, 226, 232, 378, 410.
 Otis *v.* Boston, 370.
 v. Boyd, 356.
 v. Chicago, 523.
 Otis Co. *v.* Ware, 358, 359, 457, 743
 Otken *v.* Lamkin, 121.
 Otoe Co. *v.* Brown, 510, 512, 547.
 Ottawa *v.* Barnes, 763.
 v. La Salle, 575.
 v. Spencer, 156, 589, 629, 639.
 v. Walker, 776, 782.
 Ottawa, etc., Co. *v.* McCaleb, 749, 750, 785.
 Ottawa Co. *v.* Nelson, 185.
 Ottawa Glass Co. *v.* McCaler, 181, 383, 384, 433.
 Ould *v.* Richmond, 29, 66, 167, 171, 243, 280, 573, 596.
 Oulton *v.* Savings Inst., 372.
 Overall *v.* Ruenzi, 763, 774.
 Overby *v.* State, 572.
 Overing *v.* Foote (43 N. Y.), 311, 420, 781.
 v. Foote (65 N. Y.), 355, 421.
 Overseers of Crown Point *v.* Warner, 581.
 Ovitt *v.* Chase, 355.
 Owens *v.* Ranstead, 261.
 Owners of Ground *v.* Albany, 639, 757.

P.

- Pace *v.* Burgess, 90.
 Pacific Bridge Co. *v.* Kirkham, 133.
 Pacific Hotel Co. *v.* Leib, 181, 310, 383, 387, 785.
 Pacific Ins. Co. *v.* Soule, 8.
 Pacific R. Co. *v.* Cass Co., 70, 205, 363, 378.
 v. Maguire, 68, 71, 73.

- Pacific, etc., Tel. Co. v. Commonwealth, 19.
 Pack v. Crawford, 495, 497, 503.
 Packard v. Jefferson Co., 132.
 v. New Limerick, 818.
 v. Tisdale, 17.
 Packet Co. v. Catlettsburg, 93, 94.
 v. Keokuk, 93.
 v. St. Louis, 93.
 Pacquette v. Pickness, 554.
 Padelford v. Savannah, 56, 90, 373, 577.
 Page v. Allen, 767, 770.
 v. State, 572, 581.
 v. St. Louis, 216.
 v. Webster, 502.
 Page Co. v. Railroad Co., 821.
 Paine v. Ross, 790.
 v. Spratley, 207, 345, 673.
 Painter v. Hall, 289.
 Palfrey v. Boston, 85.
 Palmer v. Craddock, 723.
 v. Cuyahoga Co., 94.
 v. Doney, 259.
 v. Fitts, 143.
 v. Jones, 736.
 v. Napoleon, 763.
 v. Rich, 780.
 v. Stumph, 207, 609, 630, 645, 820.
 v. Way, 589, 625, 628.
 Palmes v. Louisville, etc., Co., 67.
 Pana v. Bowler, 331.
 Parcher v. Marathon Co., 814.
 Parham v. Justices of Decatur, 6.
 Paris v. Lewis, 409.
 Parish v. Eager, 560, 784.
 v. Golden, 321, 413, 414, 790, 795.
 v. Stevens, 559.
 Parish of Orleans v. Cochran, 186.
 Park v. Tinkham, 488.
 Park Com'rs v. Telegraph Co., 692.
 Parker v. Altschul, 673.
 v. Baker, 250, 254.
 v. Baxter, 411, 445.
 v. Challiss, 150, 589, 644.
 v. Goddard, 531, 546.
 v. Great Western R. Co., 818.
 v. Kett, 249, 250.
 v. Overman, 473, 517.
 v. Rule's Lessee, 473.
 v. Sexton, 427, 430.
 Parker Mills v. Com'rs of Taxes, 56, 375, 378.
 Parkersburg v. Brown, 116.
 Parkinson v. Parker, 792, 794.
 Parks v. Boston, 660, 759.
 v. Goodwin, 291.
 v. Miller, 527.
 v. Watson, 536.
 Parmelee v. Railroad Co., 763.
 Parmley v. R. Cos., 69, 72.
 Parsons v. Bangor, 370.
 v. Gas Light Co., 447.
 v. Goshen, 144.
 Passenger Cases, 97, 99.
 Patchin v. Brooklyn, 758.
 v. Ritter, 797.
 Patrick v. Littell, 416.
 Patten v. Green, 364, 421.
 Patterson v. Barlow, 459.
 v. Baumer, 750, 776, 820.
 v. Blackmore, 395.
 v. Brindle, 533.
 v. Carruth, 489.
 v. Cox, 811.
 v. Kentucky, 570, 597.
 v. Miller, 253.
 v. O'Neill, 445.
 v. Philbrook, 300.
 v. Society, etc., 207, 208, 209, 606, 676.
 v. Yuba, 264.
 Patton v. Long, 161.
 v. Luther, 562.
 v. Springfield, 156.
 Paul v. Fries, 399, 503, 520.
 v. Linscott, 340.
 v. Pacific R. Co., 419.
 v. Railroad Co., 762.
 v. Virginia, 57, 99, 100, 387.
 Paulson v. Rule, 445.
 Pawnee Co. v. Railroad Co., 807.
 Paxton's Appeal, 260, 261.
 Paxson v. Sweet, 589.
 Pay v. Shanks, 443.
 Payne v. Treadwell, 143.
 Payson v. Hall, 255, 471, 492, 517.
 v. Tufts, 377.
 Peabody v. County Com'rs, 374.
 Peacock v. Carnes, 733.
 v. Leonard, 756.
 Pearce v. Augusta, 56, 280, 373, 577.
 v. Torrence, 424.
 Pearson v. Canney, 424, 425, 720.
 v. Lovejoy, 482.
 v. Robinson, 491, 533.
 v. Yewdall, 48, 51.
 v. Zable, 661, 663.
 Pease v. Chicago, 137.
 v. Lawson, 559.
 v. Smith, 257.
 v. Whitney, 790, 819.
 Peavey v. Robbins, 788.
 Peay v. Field, 451.
 v. Little Rock, 627.
 Peck v. Holcombe, 251.
 v. Miami Co., 393.
 v. School District, 780.
 v. Sexton, 560, 563.
 v. Supervisors, 738.
 v. Watrous, 753.
 Peckham v. Bicknell, 798.
 v. Millikan, 399, 445, 531, 733.
 Peebles v. Pittsburgh, 811.
 Peet v. O'Brien, 449, 546.
 Peete v. Morgan, 93.
 Pegram v. Commissioners, 787.

- Pejepescott Prop'rs *v.* Ransom, 253, 480.
Pekin *v.* Smelzel, 602.
Pelton *v.* National Bank, 175, 219, 391,
410, 751, 761, 785.
v. Transportation Co., 378.
Pellecat *v.* Angell, 434.
Penn *v.* Clemans, 201, 493, 537, 540.
Pennell *v.* Monroe, 484, 493.
Pennell's Appeal, 624.
Pennock *v.* Commissioners, 393.
v. Hoover, 624, 644.
Pennsylvania Bank Assignee's Acc't,
818.
Pennsylvania College Cases, 72.
Pennsylvania Hall, *In re*, 686, 687.
Pennsylvania R. Co. *v.* Common-
wealth, 94.
v. Pittsburgh, 225.
Pentland *v.* Stewart, 789.
People *v.* Alameda, 686.
v. Albany Ins. Co., 292, 381, 882,
417.
v. Allen (43 N. Y.), 121.
v. Allen (6 Wend.), 290, 386.
v. Allen (52 N. Y.), 756.
v. Arguello, 799.
v. Ashbury, 734, 749.
v. Assessors (39 N. Y.), 756.
v. Assessors (40 N. Y.), 756.
v. Assessors of Albany, 361, 757.
v. Assessors of Barton, 732.
v. Assessors of Brooklyn (39 N.
Y.), 368, 757.
v. Assessors of Brooklyn (76 N.
Y.), 382, 383.
v. Assessors of Brooklyn (84 N.
Y.), 70.
v. Assessors of Brooklyn (92 N.
Y.), 311, 367.
v. Atkinson, 857, 871.
v. Auditor-General, 477, 741, 822.
v. Austin, 173, 613, 628, 653, 666.
v. Bacon, 729.
v. Bangs, 251.
v. Barker, 386, 410, 420.
v. Barton, 822.
v. Batchelor, 60, 657, 689, 699.
v. Betts, 755.
v. Bennett, 737.
v. Biggins, 449, 450.
v. Big Muddy Iron Co., 752.
v. Board, etc., 756.
v. Board of Assessors, 367.
v. Board of Education (13 Barb.),
121.
v. Board of Educat'n (55 Cal.), 121.
v. Black Diamond Co., 178, 368.
v. Bradley, 232.
v. Brenham, 335.
v. Breslin, 129, 616.
v. Bringard, 712.
v. Brooklyn (23 Barb.), 619, 676.
v. Brooklyn (9 Barb.), 759.
v. Brooklyn (65 N. Y.), 614.
People *v.* Brooklyn (4 N. Y.), 2, 5, 45,
149, 151, 165, 209, 237, 238,
613, 614, 624, 636, 639, 672.
v. Brooklyn (71 N. Y.), 307.
v. Brooklyn Assessors, 311, 367,
368.
v. Brown, 257.
v. Campbell, 200.
v. Canty, 692.
v. Cassidy, 367.
v. Castro, 334, 335, 399.
v. Cemetery Co., 203.
v. Central Pac. R. Co., 89, 152,
178, 235.
v. Chicago, 60, 345, 686, 692, 703.
v. Chicago, etc., R. Co., 409, 750.
v. Christopher, 613.
v. Clark, 65, 288, 655.
v. Cline, 132.
v. Coghill, 259.
v. Cohen, 87.
v. Coleman, 5, 200.
v. Collins, 254.
v. Commissioners (4 Wall.), 84.
v. Commissioners (94 U. S.), 390.
v. Commissioners (104 U. S.), 354.
v. Commissioners (23 N. Y.), 222,
375.
v. Commissioners (47 N. Y.), 70.
v. Commissioners (53 N. Y.), 367.
v. Commissioners (58 N. Y.), 91,
873.
v. Commissioners (64 N. Y.), 378,
388.
v. Commissioners (76 N. Y.), 85,
372, 386.
v. Commissioners (80 N. Y.), 367.
v. Commissioners (82 N. Y.), 206,
367.
v. Commissioners (91 N. Y.), 754.
v. Commissioners (95 N. Y.), 205,
227.
v. Commissioners (99 N. Y.), 748.
v. Commissioners (31 Hun), 382.
v. Commissioners (43 Barb.), 755.
v. Commissioners of Highways
(80 N. Y.), 755.
v. Common Council, 71.
v. Com. Council of Chicago, 681.
v. Common Council of Detroit,
681, 689, 691.
v. Compagnie, etc., 97.
v. Cone, 408.
v. Cook, 291.
v. Cooper, 346, 350, 705.
v. County Treasurer, 296.
v. Cowles, 335.
v. Crockett, 408.
v. Culverwell, 402.
v. Davenport, 174, 362.
v. Dean, 254.
v. Delaney, 755, 756.
v. Dock Co., 388.
v. Doe, 173, 174, 291.

People v. Dolan, 410.
 v. Donnelly, 87.
 v. Draper, 112, 113, 152, 681.
 v. Dunn, 422.
 v. Dupuyt, 143.
 v. East Saginaw, 743.
 v. Eddy, 177, 178.
 v. Empire, etc., Co., 411.
 v. Eq. Trust Co., 98, 388.
 v. Eureka, etc., Co., 340.
 v. Ferguson, 410.
 v. Fields, 143.
 v. Fire Association, 58, 326.
 v. Flagg, 105, 146, 695.
 v. Flint, 409.
 v. Forrest, 421.
 v. Fowler, 732.
 v. Fredericks, 758.
 v. Frisbie (26 Cal.), 300.
 v. Frisbie (31 Cal.), 368.
 v. Gale, 463.
 v. Gerke, 178.
 v. Goff, 287.
 v. Gold Co., 291, 293.
 v. Goldtree, 302.
 v. Gold & Stock Tel. Co., 98.
 v. Governor, 248.
 v. Hadley, 419.
 v. Hagar, 662, 667, 678.
 v. Haines, 350, 616.
 v. Halsey, 733, 741.
 v. Hamilton, 756.
 v. Hammond, 495, 742.
 v. Hancock, 408.
 v. Hardenburgh, 733.
 v. Hartwell, 291, 335.
 v. Hastings, 255, 353, 354, 410, 412, 693.
 v. Havemeyer, 326.
 v. Haws, 152, 687.
 v. Hibernia Bank, 178.
 v. Highway Com'rs, 336, 487, 754.
 v. Hogan, 14.
 v. Holley, 290.
 v. Holliday, 304.
 v. Hollister, 409.
 v. Home Ins. Co. (29 Cal.), 79.
 v. Home Ins. Co. (92 N. Y.), 85, 98, 325, 326.
 v. Hopson, 253.
 v. Houston, 644, 661.
 v. Hurlburt, 59, 60, 63, 673, 689, 691.
 v. Hyde, 408.
 v. Imlay, 57.
 v. Ingersoll, 143.
 v. Inspectors of State Prison, 741.
 v. Insurance Co., 56.
 v. Jackson Co., 335.
 v. Jefferson Co. Court, 616.
 v. Johr, 707.
 v. Judge of Wayne Circuit, 727, 729.
 v. Kane, 251, 254, 256.

People v. Kelsey, 63.
 v. Koeber, 722.
 v. Kohl, 355.
 v. Lansing, 523.
 v. Latham, 178, 449.
 v. Lawrence, 5, 70, 150, 624, 640.
 v. Leib, 733.
 v. Long Island City, 754.
 v. Lothrop (3 Col.), 1, 259, 418, 422.
 v. Lothrop (24 Mich.), 252.
 v. Lumber Co., 368.
 v. Lynch, 302, 307, 644, 683.
 v. Mahaney, 60, 345, 681.
 v. Mahoney, 409.
 v. Martin, 579.
 v. Maynard, 768.
 v. Mayor, etc., 708.
 v. McAdams, 118, 122, 692.
 v. McCain, 288, 307, 484.
 v. McCreery, 1, 173, 177, 178, 216, 217.
 v. McCune, 302, 644.
 v. McDonald, 301.
 v. McEwen, 534, 540.
 v. McLean, 377, 378.
 v. Mining Co. (1 Idaho), 87, 368.
 v. Mining Co. (37 Cal.), 87.
 v. Mining Co. (39 Cal.), 409, 414.
 v. Moore, 390, 392, 428.
 v. Morris, 604.
 v. Morse, 402.
 v. National Fire Ins. Co. (27 Hun), 91, 326, 386.
 v. National Fire Ins. Co. (61 How. Pr.), 386.
 v. National Gold Bank, 390.
 v. Nearing, 617, 676, 756.
 v. New York, 759.
 v. New York Cent. R. Co., 264.
 v. New York Common Pleas, 723.
 v. Nichols, 418, 422, 430.
 v. Niles, 96, 374.
 v. Ogdensburg, 56, 374, 757, 758.
 v. Ohio, etc., R. Co., 228.
 v. O'Keefe, 743.
 v. Oldstown, 182.
 v. Olmsted, 732, 822.
 v. Otis, 527.
 v. Owyhee Co., 411.
 v. Palmer, 523.
 v. Park, 372.
 v. Parks, 108, 139, 142, 220.
 v. Peacock, 292, 458.
 v. Pearson, 729.
 v. Peck, 290, 336.
 v. Placerville, etc., R. Co., 178.
 v. Power, 686.
 v. Preston, 440.
 v. Purdy, 264.
 v. Purviance, 733.
 v. Quigg, 294.
 v. Railroad Co., 353, 360.
 v. Raymond, 419.

People v. Reay, 673.

- v. Reddy, 361, 755, 789.
- v. Regents of University, 741.
- v. Rochester, 184.
- v. Root, 401.
- v. Roper, 70, 207.
- v. Russell, 570, 599.
- v. Ryan, 174, 416.
- v. S. & C. R. Co., 412.
- v. Sacramento Co., 423.
- v. Salomon, 129, 172, 615, 692, 708.
- v. San Francisco, etc., R. Co., 177.
- v. Sargeant, 353.
- v. Savings Bank, 230.
- v. Savings Union, 304, 411.
- v. Seale, 337.
- v. Seamen's Friend Society, 208, 399.
- v. Seymour, 300, 307.
- v. Shearer, 87, 88, 368, 733.
- v. Sherman, 638.
- v. Shimmins, 400, 530.
- v. Shippee, 356.
- v. Smith (88 N. Y.), 374.
- v. Smith (94 Ill.), 463.
- v. Smith (24 Hun), 754.
- v. Sneath, 371.
- v. Soldiers' Home, 180.
- v. Springwells, 146.
- v. Stahl, 409, 449.
- v. State Treasurer, 836.
- v. Suffern, 331, 415.
- v. Sullivan, 137.
- v. Superior Court, 728.
- v. Supervisor, 137, 696.
- v. Supervisors, etc. (51 N. Y.), 756.
- v. Supervisors, etc. (16 Mich.), 345.
- v. Supervisors of Albany, 829.
- v. Supervisors of Allegany, 755, 758.
- v. Supervisors of Chenango, 21, 258, 355, 727, 791, 816, 817.
- v. Supervisors of Columbia, 136, 737.
- v. Supervisors of Delaware, 729.
- v. Supervisors of Dutchess, 144.
- v. Supervisors of Essex, 733.
- v. Supervisors of Ingham, 301.
- v. Supervisors of Jackson, 735.
- v. Supervisors of Kings, 326, 827.
- v. Supervisors of Macomb, 684, 730.
- v. Supervisors of Madison, 806.
- v. Supervisors of New York (16 N. Y.), 43, 221, 386.
- v. Supervisors of New York (18 Wend.), 882.
- v. Supervisors of New York (33 N. Y.), 730.
- v. Supervisors of New York (2 Keyes), 738.
- v. Supervisors of Niagara, 221, 230, 234, 382.

People v. Supervisors of Ontario, 732.

- v. Supervisors of Orange, 826.
- v. Supervisors of Otsego, 282, 729, 730, 737, 741, 743, 822.
- v. Supervisors of Queens, 330, 428, 755, 757, 758, 822.
- v. Supervisors of Richmond, 146, 150.
- v. Supervisors of Saginaw, 133, 305, 617.
- v. Supervisors of San Francisco, 749.
- v. Supervisors of St. Clair (11 Mich.), 333.
- v. Supervisors of St. Clair (30 Mich.), 468.
- v. Supervisors of Ulster, 145, 181, 732, 733.
- v. Syracuse, 639, 664.
- v. Tappan, 686.
- v. Thatcher, 292.
- v. Thurber, 386.
- v. Todd, 300, 458.
- v. Townsend, 178.
- v. Township Board, 104, 117, 142.
- v. Treasurer of Detroit, 534.
- v. Trustees of Schools, 119, 143.
- v. United States, 87.
- v. Van Baalen, 599.
- v. Van Epps, 717.
- v. Wallace, 552.
- v. Walsh, 549.
- v. Walter, 754.
- v. Ward, 421.
- v. Warren, 797, 798.
- v. Weaver, 175, 391.
- v. Whartenby, 177, 178.
- v. Whipple, 399.
- v. White, 251, 254, 256.
- v. Whyler, 130, 166, 168, 177, 205, 273, 611, 620, 650, 651.
- v. Wilkerson, 160.
- v. Wilson, 153.
- v. Wiltshire, 346.
- v. Woodbury, 237.
- v. Worthington, 163, 181, 223.
- v. Yeazel, 712.

People's Savings Bank v. Tripp, 444, 777.

- Peoria v. Kidder, 207, 625, 671, 750, 819.
- Perce v. Hallett, 32.
- Perdue v. Ellis, 602.
- Perkins v. Lewis, 345.
- v. Milford, 5, 45, 137, 698.
- v. Nugent, 480.
- Perkinson v. McGrath, 820.
- Perley v. Dolloff, 776, 777, 785, 792.
- v. Georgetown, 817.
- v. Stanley, 395.
- Perrin v. Benson, 284.
- Perrine v. Farr, 562.

- Perry v. Dover, 339, 816.
 v. Torrence, 92.
 v. Washburn, 1, 14, 17.
 Perry Co. v. Railroad Co., 176, 265,
 286, 289, 311, 324, 351, 352, 419, 423,
 435, 436.
 Perry & Hall Co.'s v. Railroad Co., 17,
 116, 419.
 Person v. O'Neal (28 La. An.), 398.
 v. O'Neal (32 La. An.), 409, 488,
 547, 563.
 v. Warren R. Co., 744.
 Peru v. Bearss, 768.
 Peru, etc., R. Co. v. Hanna, 408, 652.
 Peters v. Auditor, 292.
 v. Heasley, 495, 498, 555.
 Petersburg v. Lancaster, 480.
 Petersburg v. Noss, 136.
 v. Railroad Co., 205.
 Petersburg, etc., R. Co. v. Commis-
 sioners, 72.
 Pettit v. Black, 262, 447, 581.
 v. Shepherd, 781.
 Pettus v. Wallace, 495.
 Petty v. Mays, 500.
 v. Myers, 311.
 Pengnet, Matter of, 663.
 Peverelly v. People, 646.
 Peyrie v. Schreiber, 482.
 Peyser v. Mayor of N. Y., 807, 808,
 815.
 Peyton v. Bliss, 42, 265.
 Pfister v. State, 728.
 Phalen v. Virginia, 604.
 Phelan v. Boylan, 501, 502.
 Phelps v. Alfred Bank, 383.
 v. Harding, 782.
 v. Meade, 514, 522, 523.
 v. Thurston, 21, 799.
 Philadelphia v. Commonwealth, 718.
 v. Eastwick, 646.
 v. Ferry R. Co., 279, 292, 381.
 v. Field, 130, 149, 150, 640.
 v. Greble, 448.
 v. Meager, 447.
 v. Miller, 363, 396, 406, 541.
 v. Ridge Av. R. Co., 272, 274,
 381, 382.
 v. Rule, 645, 695.
 v. Tryon, 276, 590, 619, 672.
 Philadelphia Association, etc., v.
 Wood, 1, 125, 236, 265, 592.
 Philadelphia Contributorship v. Com-
 monwealth, 380, 383.
 Philadelphia Savings Fund v. Yard,
 224, 388.
 Philadelphia & Reading R. Co. v.
 Commonwealth, 423.
 Philadelphia & Sou., etc., Co. v. Com-
 monwealth, 97.
 Philadelphia & Trenton R. Co., 757.
 Philadelphia R. Co. v. Appeal Tax
 Court, 367, 384.
 v. Bayless, 214.
 Philadelphia R. Co. v. Maryland, 70.
 Philbrook v. Kennebeck, 183.
 Phileo v. Hiles, 554.
 Philips v. Stevens Point, 365, 421.
 v. Wickham, 617.
 Phillips, Matter of, 614, 752.
 Phillips v. Albany, 101.
 v. Elwell, 260, 261.
 v. Improvement Co., 543.
 v. Jefferson Co., 809.
 v. Myers, 512.
 v. Sherman, 460, 490.
 v. Stevens Point, 748.
 Phoenix Iron Co. v. Commonwealth,
 233, 380, 381.
 Piatt v. St. Clair's Heirs, 502.
 Pickard v. Howe, 261.
 Pickering v. Pearson, 708.
 Picket v. Allen, 290, 426, 488.
 Pickett v. Hartsock, 528, 529.
 Pierce v. Benjamin, 442, 485, 492, 802,
 815.
 v. Boston, 16, 17.
 v. Cambridge, 203.
 v. Richardson, 315, 317, 320, 397,
 486.
 v. State, 90.
 v. Sweetzer, 487.
 v. Weare, 254, 493, 562.
 Pike v. Carter, 787.
 v. Cummings, 458.
 v. Hanson, 253.
 v. Megoun, 794.
 v. Middleton, 128.
 v. People, 262, 456.
 Pike Co. v. State, 741, 744.
 Pile, *Ex parte*, 729.
 Pillow v. Roberts, 473, 520, 559, 569.
 Pillsbury v. Auditor-General, 300, 764.
 Pingrey v. Washburn, 135.
 Piper, Appeal of, 640, 661.
 Piper v. Singer, 86, 173.
 Piqua Bank v. Knoop, 69, 71.
 Piquet, Appellant, 300.
 Pitcher v. Dove, 474.
 Pitkin v. Parks, 398.
 v. Yaw, 315, 493.
 Pitts v. Booth, 483.
 Pittsburgh v. Scott, 612.
 Pittsburgh's Appeal, 446.
 Pittsburgh District, Matter of, 612.
 Pittsburgh, etc., R. Co. v. Chicago,
 412.
 v. Commonwealth, 6, 222, 223.
 Pittsfield v. Barnstead, 475, 480.
 Pixley v. Huggins, 781.
 Plaisted v. Lincoln, 205.
 Plant v. Echberg, 455.
 Planters' Bank v. Sharp, 80.
 Plaquemines v. Roth, 329.
 Platt v. Rice, 204.
 v. Stewart, 526, 722.
 Platteville v. Galena, etc., R. Co., 341.
 Playter v. Cochran, 289, 584.

- Pleasant *v.* Kost, 15, 181, 207, 588.
Pleasants *v.* Rohrer, 569.
v. Scott, 568.
Pleuler *v.* State, 192.
Plimpton *v.* Somerset, 687.
Plumer *v.* Supervisors, 288, 300, 812, 414, 554.
Plumstead Board of Works *v.* Ingoldsby, 676.
Plymouth *v.* Painter, 249, 251, 254.
v. Pettijohn, 60, 579.
Plympton *v.* Boston Dispensary, 467.
v. Sapp, 488.
Pocopson Road. Case of, 114.
Poindexter *v.* Doolittle, 485.
v. Greenhow, 74, 75, 81, 82.
Police Jury *v.* Brookshier, 708, 714.
Polk *v.* Hill, 553.
v. Plummer, 708.
v. Rose, 473, 517, 781, 784, 803.
Pollard *v.* State, 391.
Pomeroy *v.* Parmalee, 261.
Pompton *v.* Cooper, 381.
Pond *v.* Drake, 466.
v. Negus, 290, 291, 850.
Pons *v.* State, 294.
Pontiac *v.* Axford, 341, 453.
Pope *v.* Headon, 473, 484, 517.
v. Macon, 458, 551, 554.
v. Phiifer, 60, 693.
Pope Co. *v.* Sloan, 102.
Poppleton *v.* Yarnhill Co., 174, 416.
Porter *v.* Byrne, 481.
v. County Com'rs, 358, 359, 457.
v. Rockford, etc., R. Co., 5, 181, 227, 230, 232, 278, 419, 421, 761.
v. Rock Island St. R. Co., 378.
v. Whitney, 486.
Porterfield *v.* Augusta, 370.
Portland *v.* O'Niell, 585.
v. Railroad Co., 232.
v. Water Co., 188.
Portland Bank *v.* Aphthorp, 190, 230, 377, 379.
Portland, etc., R. Co. *v.* Saco, 70, 205, 378.
v. Standish, 132.
Portwood *v.* Montgomery, 162.
Post *v.* Kearney, 447.
v. Leet, 448.
Postmaster-General *v.* Rice, 707.
Potosi *v.* Casey, 436.
Potter Co. *v.* Oswayo, 468.
Potts *v.* Cooley (51 Wis.), 513.
v. Cooley (56 Wis.), 457, 458, 512.
Potwin *v.* Johnson, 295.
v. Oades, 411.
Pound *v.* Plumstead Board of Works, 646.
Powell *v.* Board of Education, 120.
v. Madison, 98.
v. Supervisors, 342, 811.
Powell *v.* Tuttle, 258.
Powers, Appeal of, 151, 287, 339, 484, 612, 644.
Powers, Petition of, 343.
Powers, *In re*, 44.
Powers *v.* Barney, 269.
v. Fuller, 299.
v. Penny, 523.
v. Sanford, 816.
Prairie *v.* Worth, 713, 723.
Prather *v.* Johnson, 719, 720.
Pratt, Appeal of, 706.
Pratt *v.* Brown, 115.
v. Donovan, 718.
v. Douglass, 399, 467.
v. Swanton, 339.
Pray *v.* Northern Liberties, 309, 606, 624.
Prentice *v.* Ashland Co., 352.
Prescott *v.* Beebe, 393.
v. Hawkins, 319, 323.
President and Commissioners, etc., *v.* State, 694.
Preston *v.* Boston, 375, 808, 810, 814, 816, 817.
v. Johnson, 749.
v. Roberts, 146, 449, 641, 642, 663.
v. Van Gorder, 445, 511.
Prettyman *v.* Supervisors, 345.
v. Walston, 501.
Price *v.* England, 514.
v. Kramer, 749.
v. Mott, 292, 541, 542.
Prickett *v.* People, 254.
Primm *v.* Belleville, 180, 216, 217, 245, 629.
Prince *v.* McNeill, 715.
v. Thomas, 797.
Prince George Co. *v.* Clarke, 439.
Prindle *v.* Campbell, 307, 308, 429, 483, 488.
Pritchard *v.* Madren, 48, 449, 524, 527, 763.
Probasco *v.* Moundsville, 200, 204.
Proprietors, etc., *v.* Lowell, 203.
Prospect Park, Matter of, 129.
Prot. Epis. School, *In re*, 644.
Prout *v.* People, 527.
Providence Athæneum *v.* Tripp, 202.
Providence Bank *v.* Billings, 5, 45, 70, 204.
Providence, etc., R. Co. *v.* Wright, 886.
Providence Gas Co. *v.* Thurber, 368.
Providence Inst. *v.* Gardiner, 229.
Provident Inst. *v.* Boston, 392.
v. Jersey City, 621.
v. Massachusetts, 84, 230, 233, 379.
Puget Sound Agricultural Co. *v.* Pierce Co., 88.
Pugh *v.* Youngblood, 563, 564, 782.
Pullen *v.* Com'rs of Wake Co., 5, 45.
v. Haynes, 260, 261.

- Pullman Sou. Car Co. v. Gaines, 97.
 v. Nolan, 97.
 Purrington v. Loring, 802.
 v. People, 310, 365, 776.
 Pursell v. New York, 806.
 Purvear v. Commonwealth, 20, 596,
 605.
 Putnam v. Fife Lake, 375, 436.
 v. Man, 260, 261.
- Q.**
- Quantity of Tobacco, 460.
 Queen v. Com'rs of Land Tax, 27.
 v. Dyott, 363.
 v. Exminster, 173.
 v. Shee, 173.
 Quimby v. North American, etc., Co.,
 340.
 Quin v. Quin, 503.
 Quincy v. Jackson, 848.
 Quincy Bridge Co. v. Adams Co., 212.
 Quinn v. Brittain, 466.
 v. Kenney, 534.
 Quivey v. Lawrence, 87, 352, 368, 516,
 522.
- R.**
- Rader v. Road District, 59, 162.
 Rail v. Potts, 788.
 Railroad Co., Appeal of, 867.
 Railroad Co. v. Alamance Co., 436.
 v. Berks Co., 210, 213.
 v. Brogden, 436.
 v. Brunswick Co., 436.
 v. Carroll Co., 290, 309.
 v. Collector, 22.
 v. Com'rs (87 N. C.), 72, 175, 210.
 v. Com'rs (98 U. S.), 811, 813.
 v. Com'rs (103 U. S.), 213.
 v. Georgia, 212.
 v. Hamblen Co., 213.
 v. Husen, 83.
 v. Jackson, 79, 231, 382.
 v. Loftin, 68, 211.
 v. Maine, 72, 212.
 v. McClure, 73.
 v. Morris, 88, 89.
 v. Penniston, 85, 86.
 v. Rose, 301.
 v. Schenck, 133.
 v. Spearman, 652.
 v. Stark, 459.
 v. Vance, 385.
 v. Wright, 207, 214.
 Railroad Co's. v. Gaines, 77, 211, 212,
 213, 229.
 Railroad Tax Cases, 385.
 Railway Co. v. Counties, 206.
 v. McShane, 88.
- Railway Co. v. Olmstead, 726.
 v. Portland, 384.
 v. Prescott, 88, 89.
 v. Storm Lake Bank, 541.
 v. Trempealeau Co., 88.
 Raisler v. Athens, 810, 815.
 Raleigh, etc., R. Co. v. Com'rs, 174.
 v. Reid, 210, 232, 233.
 Raley v. Guinn, 523.
 Ralls Co. Court v. United States, 101,
 736, 738.
 Ramsey v. Haeger, 70, 181.
 Rand v. Schofield, 452.
 Randall v. Elwell, 384.
 v. Smith, 336, 792.
 Randle v. Williams, 757.
 Randolph v. Bayne, 449.
 v. Gawley, 65.
 v. Metcalf, 412.
 v. Stalnaker, 730.
 Ranger v. New Orleans, 711, 740, 767.
 Rankin v. Miller, 494.
 Ranney v. Bader, 774, 797.
 Rapp v. Lowry, 398, 505, 519.
 Rathbone v. Hooney, 515.
 Rawson v. School District, 349.
 v. Spencer, 143, 442.
 Ray v. Bank of Kentucky, 810.
 v. Jeffersonville, 655.
 v. Murdock, 249, 256, 520.
 Rayburn v. Kuhl, 520.
 Raymond v. Cleveland, 296, 625, 633,
 636, 644.
 Raynor v. Lee, 388, 396, 450.
 Read v. Goodyear, 478.
 Reader v. Road District, 59.
 Readfield v. Shaver, 715.
 Reading v. Finney, 305, 403, 451, 494.
 v. Wier, 397, 399.
 Ream v. Stone, 440, 441, 447.
 Reclamation District v. Coghill, 673.
 v. Evans, 50.
 v. Hagar, 14, 223, 618, 627.
 Redd v. St. Francis Co., 100.
 Redemptionists v. Howard Co., 203.
 Redemptionists Fathers v. Boston,
 203, 205.
 Redmond v. Banks, 397.
 v. Com'rs, 57.
 Redwine v. Hancock, 460.
 Reed v. Beall, 573.
 v. Chandler, 413.
 v. Crapo (127 Mass.), 515, 821.
 v. Crapo (133 Mass.), 506, 509.
 v. Earhart, 546.
 v. Merriam, 514, 531.
 v. Millikan, 338.
 v. Reber, 781.
 v. Thompson, 513, 522.
 v. Toledo, 275, 609, 639.
 v. Tyler, 460, 763, 781.
 Reeds v. Morton, 483.
 Rees v. Watertown, 44, 76, 736, 745.
 Reeve v. Kennedy, 430, 443, 492, 529.

- Reeves *v.* Reeves, 260.
v. Treasurer of Wood Co., 209,
280, 616, 624, 633, 676.
- Regina *v.* Head, 663.
- Reid *v.* State, 86, 173, 499, 519.
- Railey *v.* Lancaster, 353, 368.
- Rain *v.* Lane, 274.
- Reinig *v.* Munson, 754.
- Reinboth *v.* Zerbe Run Co., 502.
- Reis *v.* Graff, 307.
- Reithmiller *v.* People, 77.
- Relfe *v.* Life Ins. Co., 421, 433.
- Renshaw *v.* Imboden, 484, 493, 516.
- Republic Life Ins. Co. *v.* Pollak, 232,
360, 750, 752, 785.
- Republica *v.* Deaves, 419.
- Reutchler *v.* Huccke, 715.
- Revere *v.* Boston, 376.
- Reynolds *v.* Faris, 776.
v. Lofton, 710.
v. Moore, 797.
v. New Salem, 336.
v. Plymouth Co., 89.
- Rhea *v.* Umatilla Co., 420.
- Rhein Building Association *v.* Lea,
499.
- Rhineland, Matter of, 657.
- Rhoads *v.* Given, 445.
v. Cushman, 749.
- Rhodes *v.* Gunn, 518.
v. Sexton, 427.
- Rice *v.* Commonwealth, 254.
v. Groff, 260.
v. Nelson, 533, 539.
v. Smith, 768.
v. Wadsworth, 797.
v. Walker, 338, 347, 726.
- Rice Co. *v.* National Bank, 228.
- Rich *v.* Flanders, 298.
v. Palmer, 539, 540.
v. Tuckerman, 436.
- Richards *v.* Cincinnati, 661, 664.
v. Cole, 487.
v. Hammer, 325.
v. Raymond, 120.
v. Rote, 302.
v. Stogsdell, 17, 452, 812.
v. Wapello Co., 356, 368, 306.
v. Wyandotte Co. Com'rs, 547.
- Richardson *v.* Dorr, 289, 478, 517.
v. Heydenfeldt, 288, 655.
v. Morgan, 591, 636, 648.
v. Scott, 749.
- Richland Co. *v.* Lawrence Co., 148,
240, 690.
v. Richland, 596.
- Richmond *v.* Brown, 715.
v. Daniel, 275, 277, 279, 324.
v. Richmond & Danville R. Co.,
210, 211, 329, 346.
v. Scott, 183, 345.
v. Toothaker, 715.
- Richmond, etc., R. Co. *v.* Alamance
Co. (76 N. C.), 206, 227.
- Richmond, etc., R. Co. *v.* Alamance
Co. (84 N. C.), 174, 210, 303,
305, 378, 384, 385, 414.
v. Brogden, 194.
v. Orange Co., 194, 750.
- Rickey *v.* Shute, 293.
- Ricketts *v.* Hyde Park, 484, 609, 660,
671.
v. Spraker, 133, 662, 668, 777, 820.
- Riddle *v.* Bedford Co., 253, 254.
- Rideout *v.* School District, 335, 336.
- Rieman *v.* Shepard, 56, 98.
- Riggs *v.* Johnson Co., 76, 735, 736,
745.
- Righter, Matter of, 672.
- Riker *v.* Jersey City, 303.
- Riley *v.* Rochester, 163.
v. Western U. Tel. Co., 774.
- Rima *v.* Cowan, 309, 522.
- Rinard *v.* Nodyke, 446, 762.
- Ring *v.* Ewing, 454.
- Rising *v.* Granger, 395, 487.
- Ritchie *v.* Smith, 434.
- Ritter *v.* Patch, 772, 781.
v. Worth, 394, 396.,
- Rivard *v.* Gardner, 261.
- Rivers *v.* Thompson, 567, 568.
- Rivet *v.* New Orleans, 80.
- Robb *v.* Bowen, 559.
- Robbins *v.* Barron, 290, 547.
- Roberts, Petition of, 653, 661.
- Roberts *v.* Chan Tin Pen, 323, 426,
494.
v. Deeds, 408, 547.
v. Holmes, 320.
v. Holsworth, 729.
v. Zansler, 563.
- Robertson *v.* Anderson, 412.
v. Heneger, 601.
v. Land Com'r, 50, 69.
v. Rockford, 345.
- Robins *v.* New Brunswick, 589.
- Robinson, *Ex parte*, 193, 579.
- Robinson *v.* Burlington, 320.
v. Butte Co., 737, 738.
v. Charleston, 170, 219, 309.
v. Dodge, 66, 331.
v. Franklin, 573, 574, 601.
v. Gaar, 779, 781.
v. Howe, 545.
v. Huff, 462.
v. Logan, 659.
v. Milwaukee, 672.
v. National Bank, 522.
v. Rowland, 792.
v. Supervisors, 75, 735.
- Robson *v.* Osborn, 286, 519, 555.
- Roby *v.* Chicago, 400.
- Roche *v.* Dubuque, 237.
- Rochester *v.* Rush, 172, 174, 317.
- Rock Creek *v.* Strong, 331.
- Rockingham Sav. Bank *v.* Ports-
mouth, 772.
- Rodman *v.* Justices, 737.

Roe v. Lincoln Co., 780.
Rogers, Ex parte, 259.
Rogers v. Greenbush, 808.
 v. Johnson, 308, 400, 541, 555, 559.
 v. Randall, 615.
 v. Rutter, 539.
 v. St. Paul, 608, 641, 655.
Rome v. Cabot, 134.
 v. Lumpkin, 578.
 v. McWilliams, 179, 570.
Rome Railroad Co. v. Rome, 225, 227.
Ronkendorf v. Taylor, 254, 256, 409, 454, 485, 517.
Rood v. Mitchell Co., 351, 353, 781.
Rooke, Case of, 618.
Rooney v. Brown, 207.
Roosevelt v. Draper, 765.
Roosevelt Hospital v. New York, 207.
Ropes v. Clinch, 100.
Roscommon v. Midland, 289.
 v. Supervisors, 738.
Rose v. Hatch, 711.
Roseberry v. Huff, 763.
Rosenblatt v. Johnston, 392.
Ross v. Crawford County Com'rs, 752.
 v. East Saginaw, 819.
 v. Lane, 18.
 v. Outagamie Co., 88.
Roudanez v. New Orleans, 765.
Rougelot v. Quick, 485.
Rounds v. Waymart, 294.
Roundtree v. Galveston, 198.
Roup's Case, 197.
Row v. People, 751.
Rowland v. Doty, 450, 518.
 v. School District, 773.
Rowland, Ex parte, 726.
Royce v. Jenney, 418, 754.
Rubey v. Huntsman, 281, 288, 487.
Rudderow v. State, 233.
Ruddock v. Gordon, 16.
Ruggles v. Fond du Lac, 175, 814.
Rule v. Parker, 517.
Rundell v. Lakey, 447, 448, 467.
Ruppert v. Baltimore, 669.
Russel v. Reed, 507, 510.
Russell v. Dishon, 449, 781.
 v. Hudson, 547.
 v. Mayor, 811.
 v. New Haven, 367, 809.
 v. Reed, 555.
 v. Stansell, 770.
 v. Wernitz, 400, 401, 406.
Russell's Appeal, 447.
Rutherford v. Maynes, 617.
Rutledge v. Fogg, 16, 435.
Rutz v. Calhoun, 767.
Ryan v. Gallatin Co., 16.
 v. Leavenworth Co., 777.
 v. State, 459.
 v. United States, 717.

Ryerson v. Brown, 115.
 v. Laketon, 339, 678.
 v. Utley, 142, 144.

S.

Sabattie v. Baggs, 515.
Sackett, Douglass, DeGraw Sta., Matter of, 303, 307, 667.
Sacramento v. Crocker, 177, 228, 248.
Safford v. Basto, 567.
Sage v. Laurain, 787.
Salem Iron Factory v. Danvers, 225, 227, 229, 230.
Salem Turnpike v. Essex Co., 151, 152, 162, 239, 682.
Saline Co. Com'rs v. Geis, 547, 807.
Salmond v. Hanover, 748.
Saloy v. New Orleans, 76, 726.
Salscheider v. Fort Howard, 410.
Salter v. Burlington, 184.
Salt Lake City Nat. Bank v. Golding, 232.
Samis v. King, 253, 254, 514, 520.
San Antonio v. Mehaffy, 331.
Sanborn v. Cooper, 512.
 v. Rice Co., 60, 142, 192, 667.
Sanderlin v. Thompson, 784.
Sanders v. Butler, 275, 279.
 v. Simmons, 797.
 v. Yonkers, 779.
Sanderson v. Scranton, 868.
Sandford v. New York, 671.
Sanger v. Kennebec Co., 741.
Sands v. Davis, 501, 555.
 v. Richmond, 589, 645.
Sandwich v. Fish, 256, 285, 401, 799.
Sanford v. Dick, 216, 792.
 v. People, 409.
 v. Prentice, 334.
 v. Sanford, 497.
 v. Spencer, 375.
San Francisco v. Canavan, 143.
 v. Certain Real Estate, 667.
 v. Ford, 708.
 v. Fry, 221.
 v. Jones, 436, 449.
 v. McCain, 288, 484.
 v. McKey, 22, 23, 226.
 v. Phelan, 398, 435.
 v. Quackenbush, 666.
 v. Railroad Co., 885.
 v. Springs, etc., Works, 178, 228.
 v. Talbot, 373.
San Francisco Gas Co. v. Brickwell, 16.
 v. San Francisco, 689.
San Francisco R. Co. v. State Board, 50, 65, 66, 325, 346, 354, 384, 385, 388, 407, 419.
Sangamon, etc., R. Co. v. Jacksonville, 152, 384.
San Jose v. San Jose, etc., R. Co., 385, 572, 584, 600.

- San Jose Gas Co. v. January, 22, 888, 749, 762, 789.
 San Mateo Co. v. Sou. Pac. R. Co., 52, 178, 363, 364.
 Santa Barbara v. Stearns, 588.
 Santa Clara Co. v. Sou. Pac. R. Co., 52, 863.
 Sapp v. Brown Co., 813.
 v. Morrill, 568.
 Sargent v. Bean, 309, 400, 485.
 Satterlee v. San Francisco, 837.
 Saulters v. Victory, 818.
 Saunders, Matter of, 752.
 Saunders v. Springsteen, 161.
 v. Wilson, 554.
 Saup v. Morgan, 447.
 Savacool v. Boughton, 797, 799, 804.
 Savage v. Walsh, 291.
 Savannah v. Charlton, 228, 578.
 v. Feeley, 575, 583, 805.
 v. Hartridge, 268, 275.
 v. Hines, 577.
 v. Jesup, 212.
 v. Railroad Co., 276.
 v. Solomon's Lodge, 202.
 Savannah, etc., R. Co. v. Morton, 885, 459.
 Savings Association v. Austin, 373.
 v. Marks, 83.
 Savings Bank v. Gardiner, 228.
 v. Nashua, 227.
 v. New London, 169, 226, 227, 388.
 v. Portsmouth, 227, 772.
 v. Rutland, 200.
 v. United States, 16, 435.
 v. Worcester, 228.
 Savings Society v. Austin, 178, 220, 872, 760, 771, 777.
 Savings & Loan Society v. Ordway, 501, 777.
 Sawyer v. Alton, 15, 182, 588.
 v. Gleason, 404, 411.
 v. Steele, 254.
 Saxton v. Nimms, 260, 386, 790.
 Sayles v. Davis, 86.
 Sayre v. Tompkins, 760, 772.
 Scales v. Alvis, 262, 454, 487.
 Scammon v. Chicago (40 Ill.), 329, 518.
 v. Chicago (44 Ill.), 457.
 v. Chicago (42 Ill.), 629.
 v. Scammon, 319.
 Scarborough v. Parker, 289, 290.
 Scarritt v. Chapman, 426.
 Schaefer v. Causey, 467, 468.
 Schaeffer v. People, 454, 527, 528.
 Schaum v. Showers, 453.
 Schedda v. Sawyer, 503.
 Scheiber v. Kaehler, 311, 409, 414, 456.
 Schenck v. Kelly, 504.
 v. Peay, 253, 453, 462, 463, 533, 535, 539.
 Schenley v. Allegheny City, 107, 636.
 v. Commonwealth, 300, 807, 608, 613, 639, 643, 646, 664, 672.
 Schettler v. Fort Howard, 410.
 Schirmer v. Hoyt, 610.
 Schleucker v. Risley, 253.
 Schmelz v. Giles, 641.
 Schmidt, *Ex parte*, 769.
 Schoenheit v. Nelson, 547.
 Schoff v. Gould, 339, 480.
 Schofield v. Watkins, 217.
 Scholey v. Kew, 8, 31.
 Schoolbred v. Charleston, 787.
 School Directors v. Anderson, 731, 822.
 v. Delahoussaye, 715.
 v. Fogleman, 382.
 v. James, 377.
 School District v. Allen Co., 291, 500, 818.
 v. Atherton, 322, 339.
 v. Board of Education, 162.
 v. Bragdon, 480.
 v. Clark, 720.
 v. Garvey, 337.
 v. Merrill, 429.
 School Dist. No. 9 v. School Dist. No. 5, 738.
 Schoolfield's Ex'rs v. Lynchburg, 277, 876.
 Schooner Rachel v. United States, 459.
 Schrodt v. Deputy, 262, 399.
 Schumacker v. Toberman, 655, 683, 771.
 Schuster v. Weissman, 708.
 Schuyler v. Hull, 475.
 Schuylkill Co. v. Commonwealth, 468.
 Schuylkill Nav. Co. v. Com'rs of Berks Co., 213.
 Schwuchow v. Chicago, 604.
 Scobey v. Decatur Co., 18.
 Scofield v. Lansing, 65, 770, 780, 781.
 v. McDowell, 533.
 v. Perkerson, 721, 762.
 Scotland Co. v. R. Co. 73, 200, 213.
 Scott v. Babcock, 473.
 v. Brackett, 365.
 v. Chickasaw Co., 807.
 v. Hansheer, 382.
 v. Mather, 554.
 v. Onderdonk, 779, 781.
 v. People, 463.
 v. State, 672.
 v. Union Co., 349.
 v. Watkins, 99, 256, 257, 442, 458, 486, 784.
 v. Young Men's Society, 473, 518.
 Scoville v. Cleveland, 149, 237, 252, 624, 639, 643, 665.
 Scruggs v. Gibson, 460.
 Scuffletown Fence Co. v. McAllister, 116.
 Scully v. People, 26.

- Seaman v. Thompson, 537.
 Seamans v. Harvey, 467.
 Seamen's Friend Society v. Boston, 207.
 Searing v. Heavysides, 775.
 Sears v. Boston, 370.
 v. Cottrell, 50, 439.
 v. Marshall Co., 817.
 v. West, 601.
 Seaver v. Cobb, 509.
 Secomb, *Ex parte*, 729.
 Second Avenue Church, *In re*, 810.
 Second M. E. Church, Matter of, 307.
 Second Nat. Bank, Appeal of, 447.
 Second Nat. Bank v. Caldwell, 390, 391.
 v. Lansing, 670.
 Second, etc., R'y Co. v. Philadelphia, 881.
 Second Universalist Soc. v. Providence, 207, 652.
 Sedgwick Co. v. Bunker, 162, 240.
 v. Stanton, 135.
 Seekins v. Goodale, 443, 808.
 Seeley v. Westport, 773, 811.
 Seely v. Pittsburg, 645, 695.
 Seibert v. Allen, 673.
 Seigneuret v. Fahey, 452.
 Selden v. Coffee, 293, 409.
 v. Equitable Trust Co., 888.
 Selma, etc., Association v. Morgan, 19.
 Selz v. Cagwin, 375.
 Semans v. Harvey, 467.
 Senichka v. Low, 460, 537.
 Serrill v. New Orleans, 365.
 v. Philadelphia, 157.
 Sessions v. Crunkilton, 187, 591, 616.
 Sewall v. St. Paul, 667, 781.
 Sewell v. Jones, 263.
 v. Watson, 396.
 Sexton v. Henderson, 547.
 v. Peck, 562.
 Seymour v. Hartford, 207.
 v. State, 96.
 Shackelford v. Coffey, 115.
 v. Hooper, 500, 520.
 Shackford v. Newington, 136.
 Shadden v. Sterling, 729.
 Shalemiller v. McCarty, 543.
 Shane v. St. Paul, 811.
 Shannon v. Lane, 547.
 Sharp v. Johnson, 329, 454, 455, 666, 676.
 v. Speir, 209, 275, 470, 473, 484, 517, 523, 609, 611, 636, 657, 659, 665, 666, 673, 781.
 v. Union, etc., R. Co., 537.
 Sharpe v. Dillman, 262, 454, 546.
 Sharpless v. Philadelphia, 45, 103, 107, 142, 690, 700, 767.
 Sharp's Ex'r v. Dunavan, 158.
 Shattuck v. Daniel, 497.
 Shaver v. Robinson, 26.
 Shaw v. Becket, 814, 815, 816.
 v. Dennis, 146, 149, 150, 152, 239, 355, 640, 682.
 v. Kirkwood, 493.
 v. Orr, 409.
 v. Peckett, 17, 798.
 v. State, 716.
 Shawler v. Johnson, 485, 488, 562.
 Shawnee Co. v. Carter, 276, 284, 303, 331, 692.
 Shawnee Co. Com'rs v. Equipment Co., 885.
 v. Topeka, etc., Co., 885.
 Shay v. MacNamara, 508.
 Sheafe v. Wait, 493.
 Sheaffer v. McCabe, 394.
 Shear v. Com'rs of Columbia Co., 753.
 Shearer v. Corbin, 518.
 v. Woodburn, 517, 539, 558, 559.
 Sheehan v. Good Samaritan Hospital, 207, 208, 652.
 Sheehy v. Hinds, 488, 521.
 Sheffield v. Parsons, 92.
 Shelby v. Randles, 602.
 Sheldon v. Coates, 475.
 v. Kalamazoo, 817.
 v. School District, 771, 811.
 v. Wright, 526.
 v. Van Buskirk, 325, 427, 439, 475, 797, 801.
 Sheley v. Detroit, 614, 645.
 Shell v. Martin, 781.
 v. Walker, 502.
 Shelley v. Towle, 510, 514.
 Shelton v. Dunn, 763.
 v. Mobile, 605.
 Shepardson v. Elmore, 508.
 v. Supervisors, 779, 780.
 Shepherd's Fold v. New York, 125, 143.
 Sheppard v. Clark, 546.
 Shepperd v. Sumter Co., 100, 570.
 Sheridan v. Rahway, 742.
 v. Stevenson, 295.
 Sherlock v. Winnetka, 180, 422.
 Sherman v. Benford, 686, 771.
 v. Binck, 114.
 v. Carr, 128, 770.
 v. Simons, 331.
 v. Torrey, 801.
 Sherrill v. Philadelphia, 157.
 Sherry v. Gilmore, 514.
 v. McKinley, 406.
 Sherwin v. Bugbee, 335, 339.
 v. Mudge, 393.
 v. Savings Bank, 16, 449.
 v. Wigglesworth, 463.
 Shewalter v. Brown, 789.
 Shiek v. McElroy, 556, 559.
 Shields v. Chase, 739.
 Shimmmin v. Inman, 398, 401, 414, 495, 486.
 Shiner v. Jacobs, 204.
 Shoat v. Walker, 560, 568.

- Shoemaker v. Grant Co., 774, 804.
 v. Lacey, 511.
 Shontz v. Evans, 133, 337, 338.
 Shoup v. Cent., etc., R. Co., 309, 310, 506.
 Shove v. Manitowoc, 749.
 Shreveport v. Gregg, 18.
 Shriver v. Cowell, 437, 453.
 v. Pittsburg, 56, 373.
 Shuford v. Commissioners, 621, 633.
 Shumway v. Baker Co., 420.
 Sias v. Badger, 260, 261.
 Sibley v. Bullis, 299, 309, 491.
 v. Mobile, 76, 347, 736, 739.
 v. Smith, 288, 408, 413, 470, 514, 520.
 Sidenburg v. Ely, 399, 466, 467.
 Siebenhauer, *Ex parte*, 572, 573, 577.
 Siegel v. Outagamie Co., 401, 780.
 Sikes v. Hatfield, 130.
 Silsbee v. Stockle, 281, 289, 290, 338, 413, 422, 423, 431, 497, 521.
 Simmer v. St. Paul, 768.
 Simmons v. Gardner, 659.
 v. State, 576, 584.
 v. Wilson, 279, 324.
 Simonds v. Turner, 443.
 Simpkins v. Ward, 763.
 Simpson v. Com'rs, 195.
 Sims v. Gray, 467.
 v. Jackson, 186, 187.
 Sinclair v. Learned, 216, 218, 307, 418, 499, 552, 553, 776.
 Singer Manuf. Co. v. Graham, 325.
 v. Yarger, 491.
 Single v. Stettin, 312.
 Sinnot v. Davenport, 92.
 Sinton v. Ashbury, 611, 640, 686.
 Sioux City v. School District, 653.
 Sioux City, etc., R. Co. v. Osceola Co., 384, 777.
 v. Washington Co., 364, 365, 418, 421.
 Sivley v. Summers, 467.
 Sivwright v. Pierce, 773.
 Six Carpenters' Case, 803.
 Slack v. Jacob, 264.
 v. Norwich, 807, 815.
 v. Railroad Co., 63, 345, 348.
 v. Ray, 63, 435, 437, 458.
 Slade v. Governor, 424.
 Slater v. Maxwell, 491, 496, 500.
 Slaughter v. Commonwealth, 170, 198.
 Slaughter House Cases, 100.
 Slayton v. Chester, 260, 261.
 Sledd v. Commonwealth, 579.
 Sleeper v. Bullen, 819, 820.
 Sleight v. People, 142, 144, 692, 702, 766.
 Sloan v. Beebe, 615, 656.
 v. Pacific R. Co., 70.
 v. Sewell, 407, 531, 546.
 Slocum v. Fayette Co., 293.
 Slusser v. Rawson, 616.
 Smale v. Burr, 174.
 Small v. Hagden, 360.
 Smeich v. York Co., 440.
 Smith, *In re*, 614.
 Smith, Petition of, 288.
 Smith v. Aberdeen, 63, 191, 633, 643.
 v. Adrian, 602.
 v. Auditor-General, 19, 296.
 v. Bodfish, 471.
 v. Burley, 227, 230.
 v. Chapman, 520.
 v. Cleveland, 299, 520, 751.
 v. Cofran, 329.
 v. Commissioners of Tallapoosa, 736, 745.
 v. Commonwealth, 716.
 v. Connelly, 115.
 v. Crittenden, 290, 342, 423, 795.
 v. Davis, 329, 414, 609.
 v. Easton, 522.
 v. Exeter, 221, 226, 227, 238.
 v. Farrelly, 130, 353, 812, 813.
 v. First Nat. Bank of Tecumseh, 890.
 v. Ford, 561.
 v. Gage, 482, 782.
 v. Goldsmith, 763.
 v. Hornback, 260.
 v. Leavenworth Co., 334, 414, 777.
 v. Lewis, 501, 507.
 v. Macon, 60, 70, 534.
 v. Mawhood, 434, 572.
 v. Mayor, 367.
 v. Messer, 256, 315, 396, 486.
 v. Milwaukee, 617.
 v. Nelson, 330.
 v. New York, 367.
 v. Northampton Bank, 440.
 v. Osburn, 201.
 v. Packard, 545.
 v. People, 463.
 v. Peoria, 713.
 v. Readfield, 809.
 v. Reed, 399.
 v. Rice, 526.
 v. Schroeder, 809.
 v. Sherry, 159, 299, 561.
 v. Short, 86.
 v. Simpson, 447, 449.
 v. Smith, 216, 217, 554.
 v. State, 442, 458.
 v. Stephenson, 512.
 v. Supervisors of Jones Co., 753.
 v. Thursby, 264.
 v. Todd, 512, 513.
 v. United States, 712.
 v. Vicksburg, 280.
 v. Waters, 268.
 v. Webb, 390.
 Smyth v. Titcomb, 706, 718, 720, 741.
 Snell v. Fort Dodge, 258, 331, 342, 354, 356, 437.

- Snell v. Leonard, 133.
 Snow v. Fitchburg, 650, 667, 760.
 v. Winchell, 721.
 Snyder v. Marks, 762.
 v. North Lawrence, 276, 532.
 Soady v. Wilson, 618, 662.
 Soens v. Racine, 259.
 Society for Savings v. Coite, 84, 230,
 233, 379.
 Sohn v. Wood, 546.
 Solomon v. Tarver, 137, 332.
 Sonoma Co. Tax Case, 811.
 Sorchan v. Brooklyn, 289.
 Souhegan Nail, etc., Factory v. Mc-
 Conihe, 214, 803.
 South Bend v. University, 206.
 Southern Express Co. v. Mayor, 93.
 v. Mobile, 98.
 Southern Hotel Co. v. St. Louis Co.,
 215.
 Southern Pac. R. Co. v. Laclede, 68.
 Southern R. Co. v. Jackson, 210.
 South Park Commissioners v. Rail-
 road Co., 651.
 South Platte Land Co. v. Buffalo Co.,
 363, 421.
 v. Crete, 354, 777.
 Southwestern Railroad v. Wright,
 764.
 Southwick v. Southwick, 298.
 Southworth v. Palmyra, etc., R. Co.,
 327.
 Soutter v. Miller, 533.
 Spain v. Johnson, 488.
 Spangler v. Cleveland, 408.
 v. York Co., 467.
 Spann v. Com'rs, 332.
 Sparland v. Barnes, 294, 738.
 Speak v. Powell, 582.
 Spear v. Braintree, 217, 425, 807.
 v. Ditty, 256, 284, 287, 484, 488.
 v. Tilson, 798.
 Speed v. St. Louis Co. Court, 87.
 Speer v. Commonwealth, 579.
 v. School Directors, 107, 136.
 Spellman v. Curtenius, 402, 455, 478,
 493, 528, 553.
 Spencer v. Jones, 257.
 v. People, 529.
 v. Perry, 704.
 v. Riverton, 753.
 v. State, 264.
 v. Wheaton, 774.
 Spengin v. Forry, 634.
 Sperling v. Levy, 260.
 Sperry v. Gibson, 542.
 v. McKinley, 520.
 Sprague v. Bailey, 253, 259, 268, 427,
 456, 792, 797.
 v. Birchard, 426, 804.
 v. Coenen, 450.
 v. Lisbon, 368.
 v. Pitt, 520, 559.
 Spratt v. Price, 445, 505, 512.
 Sprecker v. Wakeley, 556, 560, 568,
 569.
 Spring v. Collector of Olney, 138.
 Springer v. Bartle, 491, 547.
 v. Rosette, 784.
 v. United States, 8, 438, 495.
 Springfield v. Gay, 617.
 v. Power, 683.
 Spring Garden v. Wistar, 644.
 Spring Valley Co. v. Schottler, 22, 833,
 421.
 Stadler v. Roth, 321.
 Stafford v. Albany, 748.
 v. Hamston, 618, 663.
 v. Twitchell, 377, 397, 788.
 v. Union Bank, 728.
 St. Albans v. National Car Co., 433.
 Staley v. Columbus, 16, 452.
 Stambaugh v. Carlin, 455.
 Stamposki v. Stanley, 533.
 Stanbery v. Sillon, 520.
 Stanclift v. Norton, 466.
 Standard Oil Co. v. Bachelor, 96, 374.
 v. Combs, 90, 98.
 Stanley v. Mining Co., 42, 277, 280.
 v. Supervisors, 391.
 St. Anthony, etc., Co. v. Greely, 436,
 442, 454, 462, 463.
 Stanton v. Harris, 6.
 Starksboro v. Heinesburgh, 15.
 Starr v. Burlington, 287, 820.
 v. Rochester, 759.
 State v. Abbott, 161, 412.
 v. Addison, 202.
 v. Allan, 418, 422.
 v. Allen, 50, 358, 361, 430, 438,
 723.
 v. Allmond, 95.
 v. Anderson, 363, 418.
 v. Appgar, 305, 358, 361, 457, 756,
 760.
 v. Assessors (30 La. An.), 732.
 v. Assessors (36 La. An.), 202,
 203, 356.
 v. Assessors (34 La. An.), 202, 203.
 v. Assessors (35 La. An.), 202, 203.
 v. Atlantic City, 664.
 v. Atherton, 717.
 v. Axtell, 203.
 v. Bailey, 741.
 v. Baker, 445.
 v. Baldwin, 716.
 v. Baltimore, etc., R. Co., 69, 189,
 211, 214, 380, 706.
 v. Bank of Smyrna, 69, 70, 205.
 v. Bates, 717.
 v. Bell, 5, 46, 83, 358.
 v. Beloit, 726, 735.
 v. Bentley, 23, 42, 56, 230, 756.
 v. Bergen, 648, 759.
 v. Berry, 210, 233.
 v. Betts, 214.
 v. Bininger, 755.
 v. Bishop, 361, 748.

State v. Blasdel, 264.

- v. Blaser, 186.
- v. Bloom, 251.
- v. Blundell, 214.
- v. Board of Assessors, 356.
- v. Board of Education, 788.
- v. Board of Equalization, 358, 361.
- v. Board of Liquidation, 121.
- v. Bock, 577, 578.
- v. Boullt, 748.
- v. Bowker, 742.
- v. Branin, 23, 56, 218, 216, 230, 389.
- v. Bremond, 294, 776.
- v. Brewer, 268, 329.
- v. Britton, 161.
- v. Burbank, 727.
- v. Byers, 785.
- v. Cal. Mining Co., 825.
- v. Carlton, 718.
- v. Carney, 605.
- v. Carragan, 412, 418.
- v. Carrigan, 96.
- v. Carroll, 250, 254.
- v. Carson City Sav. Bank, 220, 388.
- v. Casper, 370.
- v. Cassidy, 168.
- v. Cent. Pac. R. Co. (7 Nev.), 219, 436.
- v. Cent. Pac. R. Co. (9 Nev.), 419.
- v. Chadbourne, 583.
- v. Chamblyss, 581.
- v. Chapeau, 579.
- v. Charleston (4 Rich.), 92, 233, 279.
- v. Charleston (12 Rich.), 170, 590, 592, 639.
- v. Charleston (2 Speers), 279.
- v. Chase, 593.
- v. Christopher, 613.
- v. City Council, 579.
- v. City Council of Charleston, 56, 324, 373, 382.
- v. Clerk of Bergen, 260, 261.
- v. Click, 291.
- v. Clinton Co., 620, 737.
- v. Cobb, 767.
- v. Clothier, 758.
- v. Cohen, 578, 579.
- v. Collector (24 N. J.), 217.
- v. Collector (26 N. J.), 214.
- v. Collector (37 N. J.), 227.
- v. Collector (38 N. J.), 206.
- v. Collector (39 N. J.), 376.
- v. Columbia, 197.
- v. Commercial Bank, 5.
- v. Commissioners (18 S. C.), 738.
- v. Commissioners (37 N. J.), 72.
- v. Commissioners (4 Wis.), 545.
- v. Commissioners (41 N. J.), 363.
- v. Comptroller-General, 726.
- v. Consolidated, etc., Co., 325, 458.

State v. Cook, 210.

- v. Cornell, 372.
- v. County Com'rs (4 Neb.), 192.
- v. County Com'rs (29 Md.), 291.
- v. County Com'rs (19 Fla.), 786.
- v. County Court, 171.
- v. County Judge, 741.
- v. County Treasurer, 749.
- v. Crawford, 197, 602.
- v. Crosley, 415, 420.
- v. Cumberland, etc., R. Co., 189.
- v. Cunningham, 257, 706.
- v. Danser, 757.
- v. Daspote, 714.
- v. Davenport, 329.
- v. Daviess Co., 341.
- v. Dean, 613, 636.
- v. Demarest, 186, 625.
- v. Dexter, etc., R. Co., 69.
- v. District Court, 367, 661, 667.
- v. Dodge Co. Com'rs, 654.
- v. Doherty, 302.
- v. Doon, 13, 593.
- v. Douglass, 280.
- v. Dowling, 759.
- v. Drake, 363, 421.
- v. Duffy, 121.
- v. Dulle, 204, 797.
- v. Duncan, 450.
- v. Duryea, 251, 341.
- v. Edgar, 404.
- v. Edgefield Co. Com'rs, 733.
- v. Elizabeth (28 N. J.), 214.
- v. Elizabeth (30 N. J.), 644.
- v. Elizabeth (31 N. J.), 644.
- v. Elizabeth (37 N. J.), 205, 607, 620, 622, 625, 662.
- v. Elizabeth (39 N. J.), 403.
- v. Endom, 178, 187.
- v. Engle, 56.
- v. Eureka, 411.
- v. Ewing, 215.
- v. Express Co., 2, 198.
- v. Fagan, 112.
- v. Falkinburge, 56, 429, 759.
- v. Farmers' Bank, 232, 331.
- v. Ferris, 410.
- v. Field, 575.
- v. Flavell, 42, 214.
- v. Foley, 104, 477.
- v. Fournet, 726.
- v. Franklin Co., 325.
- v. Frappart, 581.
- v. Frazier, 48, 721.
- v. Freeman, 601.
- v. Fuller, 206, 209, 615, 625, 639, 644, 646.
- v. Fyler, 736, 738, 742, 751.
- v. Gadsden Co., 342.
- v. Gaffney, 172, 173, 174.
- v. Gary, 822.
- v. Gaston, 86.
- v. Gates, 335.
- v. Georgia R. Co., 69.

State v. Gosper Co. Com'rs, 347, 429.

- v. Gracey, 200.*
- v. Graham (25 La. An.), 121.*
- v. Graham (8 Am. & Eng. Corp. Cas.), 291.*
- v. Gurney, 46.*
- v. Haben, 123, 142, 144, 691, 767.*
- v. Hackensack Imp. Co., 654.*
- v. Hagood, 324.*
- v. Haight, 4, 214, 373, 753.*
- v. Halifax, 15, 538.*
- v. Hamilton, 353, 389.*
- v. Hancock, 210, 211, 214.*
- v. Hannibal, etc., R. Co., 192, 200, 204, 214, 223.*
- v. Hardcastle, 336, 339.*
- v. Hardin, 355.*
- v. Harney, 708, 713.*
- v. Harper, 711.*
- v. Harris, 137, 232, 712, 737.*
- v. Hathorn, 716.*
- v. Hay, 161, 601.*
- v. Hayne, 572, 577.*
- v. Hays, 112.*
- v. Heman, 301, 463.*
- v. Herod, 598, 603.*
- v. Herron, 726.*
- v. Hill, 716.*
- v. Hipp, 581, 593.*
- v. Hoboken, 593.*
- v. Hodgdon, 579.*
- v. Hodges, 764.*
- v. Hoffman, 161, 364.*
- v. Holmes, 578, 604.*
- v. Hood, 213, 233.*
- v. Horner, 743.*
- v. Housatonic R. Co., 205.*
- v. Howard, 355.*
- v. Howard Co. Court, 374.*
- v. Howran, 32.*
- v. Hudson, 44, 648, 759.*
- v. Huffaker, 453.*
- v. Hug, 735.*
- v. Humphreys, 347.*
- v. Ill. Cent. R. Co., 386.*
- v. Illyes, 42.*
- v. Indianapolis, 183.*
- v. Irons, 375.*
- v. Jackson, 84, 87.*
- v. Jersey City (24 N. J.), 397, 696.*
- v. Jersey City (25 N. J.), 364, 366, 655.*
- v. Jersey City (26 N. J.), 329.*
- v. Jersey City (28 N. J.), 364.*
- v. Jersey City (29 N. J.), 590, 671.*
- v. Jersey City (35 N. J.), 284, 313, 637, 751, 759.*
- v. Jersey City (37 N. J.), 311.*
- v. Jersey City (42 N. J.), 207, 625, 659, 662.*
- v. Jersey City (44 N. J.), 355.*
- v. Jersey City (45 N. J.), 221.*
- v. Jervey, 797.*
- v. Jones (24 Minn.), 220.*

State v. Jones (5 Texas), 221.

- v. Jones (19 Ind.), 335.*
- v. Jones (95 Ind.), 499.*
- v. Jones (39 N. J.), 376, 377.*
- v. Justices, 603.*
- v. Kennington, 733.*
- v. Kingsland, 757, 759.*
- v. Kinkead, 230.*
- v. Kirby, 757.*
- v. Klein, 163.*
- v. Koster, 65, 333.*
- v. Krollman, 203, 206.*
- v. La Fayette Co. Court, 733.*
- v. Lancaster Co., 32.*
- v. Lanier, 711.*
- v. Lathrop, 136.*
- v. Lean, 235.*
- v. Leaphart, 767.*
- v. Leavell, 353.*
- v. Leavenworth, 766.*
- v. Lee, 573.*
- v. Leicester, 214.*
- v. Leffingwell, 60, 61, 64, 129, 142, 615, 616, 693.*
- v. Leggett, 376.*
- v. Lindell Hotel, 421.*
- v. Lott, 709.*
- v. La. Savings, etc., Co., 356.*
- v. Lowenthal, 716.*
- v. Lutz, 797.*
- v. Lyon, 203, 206.*
- v. Macon Co. Court, 103, 279, 766.*
- v. Madison, 735.*
- v. Magill, 510, 742.*
- v. Maginnis, 423, 620.*
- v. Maguire, 349.*
- v. Maine Cent. R. Co., 381, 384.*
- v. Manchester, 757.*
- v. Manning, 759.*
- v. Mansfield, 214.*
- v. Manz, 453, 462.*
- v. Matthews, 375, 713.*
- v. Maxwell, 217, 218.*
- v. Mayhew, 43, 744.*
- v. Maysville, 277, 736.*
- v. McAllister, 436.*
- v. McBride, 327, 723.*
- v. McCann, 121.*
- v. McChesney, 361.*
- v. McClurg, 753.*
- v. McCrillus, 733.*
- v. McFarland, 251.*
- v. McFetridge, 534.*
- v. McGinly, 290.*
- v. McGinnis (37 Ark.), 95.*
- v. McGinnis (26 La. An.), 324, 429.*
- v. McIntosh, 341, 711.*
- v. McLaughlin, 765.*
- v. McNally, 797.*
- v. Metz, 161.*
- v. Miami Co., 393, 727.*
- v. Miller, 72.*
- v. Mills, 207.*

- State v. Milwaukee, 735.
 v. Mining Co. (12 Nev.), 421.
 v. Mining Co. (14 Nev.), 436.
 v. Mining Co. (15 Nev.), 289, 366, 436.
 v. Minton, 214.
 v. Mitchell, 820.
 v. Mobile Co., 44.
 v. Montclair, etc., R. Co., 309.
 v. Moore, 87, 138.
 v. Moss, 457.
 v. Myers, 313.
 v. Newark (25 N. J.), 214, 222, 232, 430, 625.
 v. Newark (26 N. J.), 6, 301.
 v. Newark (27 N. J.), 207, 208, 591, 639, 651, 652, 758.
 v. Newark (32 N. J.), 758.
 v. Newark (34 N. J.), 300, 311.
 v. Newark (35 N. J.), 72, 207, 209, 660, 664.
 v. Newark (36 N. J.), 209, 409, 484, 620.
 v. Newark (38 N. J.), 207.
 v. Newark (39 N. J.), 84.
 v. Newark (40 N. J.), 193, 292, 295.
 v. Newark (42 N. J.), 455.
 v. New Brunswick, 658, 664.
 v. New Orleans, 76, 630, 737, 788, 739, 740.
 v. Norris, 100.
 v. North, 99, 200.
 v. Nor. Cent. R. Co., 67, 189, 212.
 v. Nor. Pac. R. Co., 212.
 v. Norwich, etc., R. Co., 214.
 v. Norwood, 305.
 v. Noyes, 63.
 v. O'Hara, 186, 601.
 v. Ormsby Co., 419, 747.
 v. Orvis, 335.
 v. Osawkee, 117.
 v. Padden, 338.
 v. Parker (32 N. J.), 71, 101, 170, 205.
 v. Parker (33 N. J.), 200, 361.
 v. Parker (34 N. J.), 361, 387, 748, 759.
 v. Parker (35 N. J.), 387.
 v. Passaic, 645.
 v. Perrine, 726.
 v. Person, 378.
 v. Pettit, 372.
 v. Petway, 232.
 v. Phalen, 604.
 v. Philadelphia, etc., R. Co., 8, 189, 380.
 v. Phillips Co., 353.
 v. Pinckney, 90, 579.
 v. Plainfield, 430.
 v. Police Commissioners, 682.
 v. Police Jury, 726, 736, 739.
 v. Portage, 244, 589, 647, 666.
 v. Powers, 202, 230, 748, 757.
 v. Prettyman, 581.
- State v. Pullman Car Co., 97, 212.
 v. Quaife, 758.
 v. Racine, 735.
 v. Railroad Co. (40 Md.), 99.
 v. Railroad Co. (45 Md.), 212.
 v. Railroad Co. (75 Mo.), 335.
 v. Railroad Corporations, 197.
 v. Rainey, 46, 736.
 v. Randolph, 217, 410.
 v. Reeves, 331.
 v. Register of Deeds, 460.
 v. Reimenschneider, 167.
 v. Rice, 240, 726.
 v. Richardson, 494.
 v. Richland, 136.
 v. Roberts, 598.
 v. Robertson, 207.
 v. Rollins, 288, 487.
 v. Ross (7 Yerg.), 55, 60.
 v. Ross (24 N. J.), 202.
 v. Ross (23 N. J.), 371, 757.
 v. Runyon, 193, 220, 365, 376.
 v. Rushing, 708, 710, 717.
 v. Saalman, 65, 338, 429.
 v. Sack, 450.
 v. Saline Co., 765.
 v. Sanderson, 765.
 v. Sargeant, 493.
 v. Savings Co., 187, 356.
 v. Schaack, 540.
 v. Schlier, 197, 243.
 v. Schnecko, 743.
 v. Severance, 16, 294, 295, 384, 420.
 v. Shipper, 356.
 v. Shortridge, 102.
 v. Shreveport, 76, 740.
 v. Shurts, 372.
 v. Sickles, 65, 331, 333.
 v. Sies, 581.
 v. Silvers, 415.
 v. Sinks, 596.
 v. Slavens, 736.
 v. Smith, 737.
 v. Snedeker, 754.
 v. Southwestern R. Co., 385.
 v. Squires, 305.
 v. Staats, 376.
 v. Staley, 743.
 v. State Auditor, 328.
 v. Steamship Co., 16.
 v. Stephens, 6, 577, 578.
 v. Sterling, 227, 604.
 v. St. Louis, 641.
 v. St. Louis County Court, 143, 759.
 v. St. Louis, etc., R. Co. (77 Mo.), 292, 335.
 v. St. Louis, etc., R. Co. (9 Mo. App.), 19, 325.
 v. St. Paul, etc., R. Co., 212, 221.
 v. Strader, 347.
 v. Stutz, 605.
 v. Swinney, 713.

- State v. Tappan**, 687, 691.
v. Taylor, 726, 740.
v. Thomas, 282, 389.
v. Thompson, 342, 415, 463, 466.
v. Tilley, 583.
v. Tolan, 254.
v. Town Council, 205.
v. Township Committee, 169, 170.
v. Treasurer, 743.
v. Trenton, 220.
v. Tunis, 212, 229.
v. Union (36 N. J.), 404, 408.
v. Union (33 N. J.), 300.
v. U. S. & Can. Express, 193.
v. Vanderbilt, 309.
v. Van Every, 298, 347, 349, 456.
v. Van Winkle, 385.
v. Volkman, 186.
v. Wade, 714, 715.
v. Walker, 585.
v. Walton, 712.
v. Warford, 161.
v. Wapello Co., 132, 345.
v. Washoe Co., 281, 418, 423, 754.
v. Waterville Savings Bank, 19, 295.
v. Weed, 797.
v. Welch, 353, 453.
v. Werner, 445.
v. West, 578.
v. Western, etc., R. Co., 211, 214.
v. Western U., etc., Co., 145, 188.
v. Whittaker, 578.
v. Whitworth, 742.
v. Williams, 435.
v. Williston, 400, 502.
v. Wilson, 213.
v. Wingfield, 450.
v. Winn, 512.
v. Wise, 310.
v. Woodbridge, 407.
v. Woodruff, 205.
v. Woodside, 334, 705, 708, 711, 799.
v. Wright, 67.
v. Yearby, 579.
v. Yellow Jacket, etc., Co., 16, 17.
State Auditor v. Jackson Co., 176, 261, 284, 286, 352, 413, 419, 423, 520.
State Bank v. Madison, 214.
v. People, 69, 182.
State Board of Education v. Aberdeen, 684, 767.
State Freight Tax, 94, 96.
State Lottery v. New Orleans, 69.
State Railroad Tax Cases, 169, 181, 383, 389, 421, 760, 763.
State Tax on Foreign Held Bonds, 22, 79, 81, 160, 231, 232.
State Tax on Railway Gross Receipts, 97, 576.
State Tonnage Tax Cases, 91, 92.
State Treasurer v. Auditor-General, 212.
State Treasurer v. Philadelphia, etc., R. Co., 87, 98, 99.
v. Somerville, etc., R. Co., 214.
v. Township Committee, 169, 170.
v. Wright, 14.
Staunton v. Harris, 467.
Stayton v. Hulings, 283, 290.
St. Catherine Dock Co. v. Higgs, 618.
St. Charles v. Nolle, 60, 142, 160, 276, 582.
St. Charles St. R. Co. v. Assessors, 389, 400.
St. Clair School Board, Appeal of, 761, 774.
Stead v. Course, 473, 477, 496, 517.
Steamer Block v. Richland, 97, 580.
Steam Nav. Co. v. Wasco Co., 789.
Steamship Co. v. Portwardsens, 92.
v. Tinker, 93.
Stearns v. Miller, 219, 361, 794.
Stears v. Hollenback, 501.
Stebbins v. Challiss, 497, 776.
v. Guthrie, 511, 554.
Steckert v. East Saginaw, 341, 639.
Steedman v. Planters' Bank, 520.
Steele v. Spruance, 554.
Steeple v. Downing, 521.
Steere v. Walling, 56, 367.
Stein v. Mobile (17 Ala.), 70, 403.
v. Mobile (24 Ala.), 63, 348.
v. Mobile (49 Ala.), 588.
v. Mobile (54 Ala.), 408.
Steiner v. Cox, 543.
v. Franklin Co., 768, 770.
Stephan v. Daniels, 302, 310, 814, 815.
Stephens v. Booneville, 376.
v. Holmes, 510, 512, 542.
v. Wilkins, 424, 425, 801.
Stephenson v. Martin, 546.
v. Mansony, 729.
v. Wilson, 561.
Sterling, etc., Co. v. Harvey, 850.
Stetson v. Bangor, 70.
v. Kempton, 136, 277, 278, 324, 429, 790.
Steuart v. Baltimore, 657.
v. Megler, 782.
v. Meyer, 484.
Stevens v. Brown, 260.
v. Cassady, 534.
v. Hay, 707, 708.
v. Hollister, 409.
v. McNamara, 471.
v. Newcomb, 791.
v. Rutland R. Co., 768, 770.
v. State, 601.
v. Williams, 489.
Stevenson v. Bay City, 716.
Steward v. Jefferson, 60, 63.
v. Shoenfelt, 304, 400, 406.
Stewart v. Corbin, 201, 552.
v. Coulter, 409, 528, 549.
v. Davis, 205.
v. Hawley, 787.

- Stewart v. Maple, 749.
 v. McSweeney, 520.
 v. Potts, 576, 577.
 v. Stringer, 260, 261.
 v. Trevor, 304, 365, 394, 395, 396, 559.
 Stickney, *Ex parte*, 727.
 Stickney v. Bangor, 749, 791.
 v. Huggins, 287.
 Stierlin v. Daley, 514, 523.
 Stilwell v. Corwin, 174, 416.
 Stilz v. Indianapolis, 159, 162, 399, 776.
 Stinson v. Boston, 374, 376.
 v. Richardson, 502.
 v. Smith, 632.
 v. Snow, 260, 261.
 Stipp v. Brown, 569.
 St. John v. East St. Louis, 609, 629.
 St. Joseph v. Anthony, 329, 636, 644.
 v. O'Donoghue, 636, 639.
 v. Railroad Co., 204.
 v. Rogers, 331.
 St. Joseph's Asylum, Matter of, 667.
 St. Joseph Board of Pub. Schools v. Patten, 101, 348.
 St. Joseph Co. Com'rs v. Ruckman, 18, 301, 368.
 St. Joseph, etc., R. Co. v. Smith, 378.
 St. Joseph's Church v. Assessors, 203, 400.
 St. Louis v. Armstrong, 520, 639.
 v. Bircher, 224, 583.
 v. Boatmen's Ins. Co., 71, 598.
 v. Bressler, 525, 674.
 v. Clemens, 65, 639, 647.
 v. Coons, 520.
 v. Ferry Co. (40 Mo.), 56.
 v. Ferry Co. (11 Wall.), 378.
 v. Gorman, 174, 821.
 v. Green, 191, 224, 437, 572.
 v. Laughlin, 63, 276, 574, 577, 584.
 v. Oeters, 619, 640.
 v. Savings Bank, 63, 69.
 v. Siegrist, 581.
 v. Spiegel, 169.
 v. Steinberg, 171.
 v. Sternberg, 437, 572, 577.
 v. Woodruff, 583.
 St. Louis Building, etc., Ass'n v. Lightner, 797.
 St. Louis Co. Com'rs v. Nettleton, 419.
 St. Louis M. L. Ins. Co. v. Assessors, 214, 222, 223, 224.
 St. Louis Nat. Bank v. Papin, 391.
 St. Louis Pub. Schools v. St. Louis, 207, 652, 653.
 St. Louis, etc., R. Co. v. Anthony, 437.
 v. Berry, 212.
 v. Clark, 264.
 v. Surrell, 388, 420.
 St. Mary's Church v. Tripp, 203, 400.
 St. Mary's College v. Crowl, 205.
 St. Mary's Industrial School v. Brown, 125.
 Stockdale v. Ins. Co., 801.
 Stockle v. Silsbee, 145, 255, 268, 497.
 Stockman v. Robbins, 355.
 Stockwell v. State, 499.
 v. Vietch, 819.
 Stockton v. Clark, 659.
 v. Dunham, 398.
 v. Skinner, 659.
 v. Staples, 370.
 v. Whitmore, 656, 659.
 Stoddard v. Johnson, 643, 668.
 Stoetzel v. Jackson, 394.
 Stokes v. Scott Co., 132.
 v. State, 445.
 Stone v. Bean, 409.
 v. Charlestown, 162.
 v. School District, 336.
 v. Viele, 758.
 v. Woodbury, 753, 807.
 Stoner v. Flournoy, 159, 233.
 Storm v. Odell, 756.
 Storrs v. Utica, 173, 689.
 Stoudenmire v. Brown, 521.
 Stout v. Keyes, 512.
 v. Merrill, 534.
 Stoutz v. Brown, 88.
 Stovall v. Connor, 415.
 v. Fowler, 568.
 St. Paul v. Merritt, 21, 365.
 v. Traeger, 587.
 St. Peter's Church v. Scott Co., 205, 409.
 Strachan v. Brown, 754.
 Strang, *Ex parte*, 249, 250, 254.
 Strang v. Burris, 534.
 Strassheim v. Jerman, 525.
 Stratton v. Collins, 193, 227.
 Straub v. Gordon, 571, 599, 601.
 Strauch v. Shoemaker, 300, 406.
 Strauss v. Pontiac, 161.
 Straw v. Poor, 460, 496.
 Street Railway Co. v. Philadelphia, 279.
 Striker v. Kelly, 290, 518.
 Strohm v. Iowa City, 767.
 Strong v. Burdick, 505.
 Stroud v. Philadelphia, 590, 619, 644.
 Strusburgh v. New York, 753, 780.
 Stuart v. Kalamazoo School District, 120, 348, 684, 768.
 v. Palmer, 48, 244, 363, 364, 366.
 Stubblefield v. Borders, 508, 568.
 Sturdevant v. Mather, 504.
 Sturges v. Carter, 214, 291.
 v. Crowninshield, 80, 264.
 Stuyvesant v. New York, 344.
 Styles v. Weir, 486.
 Sudbury v. Heard, 808.
 Sudderth v. Brittain, 356.
 Sullivan v. Davis, 409, 476.
 v. Merriam, 546.
 v. Walton, 341.
 Sully v. Drennan, 334.
 v. Poorbaugh, 547.

- Sumner v. Dorchester**, 789, 816.
 v. Pinney, 17.
 v. Sherman, 287.
Sumter Co. v. National Bank, 84.
Sunbury & Erie R. Co. v. Cooper, 112, 113.
Sun Mut. Ins. Co. v. Board of Liquidation, 121.
 v. New York, 232, 386.
Supervisors v. Auditor-General, 756.
 v. Birdsall, 437.
 v. Bowen, 437.
 v. Coffinbury, 707.
 v. Davenport, 374, 376.
 v. Durant, 735.
 v. Galbraith, 339.
 v. Manny, 816.
 v. People, 130, 144, 239, 633.
 v. Railroad Co., 101.
 v. Rees, 289, 716.
 v. Rogers, 745.
 v. Stanley, 391.
 v. United States (4 Wall.), 232, 735.
 v. United States (18 Wall.), 328.
Suppiger v. People, 153.
Susquehanna Bank v. Supervisors of Broome, 755, 756, 760, 766.
Susquehanna Depot v. Barry, 137.
Sutton v. Calhoun, 486.
 v. Nelson, 495.
 v. Stone, 514, 545, 551, 569.
Sutton's Heirs v. Louisville, 2, 214, 612, 625.
Sutton Manuf. Co. v. Sutton, 311.
Suydam v. Keys, 791.
Swallow v. Thomas, 374.
Swan v. Knoxville, 449.
 v. State, 708.
 v. Williams, 61.
Swan Point Cemetery v. Tripp, 303.
Swann v. Cumberland, 758.
Swanton v. Ball, 712.
Sweat v. Boston, etc., R. Co., 84.
Sweetzer v. Hay, 706, 708.
Swift v. Agnes, 507.
 v. Kyler, 519.
 v. Newport, 64, 158, 346.
 v. Poughkeepsie, 756, 757, 807.
 v. Williamsburg, 670.
Swinney v. Beard, 760, 762.
Swope v. Prior, 537.
Sydnor v. Palmer, 300, 560.
- T.**
- Taaffe v. Downes**, 787.
Taber v. New Bedford, 760.
Tabler v. Callanan, 562.
Tabor v. Cook, 784.
Tacey v. Irwin, 451, 453.
Taft v. Barrett, 315, 347, 424, 483.
- Taft v. Kessel**, 506.
 v. Lunenburg, 348.
 v. Wood, 348, 349, 791.
Taintor v. Lewis, 418.
Talbot v. Dent, 133, 822.
 v. Hudson, 104.
Talbot Co. Com'rs v. Queen Anne Co., 163.
Tallassee M'fg Co. v. Glenn, 785.
 v. Spigener, 763.
Tallant v. Burlington, 807, 820.
Tallmadge v. Supervisors, 422.
Tallman v. Butler Co., 5, 6, 168, 243.
 v. Cook, 338, 427.
 v. Janesville, 311.
 v. White, 275, 277, 329, 408, 455, 517, 518.
Tanner v. Albion, 601.
Tapp v. Bonds, 503.
Tappan v. Merchants' Nat. Bank, 56, 392.
Tarde v. Benseman, 584.
Tarr v. Haughey, 542.
Tarver v. Commissioners, 737.
Tash v. Adams, 129, 819.
Tatem v. Wright, 57, 232.
Tax Cases, The, 211, 225, 227, 229, 230, 385, 386.
Tax Sale, Ex parte, 485, 487.
Taylor v. Board of Health, 60, 634, 809, 812.
 v. Buckner, 568.
 v. Burdett, 460.
 v. Burnap, 754.
 v. Chandler, 2, 197.
 v. Courtney, 542, 557, 569.
 v. Downer, 329, 609.
 v. French, 289.
 v. Henry, 317, 320, 340.
 v. Miles, 299, 560, 566.
 v. Moore, 418.
 v. Newbern, 63.
 v. Palmer, 5, 207, 627, 671, 673, 674.
 v. People, 455, 629.
 v. Pine Bluff, 598.
 v. Skrine, 250, 254, 256.
 v. Snyder, 501.
 v. St. Louis Co. Court, 374.
 v. Stringer, 492.
 v. Thompson, 136, 303, 763.
 v. United States, 271.
 v. Youngs, 409.
Taymouth v. Koehler, 337.
Tebbetts v. Job, 475.
Teegarden v. Racine, 620, 667.
Telegraph Co. v. Texas, 85, 87, 95, 96.
Telle v. Fish, 521.
Temple v. Sumner, 579.
Temple Grove Seminary v. Cramer, 203, 779.
Tennessee v. Sneed, 81, 82.
 v. Whitworth, 212, 232.
Tenney v. Lenz, 199, 601.

- Terrett v. Sharon, 768, 770.
 v. Taylor, 299, 701.
 Terrill v. Groves, 401.
 Territory v. Reyburn, 435.
 Terry v. Hartford, 645.
 Texas Banking, etc., Co. v. State, 198, 572.
 Thacker, *Ex parte*, 408, 528.
 Thames Bank v. Lovell, 94.
 Thames Manuf. Co. v. Lathrop, 292, 305, 365, 792, 797.
 Tharp v. Hart, 460, 551.
 Thatcher v. People, 810, 832, 835, 865, 429, 430, 820.
 v. Powell, 454, 473, 517, 526, 528.
 Thayer v. Boston, 370, 371, 416.
 v. Smith, 784.
 v. Stearns, 260, 336, 352, 428.
 Thein v. Voegtlander, 115.
 Theological Seminary v. People, 208.
 Thevenin v. Slocum's Lessee, 463, 475.
 Thibodaux v. Keller, 374, 409, 485.
 Thiel College v. Mercer Co., 202.
 Thomas v. Gain, 363, 620, 641, 662, 781.
 v. Leland, 108, 128, 130, 133, 154, 651, 698.
 v. Stickle, 309, 556, 559.
 Thomasson v. State, 599, 602.
 Thompson v. Allen Co., 745.
 v. Burhans, 401, 455, 456, 537.
 v. Caldwell, 569.
 v. Carroll's Lessee, 396.
 v. Commonwealth, 295.
 v. Draining Co., 616.
 v. Ela, 395, 396.
 v. Fisher, 406.
 v. Floyd, 63.
 v. Gardner, 436.
 v. Merriam, 514, 515.
 v. Pacific R. Co., 85, 89, 90.
 v. Pittston, 137.
 v. Rogers, 442.
 v. Savage, 468, 531, 547.
 v. Schermerhorn, 65.
 v. Tinkcom, 361.
 v. Ware, 522.
 Thomson v. Ebbetts, 786.
 v. Norris, 809.
 Thomson's Heirs v. Gotham, 473.
 Thornburgh v. Cole, 564.
 Thorndike v. Boston, 369, 370.
 Thornton, *Ex parte*, 96, 198, 729.
 Thornton v. Jones, 561.
 v. Smith, 542.
 Thurston v. Little, 352, 354.
 v. Miller, 432, 516.
 Thweatt v. Black, 435, 515, 541.
 Tice v. Derby, 502.
 Tidd v. Rines, 412.
 Tide Water Co. v. Costar, 46, 243, 245, 661.
 Tiernan v. Rinker, 95.
 Tierney v. Lumbering Co., 554.
 Tift v. Buffalo, 307.
 Tift v. Griffin, 50, 526, 720.
 Tillman v. Davis, 260.
 Tillotson v. Small, 498.
 Tilson v. Thompson, 512, 514.
 Tilton v. Railroad Co., 411.
 Timberlake v. Brewer, 708, 720.
 Timm v. Harrison, 181, 182.
 Tinslar v. Davis, 288, 296.
 Tinsley v. Rusk Co., 714.
 Tobin v. Morgan, 207, 341.
 Toby v. Wareham, 775.
 Toledo, etc., R. Co. v. La Fayette, 774.
 Toll Bridge Co. v. Osborn, 224, 226, 227, 228.
 Tolman v. Hobbs, 461, 462, 483.
 Tomlinson v. Branch, 63, 212.
 v. Jessup, 72, 204.
 v. Long, 261.
 Tompkins v. Ashby, 267.
 v. Railway Co., 441, 444.
 Tonella v. State, 581.
 Torrent v. Gager, 57.
 Torrey v. Milbury, 284, 289, 335, 429, 816.
 Touchard v. Touchard, 639.
 Towle v. Holt, 495, 534.
 Townsen v. Wilson, 173, 308.
 Townsend v. Downer, 478, 479.
 v. New York, 326, 779.
 v. Prowattain, 447.
 Townsend, etc., Bank v. Todd, 491, 496.
 Township Board v. Hastings, 335.
 Traders' Ins. Co. v. Farwell, 752.
 Trainor, Succession of, 454, 470, 481.
 Transportation Co. v. Parkersburg, 93.
 v. Wheeling (9 W. Va.), 91.
 v. Wheeling (99 U. S.), 91, 93.
 Trapp v. White, 582.
 Trask v. Maguire, 204.
 Trav. Ins. Co. v. Patten, 501.
 Traverse v. Inslee, 819.
 Treadwell v. Patterson, 497.
 Treasurer v. Bates, 707.
 Treasurers v. Hilgard, 709.
 Trego v. Huzzard, 499.
 Tremont v. Clark, 797.
 Tremont Bank v. Boston, 229, 230, 232.
 Trenholm v. Charleston, 14, 17.
 Trescott v. Moan, 257, 705, 708, 799.
 Trevor v. Emerick, 499.
 Tribble v. Frame, 260.
 Trigally v. Memphis, 63.
 Trigg v. Lewis' Ex'rs, 260, 261.
 Trinity Church v. Boston, 203.
 Trinity College v. Hartford, 612.
 Tripp v. Brown, 370.
 v. Insurance Co., 749.
 Troutman v. May, 559.
 Trowbridge v. Horan, 305, 397.

Troy Iron and Nail Factory v. Winslow, 221.
 Troy, etc., R. Co. v. Kane, 801.
 Truesdell, Appeal of, 769.
 Truesdell v. Green, 489.
 Truett v. The Justices, 566, 766.
 Trufler, *In re*, 329.
 Trull v. Board of Com'rs, 101.
 Trumbo v. People, 254.
 Trumbull v. White, 68, 331.
 Trust and Guaranty Co. v. Portsmouth, 764.
 Trustees v. Bailey, 800.
 v. Deposit Bank, 228.
 v. Guenther, 311, 312, 715, 785.
 v. McCaughey, 300.
 v. McConnell, 180, 181.
 v. Railway Co., 143.
 v. Roome, 57, 111, 379.
 v. Trenton, 445.
 Trustees of Church v. Ellis, 207, 652.
 Trustees of Schools v. Tatman, 143.
 v. Trenton, 172, 193.
 Trustees of University v. Champaign Co., 173.
 v. Indiana, 71.
 Tucker v. Aiken, 249, 256, 257.
 v. Bond, 261.
 v. Drain Com'r, 754.
 v. Ferguson, 69, 70, 89.
 v. Justices, etc., 300, 303, 329, 429.
 v. Raleigh, 687.
 v. Stokes, 716.
 Tufts v. Lexington, 806.
 Tullis v. Brawley, 260.
 Tully v. Bauer, 487, 498.
 Tunbridge v. Smith, 303, 305, 412, 413.
 Tupelo v. Beard, 805.
 Turner v. Althaus, 6, 46, 809.
 v. Burlington, 57.
 v. Franklin, 797.
 v. Smith, 411, 510.
 v. State, 90.
 Turney v. Yeoman (14 Ohio), 520.
 v. Yeoman (16 Ohio), 408.
 Turpin v. Eagle Creek, etc., Co., 630, 666.
 Tuttle v. Cary, 336.
 v. Everett, 810.
 Tweed v. Metcalf, 290, 311, 419, 422, 426, 508.
 Twenty-eight Cases, 269.
 Twenty-sixth St., Matter of, 612, 639.
 Twiggs v. Chevallie, 462.
 Twitchell v. Shaw, 799.
 Twombly v. Kimbrough, 256, 763.
 Twycross v. Fitchburg R. Co., 589.
 Tyler v. Beacher, 105, 115.
 v. Flanders, 251.
 v. Hardwick, 808.
 Tyson v. School Directors, 2, 46, 104, 187, 696.
 v. State, 80.

U.

Uhl v. Taxing District, 78.
 Uhrig v. St. Louis, 625, 632, 639.
 Underhill v. Calhoun, 448.
 Underwood v. Brockman, 810.
 v. Robinson, 797.
 Union Bank v. Hill, 86.
 v. New York, 811.
 v. State, 56, 232.
 Union Co. v. James, 577.
 Union Co. Court v. Robinson, 734.
 Union Improvement Co. v. Commonwealth, 72.
 Union Insurance Co. v. Weber, 333, 426.
 Union, etc., Ins. Co. v. Dice, 560.
 Union Nat. Bank v. Chicago, 84.
 Union Pac. R. Co. v. Buffalo Co., 328.
 v. Cheyenne, 295, 296, 383, 760.
 v. Dawson Co., 328, 766.
 v. Donnellan, 248.
 v. Lincoln Co., 760.
 v. Penniston, 89.
 v. Pottawatamie Co., 184.
 v. Ryan, 763, 764.
 v. York Co., 328.
 Union Passenger R. Co. v. Philadelphia, 71, 206.
 Union R., etc., Co. v. Skinner, 468.
 Union S. B. Co. v. Buffalo, 378, 416.
 Union Tel. Co. v. Mayer, 4.
 Union Trust Co. v. Weber, 290, 342, 346, 384, 385, 386, 399, 426, 454, 749, 750, 776.
 United, etc., Co. v. Commissioner, 69.
 United States v. Allen, 31.
 v. Bachelder, 254.
 v. Banks, 376.
 v. Barrels of Spirits, 270.
 v. Benzon, 223.
 v. Boyd, 712.
 v. Brice, 31.
 v. Brooklyn, etc., R. Co., 457, 459.
 v. Buchanan Co. Court, 742.
 v. Buffalo Park, 582.
 v. Burlington, 276.
 v. Caddies of Tobacco, 465.
 v. Cases of Cloth, 270.
 v. Central Nat. Bank, 362.
 v. Clark Co., 102, 726, 737.
 v. Cruikshanks, 100.
 v. Cutting, 575.
 v. Dandridge, 290.
 v. Dashiell, 711.
 v. Distilled Spirits, 269.
 v. Farrell, 444.
 v. Eckford, 714.
 v. Fisher, 264.
 v. Fisk, 575.
 v. Fort Scott, 658.
 v. Glab, 374.
 v. Halloran, 353.
 v. Hart, 31.

United States v. Hazard, 81.
 v. Hess, 469.
 v. Hodson, 270, 271.
 v. Hogsheads of Tobacco, 465.
 v. Howell, 707.
 v. Huger, 711.
 v. Hunewell, 31.
 v. Jackson Co., 58.
 v. Jefferson Co., 76, 735.
 v. Kenton, 575.
 v. Keokuk, 735, 745.
 v. Kirkpatrick, 290, 717.
 v. Lafayette Co. Court, 742.
 v. Labette Co., 726.
 v. Lawrence, 730.
 v. Lawton, 496.
 v. Lee, 452.
 v. Leverick, 31.
 v. Macon Co., 101, 736, 738.
 v. Mathoit, 461.
 v. Maurice, 248, 257, 705.
 v. McKinley, 111, 466.
 v. Memphis, 77, 239.
 v. Mobile, 76, 737.
 v. Morgan, 710, 711.
 v. New Orleans (2 Woods), 44, 76, 744.
 v. New Orleans (98 U. S.), 101, 348, 735, 736.
 v. New York Life, etc., Co., 31.
 v. Nicholl, 717.
 v. Olney, 269.
 v. Pacific R. Co., 18, 853, 441, 444, 445, 449.
 v. Prescott, 711.
 v. Railroad Co. (17 Wall.), 86, 231, 382, 438.
 v. Railroad Co. (17 Fed. Rep.), 221.
 v. Railway Co., 22.
 v. Riley, 246.
 v. Savings Bank, 818.
 v. Schellinger, 221.
 v. School District, 733.
 v. Silverman, 745.
 v. Spreckens, 466.
 v. Sterling, 737.
 v. Stone, 714.
 v. Tappan, 31.
 v. Taylor, 294.
 v. Thomas, 711.
 v. Tilden, 435.
 v. Tingey, 707.
 v. Townsend, 31.
 v. Tynen, 305.
 v. Van Zandt, 717.
 v. Vernon Co., 735.
 v. Watts, 269.
 v. Wigglesworth, 269.
 v. Wilson, 31.
 United States Exp. Co. v. Ellyson, 227.
 Universalist Society v. Leach, 253.
 University v. People, 67, 73, 180, 202.
 Updike v. Wright, 620, 654, 692.

Uppington v. Oviatt, 309, 644, 770.
 Upton v. Holden, 797.
 v. Kennedy, 290, 341, 342, 455, 497, 518, 521, 522.
 Usher v. Colchester, 137.
 v. Pride, 462.
 v. Taft, 481.
 Utah, etc., R. Co. v. Crawford, 776.

V.

Vaccari v. Maxwell, 251.
 Vail v. Beach, 205.
 v. Bentley, 43.
 v. Owen, 787, 789, 791.
 Valle v. Fargo, 325.
 Valpy v. Manly, 813.
 Van Allen v. Assessors, 84, 226, 232, 390.
 Van Antwerp, Matter of, 5, 53, 311, 312.
 Van Auker v. Highway Com'rs, 754.
 v. Monroe, 479.
 Van Benthuyzen v. Sawyer, 534, 541.
 Van Brundt v. Schenck, 803.
 Van Buren, Petition of, 618.
 Van Buskirk v. Drain Com'r, 754.
 Vance v. Corrigan, 450.
 v. Little Rock, 277, 329, 347, 349, 350, 744, 759.
 v. Schuyler, 290.
 Vancleave v. Milliken, 559.
 Van Cott v. Supervisors, 772.
 Vanderbilt v. Adams, 604.
 Vandine, Petitioner, 605.
 Van Doren v. New York, 779, 781.
 Van Hook v. Barnett, 707.
 Van Horn v. People, 190, 602.
 Vanover v. Justices, 275, 278, 324, 770.
 Van Rensselaer v. Kidd, 779.
 v. Witbeck, 413, 800.
 Van Riper v. North Plainfield, 325.
 Van Schaac v. Robbins, 477.
 Van Sicklen v. Burlington, 134.
 Van Steenburgh v. Bigelow, 787.
 Van Tassel v. Jersey City, 589, 609.
 Van Voorhis v. Budd, 397.
 Varney v. Stevens, 501.
 Vass v. Corrigan, 450.
 Vasser v. George, 487, 636, 638.
 Vaughan v. Bowie, 771, 781.
 Vaughn v. Stone, 485.
 v. Swayzie, 292, 293, 302, 306, 409, 510.
 Veazie v. China, 137.
 Veazie Bank v. Feno, 5, 6, 8, 13, 20, 45, 46, 83, 110, 112, 113.
 Veghte v. Bernards, 735.
 Veit v. Graff, 442.
 Venable v. Curd, 253.
 Venard v. Cross, 115.
 Venice v. Murdock, 331, 333.
 Verdery v. Dotterer, 499.

Vermont Cent. R. Co. v. Burlington, 214, 807.
 Vernon v. Nelson, 488.
 Vicksburg v. Butler, 814.
 v. Tobin, 93.
 Villey v. Jarreau, 249, 441.
 Vincennes University v. Indiana, 61.
 Vincent v. Moore, 466.
 Virden v. Bowers, 262, 438, 479, 483, 520, 522.
 Virginia v. Hall, 589, 629, 674.
 v. Justices, 282.
 Virginia, etc., R. Co. v. Washington Co., 198, 324, 329, 784.
 Vocht v. Reed, 819.
 Vogel v. Vogler, 877.
 Voght v. Aver, 373.
 Volger v. Sidener, 262, 440, 448, 454.
 Von Hoffman v. Quincy, 76, 81, 785, 786.
 Voris v. Thomas, 508, 507.
 Voss v. Frankfort, 346, 686.
 v. Willard, 361, 789.
 Voss v. School District, 768.

W.

Wabash, etc., R. Co. v. Johnson, 868, 761, 808.
 v. McCleave, 739.
 Wabunsee Co. v. Walker, 809.
 Waco v. Texas, 159.
 Waddell v. Judson, 261.
 v. Williams, 526.
 Wade v. Craven Co., 750.
 v. Matterson, 789.
 v. Richmond, 162, 768.
 Wadham College, 259.
 Wadleigh v. Marathon Co. Bank, 516, 561, 563.
 Wafford v. McKinna, 236.
 Waggener v. McLaughlin, 500.
 Wagoner v. Loomis, 776, 785.
 Wahschlager v. Liberty, 136.
 Wait v. Gilmore, 485.
 Waite v. Dowley, 392.
 Wakefield v. Patterson, 335.
 Wakely v. Nicholas, 551.
 Walcott v. People, 190, 327, 631.
 Walden v. Dudley, 797.
 v. Lee Co., 332, 709, 720.
 Waldo v. Portland, 136.
 Waldron v. Lee, 239, 346, 353, 718, 720, 741.
 v. McComb, 517.
 v. Tuttle, 478.
 Walker v. Burlington, 330, 413.
 v. Chapman, 284, 365, 401, 707, 719.
 v. Cochran, 748.
 v. Hallock, 787, 789, 794.
 v. Miner, 355, 426.
 v. Moore, 493.
 v. New Orleans, 588.

Walker v. Sargent, 534.
 v. Springfield, 181, 337.
 v. St. Louis, 809.
 Walkley v. Muscatine, 785.
 v. Nicholas, 551.
 Wall v. Trumbull, 290, 429, 430, 787, 788, 789, 790, 795, 799.
 v. Wall, 300, 302, 307, 497.
 Wallace v. Brown, 450, 452, 530.
 v. Menasha, 817.
 v. Scott, 394.
 v. Sexton, 560.
 v. Shelton, 243, 591, 630, 633, 648.
 v. Smith, 14.
 Wallace's Estate, 445, 453.
 Waller v. Perkins, 332.
 v. Yaeger, 174, 416, 423.
 Wallingford v. Fiske, 494.
 Wallis v. Bourg, 261.
 v. Smith, 14, 276, 277, 710.
 Wally's Heirs v. Kennedy, 300.
 Wahn v. Shearman, 557, 558, 559.
 Wals v. Grosvenor, 780.
 Walsh v. Bailie, 712.
 v. Mathews, 177, 209, 627, 672.
 v. Wilson, 505.
 Walter, Matter of, 661.
 Walter v. Bacon, 300.
 Walters v. Duke, 186.
 Walthall v. Rives, 504.
 Waltham Bank v. Waltham, 230, 338.
 Walton v. Gray, 450.
 v. Hollywood, 504.
 v. Westwood, 98, 373.
 Warnell v. Reed, 434.
 Wangler v. Black Hawk Co., 355.
 Ward, Matter of, 644, 646.
 v. Carson, 443.
 v. Dewey, 781.
 v. Flood, 121.
 v. Maryland, 86, 99, 598.
 v. Montgomery, 474, 519.
 v. Ward, 781.
 Warden v. Commissioners, 130.
 v. Supervisors, 20, 760.
 Wardens v. Burlington, 656.
 v. Philadelphia, 130.
 Ware v. First Parish, etc., 355, 436.
 v. Little, 299, 309.
 v. Percival, 789, 805, 815.
 v. Thompson, 400, 493.
 Waring v. Mayor, 95, 98.
 v. Savannah, 179, 180, 199, 201, 882.
 Warner v. Curran, 183.
 v. Shed, 797.
 Warren v. Grand Haven, 66, 412, 631, 648, 659, 819.
 v. Henley, 184, 608, 647.
 v. Marcy, 331.
 v. Paul, 86.
 v. Thomaston, 370.
 Warren Manuf. Co. v. Aetna Ins. Co., 100.

- Warren Railroad Co. v. Belvidere, 19, 292.
 Warrensburg v. Miller, 801.
 Warrington v. Furber, 287.
 Waseca Co. Bank v. McKenna, 761.
 Washburn v. Cutler, 560, 567.
 v. Oshkosh, 70, 159, 375.
 v. Walworth, 374.
 Washburn College v. Shawnee Co., 205.
 Washington v. Meigs, 602.
 v. Miller, 256.
 v. Nashville, 589.
 v. Pratt, 396, 483, 484, 496.
 v. State, 63, 177, 571, 601, 627.
 Washington Avenue, 54, 104, 142, 146, 247, 608, 624, 636, 645, 695.
 Washington Co. v. Berwick, 136.
 v. German Am. Bank, 485, 753.
 Washington, etc., Co. v. Kinnear, 260.
 Washington University v. Rouse, 71, 205.
 Waterbury v. Lawler, 706.
 Waterbury Sav. Bank v. Lawler, 773, 782.
 Water Commissioners v. East Saginaw, 736.
 Waterhouse v. Public Schools, 43, 64, 65.
 Waterman v. Harkness, 325.
 Water Power Co. v. Boston, 227.
 Waters v. Duke, 186.
 v. State, 45, 234, 706, 799.
 Waterson v. Devoe, 505, 564.
 Watertown v. Cady, 735.
 Waterville v. Kennebec Co., 150, 682.
 Watkins v. Eaton, 584.
 v. Inge, 256, 310, 483, 495, 587.
 v. Milwaukee, 617.
 Watson, *In re*, 95, 100.
 Watson v. Com'rs of Pamlico, 162.
 v. Davidson, 394.
 v. Phelps, 491.
 v. Princeton, 217.
 v. Sawyers, 467.
 v. Watson, 797, 799.
 Wattles v. Lapeer, 431, 435, 497.
 Watts v. McCleave, 332.
 Wauwatosa v. Gunyon, 457.
 Waverley v. Auditor, 770.
 Wayland v. Commissioners, 172, 178.
 Wayman v. Southard, 43.
 Wayne v. Savannah, 18, 436.
 Wayne Co. v. Del. & Hud. Canal Co., 210, 213.
 Weare v. Van Meter, 502.
 Weathersby v. Thoma, 510.
 Weaver v. Devendorf, 787, 788, 789, 791, 794.
 v. Grant, 403, 494.
 v. State, 749, 750, 760, 778.
 Webb v. Bidwell, 449, 523.
 Webber v. Commonwealth, 579.
 v. Gray, 797, 798, 799.
 Webber v. Virginia, 95, 96, 570.
 Weber v. Lee Co., 735.
 v. Railroad Co., 342.
 v. Reinhard, 45, 142, 169, 197, 353, 639.
 v. San Francisco, 781, 819.
 v. Schergens, 673.
 v. Traubel, 294, 329.
 v. Zimmerman, 727.
 Webster v. Baltimore Co., 138.
 v. Chicago, 523.
 v. French, 290.
 v. Harwinton, 136, 767, 770.
 v. Munger, 434.
 v. People, 65, 277, 324.
 v. Seymour, 17.
 v. Webster, 567.
 Wederstrandt v. Freyhan, 536.
 Weeks v. Gilmanton, 161.
 v. Milwaukee, 209, 215, 217, 244, 627, 634, 647, 780.
 Weet v. Brockport, 817.
 Weichselbaum v. Curlett, 500.
 Weightman v. Clark, 119, 143.
 Weimer v. Bunbury, 48, 710, 719, 720, 722.
 v. Potter, 547.
 Weinstein v. Newbern, 195.
 Weir v. Day, 121.
 v. Kitchens, 288, 455.
 Weisner v. Douglass, 46, 116, 117.
 Weister v. Hade, 136, 137.
 Welch v. Cook, 68.
 Welker v. Potter, 309.
 Weller v. St. Paul, 244, 460, 751, 781.
 Welles v. Battelle, 317, 320, 322, 397.
 Wells v. Atlanta, 134.
 v. Board of Education, 338, 752.
 v. Buffalo, 779.
 v. Burbank, 429, 487.
 v. Cole, 14.
 v. Dayton, 761.
 v. Jackson Manuf'g Co., 492.
 v. Railroad Co., 200.
 v. Smyth, 351, 415.
 v. State Board, 419, 420, 422.
 v. Weston, 142, 160, 192.
 Wellshear v. Kelly, 301, 526.
 Welsh v. Bell, 260.
 Welton v. Merrick Co., 809.
 v. Missouri, 94, 95, 100.
 Wendell v. Fleming, 256.
 v. Whitaker, 516.
 Wendover v. Lexington, 68, 70, 596, 601.
 Wentworth v. Gove, 257, 704.
 Wesleyan Academy v. Wilbraham, 202.
 West v. Bancroft, 134.
 v. Whittaker, 331, 338, 342, 776.
 West Baton Rouge v. Morris, 710, 714.
 West Bend v. Brown, 749.

- Westbrook v. Willey, 484, 518, 521, 537.
 West Chester Gas Co. v. Chester Co., 214, 223, 224.
 West Chester School District v. Darlington, 377.
 Western College v. Cleveland, 689.
 Western Railroad, Matter of, 221, 382.
 Western Railroad Co. v. Nolan, 219, 436, 748, 756, 758, 769, 789.
 Western Savings Fund Society v. Philadelphia, 185, 689.
 Western Transportation Co. v. Scheu, 378.
 Western U. Tel. Co. v. Leib, 57.
 v. Mayer, 98, 195, 196.
 v. Richmond, 90, 574.
 v. State, 198.
 Westfall v. Preston, 413, 421, 473, 790, 800, 821.
 Westhampton v. Searle, 284, 309, 389, 750.
 West Hartford v. Water Commissioners, 172, 173, 174.
 Westinghausen v. People, 571.
 Westlake v. St. Louis, 815.
 Westmore Lumber Co. v. Orne, 205.
 Weston v. Charleston, 5, 6, 12, 46, 83, 84.
 v. Supervisors, 71.
 West School District v. Merrills, 838.
 West Wisconsin R. Co. v. Supervisors, 69, 71, 72, 89.
 Wetherbee v. Dunn, 514, 530.
 Wetmore v. Multnomah Co., 195, 196.
 Wettig v. Bowman, 567.
 Weymouth, etc., Dist. v. Commissioners, 143.
 Whalen v. La Crosse, 669.
 Wharton v. Birmingham, 749, 799.
 v. School Directors, 45, 343, 769.
 Wheatly v. Covington, 284.
 Wheeler v. Addison, 446.
 v. Anthony, 396.
 v. Chicago, 284.
 v. Lampman, 260, 261.
 v. Merriman, 89, 555, 569.
 v. Plattsmouth, 44, 277.
 v. Wall, 60.
 v. Winn, 559.
 Wheeling v. Hawley, 811.
 Wheelock v. Archer, 448, 798.
 Whipple's Case, 449.
 Whistler v. Drain Com'rs, 754.
 Whitbeck v. Hudson, 754.
 White v. East Saginaw, 716.
 v. Flynn, 299.
 v. Greenhow, 75.
 v. Hart, 73, 77.
 v. Kent, 602, 605.
 v. Railroad Co., 88.
 v. People, 589, 615, 625, 629, 645.
 v. Quarles, 708.
 White v. State, 355, 453.
 Whiteford v. Probate Judge, 49, 642, 655, 657, 754.
 Whitehurst v. Coleen, 718.
 v. Gaskill, 482.
 Whiteley v. Lansing, 75, 735.
 White River Bank v. Downer, 260.
 White Sulphur Springs Co. v. Robinson, 6, 775.
 Whitfield v. Longest, 60, 579.
 Whiting v. Boston, 756, 769, 771.
 v. Bradley, 260.
 v. Quackenbush, 645, 666, 667.
 v. Sheboygan, 108, 117.
 v. Townsend, 645, 656, 673.
 Whitman v. Boston, 660.
 v. Taylor, 524, 528.
 Whitmore v. Learned, 409, 496, 546.
 Whitney v. Boston, 662.
 v. Gunderson, 409, 507.
 v. Marshall, 520, 560.
 v. Richardson, 554.
 v. Stow, 162.
 v. Thomas, 396, 793.
 Whitsell v. Northampton Co., 23, 56, 224, 232, 373, 389.
 Whittaker v. Haley, 14.
 v. Sumner, 260, 261.
 v. Wright, 466.
 Whitten v. Covington, 604.
 Whittlesey v. Clinton, 372.
 Whyte v. Nashville, 589.
 Wider v. East St. Louis, 686, 692.
 Wiggin v. New York, 779.
 v. Temple, 519, 522.
 Wiggins v. Chicago, 578.
 v. Holley, 473.
 Wiggins Ferry Co. v. East St. Louis, 93, 181, 205, 584.
 Wilcox v. Deer Lodge Co., 682.
 v. Ellis, 374.
 v. Gladwin, 437, 801.
 v. Middlesex Co., 221, 231.
 v. Smith, 250, 254, 256, 797.
 Wild's Lessee v. Serpell, 462.
 Wilder v. Cincinnati, 644.
 v. Cockshutt, 536.
 v. Savannah, 575.
 Wiley v. Bean, 473.
 v. Flournoy, 281, 285, 286, 419.
 v. Owens, 584.
 v. Parmer, 99.
 Wilhelm v. Russell, 262, 447.
 Wilkerson v. Walters, 776.
 Wilkes v. Dinsman, 787.
 v. Mayor, 807.
 Wilkey v. Pekin, 56, 160, 812.
 Wilkins v. Benning, 493.
 v. Detroit, 614.
 v. Tourtelot, 404.
 Wilkins' Heirs v. Huse, 488.
 Wilkins' Lessee v. Huse, 530.
 Wilkinson v. Bennett, 703, 709, 712.
 v. Cheatham, 128, 682, 737.

- Wilkinson v. Leland, 299.
 v. Peru, 766.
 Willard v. Blount, 411.
 v. Newburyport, 134, 135.
 v. Presbury, 613, 614.
 v. Redwood Co., 764.
 v. Strong, 501.
 Willcheck v. Edwards, 754.
 Willey v. Koons, 398.
 v. Scoville's Lessees, 401, 414, 493.
 William and Anthony Sts., Matter of, 525.
 Williams' Case, 14, 25, 30, 167.
 Williams v. Bank of Michigan, 61.
 v. Brace, 411, 589.
 v. Bruffy, 99.
 v. Cammack, 6, 46, 165, 191, 620, 624, 632, 648, 650.
 v. Case, 14, 25, 30, 167.
 v. Cent. Land Co., 469.
 v. Commonwealth, 573.
 v. Corcoran, 353.
 v. Detroit, 151, 190, 349, 613, 614, 631, 645, 772, 778.
 v. Garigues, 582.
 v. Gleason, 528.
 v. Hall, 332.
 v. Harris, 486, 526.
 v. Hilton, 467, 501.
 v. Holden, 377, 671, 705, 709.
 v. Kirtland, 520.
 v. Larkin, 335.
 v. Lemon, 518.
 v. McDonald, 656, 666.
 v. McLanahan, 515.
 v. Peinney, 760.
 v. Peyton's Lessee, 473, 517.
 v. Rees, 181.
 v. Saginaw, 751, 791, 808.
 v. Sangar, 267.
 v. School District (21 Pick.), 217, 253, 254, 259, 290, 339, 343, 428, 815.
 v. School District (38 Vt.), 103.
 v. State, 268, 464, 473, 517, 530.
 v. Townsend, 504.
 v. Weaver (100 U. S.), 391.
 v. Weaver (75 N. Y.), 392, 789, 792.
 v. Young, 395.
 Williamsburg v. Lord, 258, 268, 460, 471, 517, 552.
 Williamson v. Dow, 443, 803.
 v. Massey, 200.
 v. Railroad Co., 293.
 v. Russell, 550, 501, 516.
 Williamsport v. Brown, 295.
 Williamstown v. Willis, 256, 708, 797, 799.
 Willimantic v. Windham, 240.
 Willink v. Miles, 254.
 Willis v. Wetherbee, 438.
 Willison v. Bell, 471.
 Williston v. Colkett, 300, 403, 408.
 Wills v. Austin, 811.
 Wilmarth v. Burt, 799.
 Wilmerton v. Phillips, 782.
 Wilmington v. Macks, 577.
 v. Patterson, 603.
 v. Roby, 60, 63, 578, 579, 603.
 Wilmington, etc., R. Co. v. Brunswick Co., 194, 750.
 v. Reid, 71, 210, 213, 214, 230, 232, 233, 380.
 Wilson v. Anderson, 235.
 v. Bell, 471.
 v. Buckman, 196.
 v. Charlotte, 194, 334.
 v. Crafts, 513, 522.
 v. Gaines, 212, 213.
 v. Hamilton Co., 332, 764.
 v. Henry, 560, 561.
 v. Hurst's Ex'rs, 290.
 v. Lemon, 518.
 v. Longendyke, 763.
 v. Marsh, 219, 361, 787, 789.
 v. McKenna, 304, 460, 537.
 v. New York, 56.
 v. Pelton, 810.
 v. Seavey, 425, 798, 803.
 v. Supervisors of Albany, 729.
 v. Supervisors of Sutter, 177, 201, 244, 245.
 v. Waterson, 394.
 v. Weber, 384, 762.
 v. Wheeler, 217, 352.
 Winchester v. Cain, 533.
 v. Tozer, 463.
 Windham v. Portland, 162.
 Windman v. Vincennes, 763.
 Windsor v. Field, 671, 750.
 Wing v. Hall, 425, 516.
 Wingate v. Sluder, 63, 346.
 Winnisimmet Co. v. Chelsea, 353, 359, 457.
 Winslow v. Morrill, 162.
 Winstanley v. Meacham, 567.
 Winston v. Railroad Co., 279.
 Winter v. Atkinson, 502.
 v. Montgomery, 199, 805.
 Wires v. Farr, 569.
 Wirtz v. Girardy, 136.
 Wis. Cent. R. Co. v. Lincoln Co., 199.
 v. Taylor Co., 157, 199, 200.
 Wisconsin R. Imp. Co. v. Manson, 94.
 Wisconsin Tel. Co. v. Oakkoah, 268.
 Wisner v. Davenport, 426.
 Wistar v. Philadelphia, 614.
 Witherspoon v. Duncan, 21, 57, 83, 308, 396.
 Withnell v. Gartham, 259.
 Withowski v. Bradley, 346, 347.
 v. Skalowski, 756.
 Witt v. Mewhirter, 539.
 Withington v. Corey, 554.
 v. Eveleth, 790.
 v. Harvard, 706, 818.

- Woart v. Winnick, 569.
 Wofford v. Bailey, 784.
 v. McKinna, 568.
 Wolf v. Keokuk, 589, 645.
 v. Lansing, 581.
 v. Philadelphia, 452, 619, 642, 674.
 Wolfe v. Henderson, 545.
 v. Murphy, 249, 251, 418, 421, 423.
 Wolff v. Baltimore, 673, 677.
 v. New Orleans, 101, 292, 347, 348,
 735, 736.
 Won Lung Qui, *In re*, 53.
 Wood v. Bangs, 769.
 v. Helmen, 764.
 v. McCann, 135.
 v. Meyer, 520, 521, 560.
 v. Norwood, 820.
 v. Stirman, 802.
 v. Thomas, 797.
 v. Torrey, 377.
 Woodall v. Oden, 715.
 Woodard v. Isham, 371.
 Woodbridge v. Detroit, 2, 237, 244,
 589, 625, 631, 636, 647.
 v. State, 473, 520, 754.
 Woodburn v. Wireman, 493, 494.
 Woodbury v. Hamilton, 135.
 v. Swan, 505.
 Woodland Cemetery v. Everett, 208.
 Woodman v. Auditor-General, 219,
 354, 363, 412, 792.
 Woodruff v. Depere, 312.
 v. Fisher, 137, 350, 420, 616.
 v. Parham, 90, 91, 95, 96.
 v. Trapnall, 81.
 Woods v. Freeman, 412, 529.
 Woodside v. Wilson, 406, 407.
 Woodson v. Murdock, 265.
 Woodward v. Campbell, 589.
 v. Ellsworth, 446.
 v. French, 355.
 v. Sloan, 463, 516.
 v. Turnbull, 575.
 Woodworth v. Gibbs, 756.
 Woolen v. Rockafeller, 519.
 Woolf v. Chalker, 602.
 Woolfolk v. Fonbene, 409.
 Woolley v. Staley, 805.
 Woolman v. State, 223, 578.
 Woolsey, Matter of, 682, 821.
 Woolsey v. Morris, 798.
 Worcester v. Railroad Corporation,
 89.
 Worcester Co. v. Worcester, 173, 174.
 Workingmen's Aid Society v. Lyon,
 203.
 Workingmen's Bank v. Lannes, 482,
 485, 485, 496.
 Workman v. Worcester, 429, 430,
 658.
 Worley v. Harris, 762, 776.
 Worth v. Ashe Co., 214, 221.
 v. Cox, 713, 723.
 v. Fayetteville, 56, 373, 772.
 Worth v. Petersburg, etc., R. Co.,
 194, 213, 383.
 v. Wilmington, etc., R. Co., 194,
 213.
 Worthen v. Badgett, 342, 347, 481,
 458, 498, 763, 778, 781.
 Worthing v. Webster, 478, 479.
 Worthington v. Sebastian, 56.
 Wray v. Pittsburgh, 613, 636, 639, 662.
 Wright v. Atlanta, 577.
 v. Blakeslee, 31.
 v. Boston, 370, 608, 617, 619, 639,
 640, 658, 672, 750, 808.
 v. Briggs, 590.
 v. Chicago, 629.
 v. Cradlebaugh, 299.
 v. Defrees, 112.
 v. Dunham, 409, 520, 766, 818.
 v. Johnson, 729.
 v. Merrimack, 808.
 v. Oakley, 569.
 v. People, 149, 163, 338, 616.
 v. Railroad Co., 763, 773, 785.
 v. Rowley, 754.
 v. Sill, 69.
 v. Sou. West. R. Co., 205, 212,
 382, 385.
 v. Sperry, 537.
 v. Stultz, 391.
 v. Thomas, 820.
 v. Walker, 503.
 v. Wigton, 371, 440.
 Wroughton v. Turtle, 267.
 Wurts v. Hoagland, 52.
 Wyandotte v. Zeitz, 669.
 Wyandotte, etc., Bridge Co. v. Wy-
 andotte, 771.
 Wyley v. Wilson, 339.
 Wyman v. Baer, 403, 505.
 v. St. Louis, 203.
 Wynne v. Wright, 579.

Y.

- Yancey v. Hopkins, 397, 471, 517, 784.
 v. New Manchester, etc., Manuf.
 Co., 819.
 Yandell v. Pugh, 406.
 Yates v. Lansing, 787.
 Yeatman v. Crandall, 188, 209, 591,
 630, 648, 661.
 Yelverton v. Steele, 414, 419, 800.
 Yenda v. Wheeler, 286, 396, 399, 404,
 483, 518.
 York v. Goodwin, 435.
 Yorty v. Paine, 251, 514.
 Young v. Beardsley, 299.
 v. Brand, 504.
 v. Governor, 576.
 v. Hall, 6.
 v. Henderson, 194, 195, 633.
 v. Joslin, 281, 285, 497.
 v. Parker, 457.
 v. Rheinecker, 489.

Young v. Thomas, 577.

v. Thompson, 314, 315, 530.

Youngblood v. Sexton, 5, 13, 20, 168,
170, 237, 242, 243, 425, 600, 632, 635,
770, 772.

Youngs v. State, 287.

Yuba Co. v. Adams, 221, 439.

Yuen Hai Co. v. Ross, 371.

Z.

Zahradnicek v. Selby, 487, 537.

Zanesville v. Richards, 157, 195, 901,
633, 727.

Zanone v. Mound City, 581.

Zoeler v. Kellogg, 625, 663.

Zweitusch v. Watkins, 555.

LAW OF TAXATION.

CHAPTER I.

TAXES, THEIR NATURE AND KINDS.

Definition. Taxes are the enforced proportional contributions from persons and property, levied by the state by virtue of its sovereignty for the support of government, and for all public needs.¹ The state demands and receives them from the subjects of taxation within its jurisdiction, that it may be enabled to carry into effect its mandates and perform its manifold functions,² and the citizen pays from his property the portion demanded, in order that, by means thereof, he may be secured in the enjoyment of the benefits of organized society.³ The

¹ Opinions of Justices, 58 Me., 591; *People v. Lothrop*, 3 Col., 428; *Dalrymple v. Milwaukee*, 53 Wis., 178, 184.

² Opinions of Justices, 58 Me., 591; *Davison v. Ramsay County*, 18 Minn., 482. "Tax legislation means the making of laws that are to furnish the measure of every man's duty in support of the public burdens, and the means of enforcing it." *Philadelphia Association, etc., v. Wood*, 39 Pa. St., 73, 82, per *Lowrie*, Ch. J.

³ Montesq. *Spirit of the Laws*, b. 18, ch. 1. "What are taxes but the revenue collected from the people for objects in which they are interested; the contributions of the people for things useful and conducive to their welfare." *Agnew, J.*, in *Hilbish v. Catherman*, 64 Pa. St., 154, 159. Blackwell, in his *Treatise on Tax Titles*, p. 1, defines taxes as "burdens or charges imposed by the legislative power of a state upon persons or property, to raise money for public purposes." Substantially the same definition is given by *Field*, Ch. J., in *Perry v. Washburn*, 20 Cal., 318, 350. And see *Hanson v. Vernon*, 27 Iowa, 28, 47, per *Dillon, J.*; *Matter of Mayor, etc., of New York*, 11 Johns., 77, 80; *Mitchell v. Williams*, 27 Ind., 62; *Loan Association v. Topeka*, 20 Wall., 655, 664, per *Miller, J.*; *Philadelphia Association, etc., v. Wood*, 39 Pa. St., 73, 82; *Glasgow v. Rowse*, 43 Mo., 479, 489, per *Wagner, J.*; *Exchange Bank of Columbus v. Hines*, 3 Ohio St., 1, 10; *Judd v. Driver*, 1 Kan., 455, 462. In *People v. McCreery*, 84 Cal., 432, 456, it is said a tax is "a charge levied by the sovereign power upon its subjects. It is not a charge upon its own property, nor upon property over which it has no do-

justification of the demand is therefore found in the reciprocal duties of protection and support between the state and those who are subject to its authority, and the exclusive sovereignty and jurisdiction of the state over all persons and property within its limits for governmental purposes. The person upon whom the demand is made, or whose property is taken, owes to the state a duty to do what shall be his just proportion towards the support of government, and the state is supposed to make adequate and full compensation, in the protection which it gives to his life, liberty and property, and in the increase to the value of his possessions, by the use to which the money contributed is applied.¹

Taxes are supposed to be regular and orderly,² and they are commonly required to be paid at regular periods. In English law they have sometimes been demanded under the name of subsidy; this being a special tax, levied for some exceptional occasion or need. The term is scarcely known in American law. Taxes differ from the forced contributions, loans and benevolences of arbitrary and tyrannical periods, in that they are levied by authority of law, and by some rule of proportion which is intended to insure uniformity of contribution, and a just apportionment of the burdens of government. In an exercise of the power to tax, the purpose always is, that a common burden shall be sustained by common contributions, regulated by some fixed general rule, and apportioned by the law according to some uniform ratio of equality.³ The power is

minion." And see *State v. Express Co.*, 60 N. H., 219, where the whole subject is largely discussed and many authorities referred to. Also, *Taylor v. Chandler*, 9 Heisk., 349.

¹ *People v. Brooklyn*, 4 N. Y., 419, 422; *McKeen v. Delaware Division Canal Company*, 49 Pa. St., 519.

² *Tyson v. School Directors*, 51 Pa. St., 9. Tribute is often used as synonymous with tax, but the more ordinary meaning is, an exaction demanded by a conqueror, or by some external authority whose power is too great to be resisted; an exaction from "strangers" rather than from the "children." Matthew 17: 26. Lawless and arbitrary exactions are sometimes called tribute when made by the constituted government; as in the remonstrances of the Spanish Cortes to their sovereign against such demands. Hallam's Middle Ages, ch. IV.

³ *Sutton's Heirs v. Louisville*, 5 Dana, 28, 31; *Knowlton v. Supervisors of Rock Co.*, 9 Wis., 410, 421; *Woodbridge v. Detroit*, 8 Mich., 274, 301; *Grim v. School District*, 57 Pa. St., 483.

not therefore arbitrary, but rests upon fixed principles of justice, which have for their object the protection of the tax payer against exceptional and invidious exactions,¹ and it is to have effect through established rules operating impartially. The apparent equity of any particular exaction cannot support it as a tax unless it is made in accordance with law;² nor, on the other hand, can the seeming injustice of a levy actually authorized by law defeat it, provided it is made under such general rules as the wisdom of the legislature has determined are needful and proper for the general good.³ The impossibility that government should be administered even by the most conscientious rulers without unjust consequences in particular cases is universally recognized; and the state is therefore considered to have performed its full duty when it has devised and established such general rules and regulations as seem calculated to reduce such consequences to a minimum.

Particular names are applied to some kinds of taxes whereby they are commonly known and distinguished from all others; but in nearly every case the term is not used with much precision, and its use may therefore be liable to cause confusion. Thus the word *duty* is sometimes used in a general sense as synonymous with tax; but in common use it means an indirect tax, imposed on the importation, exportation or consumption of goods. The term *impost*, also, in its general sense,

¹ "Whenever the property of a citizen shall be taken from him by the sovereign will, and appropriated, without his consent, to the benefit of the public, the exaction should not be considered as a tax unless similar contributions be made by that public itself, or shall be exacted rather by the same public will from such constituent members of the same community generally as own the same kind of property." *Robertson*, Ch. J., in *Lexington v. McQuillan's Heirs*, 9 Dana, 513, 517.

² However equitable it may be, a tax is void unless legally assessed. *Joyner v. School District*, 3 Cush., 567, 572. As when it is demanded contrary to agreement with the state, but to pay debts for which the state is liable for the party taxed. *Northern Missouri R. R. Co. v. Maguire*, 20 Wall., 46. See *Hamilton v. Amsden*, 88 Ind., 304.

³ It is no objection to a tax that the party required to pay it derives no benefit from the particular burden: *e. g.*, a tax for school purposes levied upon a manufacturing corporation. But in truth benefits always flow from the appropriation of public moneys to such purposes, which corporations in common with natural persons receive in the additional security to their property and profits. See *Amesbury Nail Factory Co. v. Weed*, 17 Mass., 52.

signifies any tax, tribute or duty; but it is seldom applied to any but the indirect taxes. *Customs duties*, as the term is commonly used, are the duties levied upon imports and exports, while *excise duties* are inland imposts levied upon articles of manufacture and sale, upon licenses to pursue certain trades or deal in certain commodities, upon special privileges, etc.¹

The term *toll*, in its application to the law of taxation, is nearly obsolete. It was formerly applied to duties on imports and exports, but tolls, as now understood, are confined almost exclusively to charges for permission to pass over a bridge, road or ferry owned by the party imposing them.²

The taxing power an incident to sovereignty. The power of taxation is an incident of sovereignty, and is possessed by the government without being expressly conferred by the people.³ It is a legislative power; and when the people, by their constitutions, create a department of government upon which they confer the power to make laws, the power of taxation is conferred as part of the more general power.⁴ Even a wrongful government, if it be for the time being a government *de facto*, maintaining its authority and enforcing obedience to its laws, may exercise the power of taxation, and the power, so far as it has been completely enforced, must be recognized as law-

¹ An excise is a fixed, absolute and direct charge laid on merchandise, products or commodities, without any regard to the amount of property belonging to those on whom it may fall, or to any supposed relation between money expended for a public object, and a special benefit occasioned to those by whom the charge is to be paid. *Oliver v. Washington Mills*, 11 Allen, 268, 274-5.

² See *State v. Haight*, 80 N. J., 447, 448. This case holds that railroad fares are not tolls. See, also, *Manistee Riv. Imp. Co. v. Sands*, 53 Mich., 593. Water rates paid by consumers to the city are not taxes. *Jones v. Board of Water Commissioners*, 34 Mich., 278. The same might be said of the charges for gas when the city supplies it.

³ *Union Tel. Co. v. Mayer*, 28 Ohio St., 521, 533.

⁴ *North Missouri R. R. Co. v. Maguire*, 20 Wall., 46, 60; *Merriwether v. Garrett*, 103 U. S., 472; *Extension of Hancock Street*, 18 Pa. St., 26, 30; *Bank of Pennsylvania v. Commonwealth*, 19 Pa. St., 144. "By all the well settled and acknowledged principles relating to the power of sovereign states, they have the power to tax all persons or property within their jurisdiction." *Poland, J.*, in *Catlin v. Hull*, 21 Vt., 152, 161. And see *Blus Jacket v. Johnson County*, 8 Kan., 299; *Hagar v. Supervisors of Yolo*, 47 Cal., 222; *Coite v. Society for Savings*, 32 Conn., 173.

ful.¹ But the overthrow of the *de facto* government defeats the power; and the rightful government will not thereafter aid in enforcing the uncollected levies.²

Every thing to which the legislative power extends may be the subject of taxation, whether it be person or property, or possession, franchise or privilege, or occupation or right. Nothing but express constitutional limitation upon legislative authority can exclude anything to which the authority extends from the grasp of the taxing power, if the legislature in its discretion shall at any time select it for revenue purposes.³ And not only is the power unlimited in its reach as to subjects, but in its very nature it acknowledges no limits, and may be carried to any extent which the government may find expedient. It may therefore be employed again and again upon the same subjects, even to the extent of exhaustion and destruction, and may thus become in its exercise a power to destroy.⁴ If the power be threatened with abuse, security must be found in the responsibility of the legislature which imposes the tax to the constituency who are to pay it. The judiciary can

¹*O'Bryne v. Savannah*, 41 Ga., 331. See *Dickerson v. Acosta*, 15 Fla., 614, as to taxation in the period of Reconstruction.

²*O'Bryne v. Savannah*, 41 Ga., 331. In *Jacks v. Chaffers*, 34 Ark., 534, it was decided that while a state would have a right to enforce the collection of taxes levied by the territorial government which it had superseded, yet express legislation would be requisite to authorize it. It has been customary, however, in the constitutions of new states, to insert some provision which will save all rights which have previously accrued.

³*Youngblood v. Sexton*, 32 Mich., 406; *Commonwealth v. Moore*, 25 Grat., 951. See *Porter v. Rockford, etc., R. Co.*, 76 Ill., 561.

⁴*Marshall, Ch. J.*, in *McCulloch v. Maryland*, 4 Wheat., 316, 423, 429; *Weston v. Charleston*, 3 Pet., 449; *Providence Bank v. Billings*, 4 Pet., 514, 563; *Charles River Bridge v. Warren Bridge*, 11 Pet., 420; *Nathan v. Louisiana*, 8 How., 73; *Veazie Bank v. Fenno*, 8 Wall., 533; *Howell v. State*, 3 Gill, 14; *Atkins v. Hinman*, 7 Ill., 437, 449; *Cheaney v. Hooser*, 9 B. Monr., 330, 339; *Perkins v. Milford*, 59 Me., 315; *People v. Brooklyn*, 4 N. Y., 419; *Tallman v. Butler County*, 12 Ia., 531; *Davenport v. Railroad Co.*, 16 Ia., 348; *State v. Bell*, 1 Phil., N. C., 76, 85; *Pullen v. Commissioners of Wake County*, 66 N. C., 361; *Bridge Proprietors v. State*, 21 N. J., 384, 386; *S. C. on appeal*, 22 N. J., 593; *People v. Lawrence*, 41 N. Y., 137, 141; *Matter of Van Antwerp*, 56 N. Y., 261; *People v. Coleman*, 4 Cal., 46; *Taylor v. Palmer*, 31 Cal., 240; *State v. Commercial Bank*, 7 Ohio, 125; *Hanna v. Allen County*, 8 Blackf., 352.

afford no redress against oppressive taxation, so long as the legislature, in imposing it, shall keep within the limits of legislative authority and violate no express provision of the constitution.¹ The necessity for imposing it addresses itself to the legislative discretion, and it is or may be an urgent necessity which will admit of no property or other conflicting right in the citizen while it remains unsatisfied.²

Classification of taxes. Taxes are said to be

Direct, under which designation would be included those which are assessed upon the property, person, business, income, etc., of those who are to pay them; and

Indirect, or those which are levied on commodities before they reach the consumer, and are paid by those upon whom

¹ "The judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts but to the people by whom its members are elected. So, if a particular tax bear heavily upon a corporation or class of corporations, it cannot, for that reason only, be declared contrary to the constitution." *Veazie Bank v. Fenno*, 8 Wall., 533, 548, per *Chase*, Ch. J. See *Carroll v. Perry*, 4 McLean, 25; *Weston v. Charleston*, 2 Pet., 449, 466; *Lane County v. Oregon*, 7 Wall., 71, 77; *Berney v. Tax Collector*, 2 Bail. (S. C.), 654; *Coite v. Society for Savings*, 32 Conn., 173; *Kirby v. Shaw*, 19 Pa. St., 258; *Pittsburgh, etc., Railroad Co. v. Commonwealth*, 66 Pa. St., 73; *Hanna v. Allen County*, 8 Blackf., 352; *State v. Newark*, 26 N. J., 519; *Tallman v. Butler County*, 12 Ia., 531; *State v. Stephens*, 4 Tex., 187, 189; *Gibson v. Mason*, 5 Nev., 283, 306; *Young v. Hall*, 9 Nev., 212, 224; *Turner v. Althaus*, 6 Neb., 54; *Williams v. Cammack*, 27 Miss., 209, 219. There is no limitation upon the power of the state to tax, unless it be found in the constitution itself; but when there found, it must be strictly observed. Under a power to tax for the payment of the state debt, taxes cannot be levied for interest on state bonds which remain unsold in the hands of state officers. *Cheney v. Jones*, 14 Fla., 587.

² *Parham v. Justices of Decatur*, 9 Ga., 341, 352; *Athens v. Long*, 54 Ga., 330. Where the property, whose value consists in its being used for a summer resort, has greatly depreciated in value on account of public events, *e. g.*, the existence of a rebellion against the government, the fact constitutes no ground for an application to a court of equity to restrain or abate the taxes assessed upon it. It presents considerations which might appropriately be addressed to the legislative department, but not to the judicial. *White Sulphur Springs Co. v. Robinson*, 3 W. Va., 542. A purchaser of lands at a forced sale, even when made by the state, takes the land subject to all lawful taxes. *Stanton v. Harris*, 9 Heisk., 579.

they ultimately fall, not as taxes, but as part of the market price of the commodity. Under the second head may be classed the duties upon imports, and the excise and stamp duties levied upon manufactures.¹ The individual states have always derived their principal revenue from direct taxes, and the federal government from those which are indirect,² but this has been matter of selection and policy merely; there being no doubt that each government has power to levy taxes of both descriptions.

For the purposes of the general government congress has general power to lay and collect taxes, subject only to the

¹Wayland's Pol. Econ., b. 4, ch. 2, § 1. See, also, 1 Kent's Com., 254; Story on Const., §§ 950-957; 1 Montesq. Spirit of the Laws, b. 18, ch. 7; Tucker's Pol. Econ., ch. 14; Rogers' Pol. Econ., ch. 22.

²One chief reason for resorting to indirect taxes is that this method enables the government, in the language of Turgot, "to pluck the goose without making it cry out," since those who pay do not perceive, or at least do not reflect, that a part of what they pay as price is really paid as a tax. Montesquieu says: "There are two states in Europe where the imposts are very heavy upon liquors; in one the brewer alone pays the duty, in the other it is levied indiscriminately upon all the consumers; in the first, nobody feels the rigor of the impost, in the second, it is looked upon as a grievance. In the former, the subject is sensible only of the liberty he has of not paying, in the latter, he feels only the necessity that compels him to pay." Spirit of the Laws, b. 18, ch. 7. The merchants and others who were the customers of Jewish money lenders in lawless times are supposed to have delighted in the plunder of the usurers, though they themselves were compelled to make it good in the additional interest demanded of them to compensate for the risks to which the lenders were exposed. Hallam's Middle Ages, ch. 8, pt. 2. Unreasonable exactions imposed by the state upon any class who supply to the people any customary convenience or article of necessity are impolitic and unwise for the same reason; the exaction adds to the cost of what is supplied, and the cost in the end is borne, not by the class nominally subjected to it, but by the people.

Indirect taxation may be as just as any other, provided it is justly laid. To make it just, it must reach everything of the class on which it is levied. If it reaches a part only, it must generally be unjust, because, while increasing the price of that portion which is taxed, it enables the producers of or dealers in that portion which is not taxed to demand a similar price, and thus operates as a bounty to one class of the community at the expense of other classes. This is a perpetual difficulty attending the imposition of duties on imports, when the laws are not strictly enforced; the smuggler either undersells the honest dealer, or, if he sells at the same price, adds the amount of the duties to his own profits, and to that extent has an advantage in the market.

limitations imposed by the federal constitution.¹ It is provided by that instrument that direct taxes, when laid by the federal government, shall be apportioned among the several states according to representative population.² Question has several times been made as to the meaning of the term direct taxes as thus employed. It was held in an early case that a tax on carriages by number was not a direct tax in the sense of the constitution, and it was strongly intimated in the same case that only capitation taxes and taxes on land should be deemed within the provision.³ More recently it has been decided that a tax on income is not a direct tax.⁴ Neither is a tax of a specified per cent. upon the circulation of banks.⁵ Nor a tax upon succession to realty on the death of the owner.⁶ And the intimation of the earliest case is very distinctly affirmed in one recently decided where a tax on land was in question.⁷

Maxims of policy. Writers on political economy lay down certain principles which should govern the imposition of taxes, but these are guides rather to the legislature than to the courts. The author of the "Wealth of Nations," in particular, has enumerated certain maxims, the substance of which may be stated as follows: 1. That the subjects of every state ought to contribute to the support of the government as nearly as possible in proportion to the revenue which they respectively enjoy under its protection. 2. The tax which each is to pay ought, as respects the time and manner of payment, and the sum to be paid, to be certain and not arbitrary. 3. It ought to be levied at the time and in the manner in which it is most likely to be convenient to the contributor to pay it; and 4. It ought to be so contrived as both to take out and to

¹ License Tax Cases, 5 Wall., 462.

² Const., art. 1, § 2, cl. 3. See Amendment 14.

³ Hylton v. United States, 3 Dall., 171.

⁴ Pacific Ins. Co. v. Soule, 7 Wall., 483.

⁵ Veazie Bank v. Fenno, 8 Wall., 533.

⁶ Scholey v. Rew, 23 Wall., 331; Clark v. Sickel, 14 Int. Rev. Rec., 6.

⁷ Springer v. United States, 102 U. S., 586. Under the Maryland bill of rights it has been decided that a tax upon the gross receipts of a railroad company was not a direct tax upon property, but a tax upon the franchise of the corporation measured by the extent of its business. *State v. Philadelphia, etc., R. Co.*, 45 Md., 361.

keep out of the pockets of the people as little as possible over and above what it brings into the public treasury.¹

¹The following are the maxims in Mr. Smith's words:

"I. The subjects of every state ought to contribute to the support of the government as nearly as possible in proportion to their respective abilities; that is, in proportion to the revenue which they respectively enjoy under the protection of the state. The expense of government to the individuals of a great nation is like the expense of management to the joint tenants of a great estate, who are all obliged to contribute in proportion to their respective interests in the estate. In the observation or neglect of this maxim consists what is called the equality or inequality of taxation. Every tax, it must be observed once for all, which falls finally upon one only of the three sorts of revenue above mentioned [rent, profit, wages], is necessarily unequal, in so far as it does not affect the other two. In the following examination of different taxes, I shall seldom take much further notice of this sort of inequality, but shall, in most cases, confine my observations to that inequality which is occasioned by a particular tax falling unequally upon that particular sort of private revenue which is affected by it.

"II. The tax which each individual is bound to pay ought to be certain and not arbitrary. The time of payment, the manner of payment, the quantity to be paid, ought all to be clear and plain to the contributor and to every other person. Where it is otherwise, every person subject to the tax is put more or less in the power of the tax gatherer, who can either aggravate the tax upon any obnoxious contributor, or extort, by the terror of such aggravation, some present or perquisite to himself. The uncertainty of taxation encourages the insolence and favors the corruption of an order of men who are naturally unpopular, even where they are neither insolent nor corrupt. The certainty of what each individual ought to pay is, in taxation, a matter of so great importance, that a very considerable degree of inequality, it appears, I believe, from the experience of all nations, is not near so great an evil as a very small degree of uncertainty.

"III. Every tax ought to be levied at the time or in the manner in which it is most likely to be convenient to the contributor to pay it. A tax upon the rent of lands or of houses, payable at the same term at which such rents are usually paid, is levied at the time when it is most likely to be convenient for the contributor to pay, or when he is most likely to have the wherewithal to pay. Taxes upon such consumable goods as are articles of luxury are all finally paid by the consumer, and generally in a manner that is very convenient for him. He pays them by little and little, as he has occasion to buy the goods. As he is at liberty, too, either to buy or not to buy, as he pleases, it must be his own fault if he ever suffers any considerable inconvenience from such taxes.

"IV. Every tax ought to be so contrived as both to take out and to keep out of the pockets of the people as little as possible over and above what it brings into the public treasury of the state. A tax may either take out or keep out of the pockets of the people a great deal more than it brings into the public treasury, in the four following ways: First. The levying of it may

Of these maxims, the wisdom of which has secured for them universal acceptance,¹ the second embodies a rule of absolute right from which the authorities are not at liberty to depart; the first and third address themselves to the legislature which frames the revenue laws; the fourth also appeals to the legislative wisdom, and is perhaps less observed than either of the others, especially in those states which have never burdened themselves with heavy debts or been tempted into wild and extravagant expenditures. In such states a tendency has been apparent to heavy accumulations of money in the state treasury; accumulations not only unjust to the people whom they deprive of the use of the money taken from them for considerable periods, but especially impolitic, as they tempt those having the custody of the funds to a use of them in loans — possibly in speculations — which, when not strictly within the law, is always demoralizing and often leads to defalcations. The maxim which is alluded to would justify any state in having its treasury in condition at all times to meet all possible calls

require a great number of officers, whose salaries may eat up the greater part of the produce of the tax, and whose perquisites may impose another additional tax upon the people. Secondly. It may obstruct the industry of the people, and discourage them from applying to certain branches of business which might give maintenance and employment to great multitudes. While it obliges the people to pay, it may thus diminish, or perhaps destroy, some of the funds which might enable them more easily to do so. Thirdly. By the forfeitures and other penalties which those unfortunate individuals incur who attempt unsuccessfully to evade the tax, it may frequently ruin them, and thereby put an end to the benefit which community might have received from the employment of their capital. An injudicious tax offers a great temptation to smuggling; but the penalties of smuggling must arise in proportion to the temptation. The law, contrary to all the ordinary principles of justice, first creates the temptation and then punishes those who yield to it; and it commonly enhances the punishment, too, in proportion to the very circumstance which ought certainly to alleviate it — the temptation to commit the crime. Fourthly. By subjecting the people to the frequent visits and the odious examination of the tax gatherers, it may expose them to much unnecessary trouble, vexation and oppression; and though vexation is not, strictly speaking, expense, it is certainly equivalent to the expense at which every man would be willing to redeem himself from it. It is in some one or other of these four different ways that taxes are frequently so much more burdensome to the people than they are beneficial to the sovereign." *Wealth of Nations*, b. 4, ch. 2.

¹ See Mill's *Pol. Econ.*, b. 5, ch. 2, § 2; Tucker's *Pol. Econ.*, ch. 14; Rogers' *Pol. Econ.*, ch. 21.

upon it, but it would condemn emphatically any exactions from the people in advance of any needs of the government.¹

All these maxims assume that the taxation is laid for the purpose of obtaining a revenue. Within the definitions given, the burden would not be taxation, if revenue were not the purpose. But in laying taxes other considerations not only are but ought to be kept in view; the question being always not exclusively how a certain sum of money can be collected for public expenditure, but how, when, and upon what subjects it is wise and politic to lay the necessary tax under the existing circumstances, having regard not merely to the replenishing of the public treasury, but to the general benefit and welfare of the political society, and taking notice, therefore, of the manner in which the laying and collection of the tax will affect the several interests in the state. And upon this it may be observed that:

1. In the laying of taxes, one purpose had in view may be

¹ Provision is made by law in some states that the moneys in the treasury may be deposited in banks at a low specified interest. The rate is so low as to constitute a temptation to bankers to obtain it, and the fact that the office of state treasurer is generally regarded as a prize beyond what the salary would make it, is strong presumptive evidence that that officer expects to make some profit to himself, either by obtaining a bonus from the favored bank that receives the deposits, or by making loans at a higher rate than he would be expected to account for to the state. That such loans are regarded as impolitic is evidenced by the fact that under the statutes of a number of the states, they would constitute criminal embezzlement; but that they are frequently made is commonly believed. Yet it is within the observation of all who have watched the course of public affairs, that legislation has sometimes been so shaped as to increase the already impolitic accumulations in state treasuries, and tax payers have been hastened up in making their payments by the imposition of heavy penalties for delay, when even the ordinary interest exacted from the tax payer would have accorded better with state policy than collecting the money in advance of state needs, in order that it might be deposited in banks at a rate still lower. The impolicy of such legislation has been intensified in some cases by provisions for which it is difficult to account; so unjust are they, and of such doubtful validity. Allusion is here made to laws imposing a penalty, payable to the state, on those who shall redeem their lands from a tax purchase made by an individual; as if the state had an interest in preventing any citizen who, by poverty or other cause, had failed to pay his taxes in season, from saving his estate by a later payment. That these heavy penalties have sometimes prevented redemptions which otherwise would have been made — especially in the case of special taxes, like those for building school-houses or constructing drains — is not to be doubted.

to encourage one branch of industry or trade, though at the expense of others; as where a tax is laid upon certain fabrics received from abroad by the exchanges of commerce for the sake of encouraging the domestic producer of similar articles, on whose industry the tax operates as a bounty.¹ Such a burden, however, may be so heavy that the market will not warrant its being paid, and in such case, instead of producing revenue, it merely precludes importation. But a law which, under the name of taxation, has for its purpose only to embarrass and, perhaps, to destroy a certain branch of commerce, if enacted by a state, would look to the general police power for its justification; and, if enacted by the general government, would seem more properly to derive its force from the authority conferred upon the government to regulate commerce and the intercourse with foreign countries, than to an authority conferred for revenue purposes, which such a law would not aim or tend to subserve.²

¹Tucker's Pol. Econ., ch. 14. Mr. Justice *Story*, in his treatise on the Constitution, § 965, asserts very broadly the power to tax for other purposes than for revenue. He says: "The absolute power to levy taxes includes the power in every form in which it may be used, and for every purpose to which the legislature may choose to apply it. This results from the very nature of such an unrestricted power. *A fortiori*, it might be applied by congress to purposes for which nations have been accustomed to apply it. Now, nothing is more clear from the history of commercial nations than the fact that the taxing power is often, very often, applied for other purposes than revenue. It is often applied as a regulation of commerce. It is often applied as a virtual prohibition upon the importation of particular articles, for the encouragement and protection of domestic products and industry; for the support of agriculture, commerce and manufactures (Hamilton's Report on Manufactures, in 1791); for retaliation upon foreign monopolies and injurious restrictions (see Mr. Jefferson's Report on Commercial Restrictions, in 1793; 5 Marshall's Life of Washington, ch. 7, pp. 482 to 487; 1 Wait's State Papers, 423, 434); for mere purposes of state policy and domestic economy; sometimes to banish a noxious article of consumption; sometimes as a bounty upon an infant manufacture, or agricultural product; sometimes as a suppression of particular employments; sometimes as a prerogative power to destroy competition and secure a monopoly to the government. See Smith's Wealth of Nations, b. 5, ch. 2, art. 4."

²Chief Justice *Marshall* says in *McCullough v. Maryland*, that "the power to tax involves the power to destroy." And again, "if the right to tax exists, it is a right which, in its nature, acknowledges no limits. It may be carried to any extent within the jurisdiction of the state or corporation which imposes it, which the will of such state or corporation may prescribe." *Weston v. Charleston*, 2 Pet., 449. The learned chief justice, in these cases,

2. They may be intended to discourage trades and occupations which may be useful and important when carried on by a few persons under stringent regulations, but exceedingly mischievous when thrown open to the general public and engaged in by many persons. An example is the heavy tax imposed in some states and in some localities of other states on those who engage in the manufacture or sale of intoxicating drinks. Two purposes are generally had in view in imposing such a tax: to limit the business to a few persons, in order to more efficient and perfect regulation, and also to produce a revenue. As no one will pay the tax who does not expect to be reimbursed the expense from the profits of sales, it is obvious that the heavier the tax the fewer can afford to pay it, and it may be made so heavy that no one can afford to pay it, and then it becomes prohibitory.¹ A tax laid for the double purpose of regulation and revenue must be grounded in both the police and the taxing power; but the grant of a power to tax would not authorize the imposition of a burden in its nature and purpose prohibitory.²

Taxes in kind. Taxes are generally demanded in money, and any tax law will be understood to require money when a

was arguing against the existence of the power; and the idea he expresses so forcibly is, that the power to tax is so vast, and rests upon reasons which at times are so imperative, that it may be exercised again and again, as the exigencies of the state may demand, until the property taxed is exhausted or the privilege taxed can no longer be exercised. This statement has abundant illustrations in history, of people absolutely impoverished by taxation, and even, in individual cases, sold into slavery because they could not meet the demands of the state upon them. It may justly be questioned, whether this strong statement, which was put forth as a defense against an injurious tax, will fairly justify an affirmative exercise of power that has not revenue in view, but is only called a tax in order that it may be employed as an instrument of destruction. In other words, whether the unavoidable incident to the exercise of a power to demand and collect revenue can lawfully be the inducement to the exercise of the power when revenue is not contemplated or sought.

¹ *Youngblood v. Sexton*, 82 Mich., 406.

² So held in *Ex parte Burnett*, 30 Ala., 461. The early case of *State v. Doon, R. M. Charl.*, 1, affirmed the right to levy a tax of \$1,000 on faro tables for the purpose of prohibition, though the payment of the tax would not legalize the use of the tables. Compare *Veazie Bank v. Fenno*, 8 Wall., 533.

different intent is not expressed.¹ But if the condition of any state, in the judgment of its legislature, shall require the collection of taxes in kind — that is to say, by the delivery to the proper officers of a certain proportion of products — or in gold or silver bullion, or in anything different from the legal tender currency of the country, the right to make the requirement is unquestionable, being in conflict with no principle of government, and with no provision of the federal constitution. Instances of taxes in kind occurred in the colonial period,² and statutes requiring state taxes to be paid in gold and silver, to the exclusion of legal tender treasury notes, have been fully sustained in several of the states.³ The exigencies of government have also in some cases seemed to require that the state should make the taxes levied for its municipalities payable in state obligations; and if it shall so provide, the municipalities have no alternative and must submit to the requirement.⁴

A levy is sometimes made payable in labor; but this has commonly been restricted to the labor needed to keep the highways in repair; and while it is in its nature a tax, it par-

¹ *Amenia v. Stanford*, 6 Johns., 92; *Bryan v. Sundberg*, 5 Tex., 418; *Judd v. Driver*, 1 Kan., 455. As to taxes made payable in scrip, see *New Orleans v. Jackson*, 33 La. An., 1038. The running of the statute of limitations does not excuse a collector from taking scrip when the statute provides for it. *Daniel v. Askew*, 36 Ark., 487.

² *Lane County v. Oregon*, 7 Wall., 71; *Williams' Case*, 3 Bland Ch., 186, 255; 2 *Rives' Life of Madison*, 146. An early tax by the French government in Canada was of a certain proportion of all the beaver skins and moose hides. *Parkman's Old Régime*, 302.

³ *Perry v. Washburn*, 20 Cal., 818, 850; *State Treasurer v. Wright*, 28 Ill., 509; *Trenholm v. Charleston*, 3 Rich. (N. S.), 347, 349; *Whittaker v. Haley*, 2 Or., 128; *Lane County v. Oregon*, 7 Wall., 71; *People v. Hogan*, 52 Cal., 171; *Reclamation District v. Hagar*, 6 Sawy., 567; *Hagar v. Reclamation District*, 111 U. S., 701. *Contra*, *Haas v. Misner*, 2 Idaho, 174; *Cruther v. Sterling*, 3 Idaho, 306. It has been decided that a state cannot compel state scrip to be received in payment of county, school and district taxes; it not being money, and the creditors of the municipalities not being compellable to receive it in payment. *Wells v. Cole*, 27 Ark., 603. But see next note.

⁴ "Cities and counties cannot disregard the provisions of the acts of the legislature for the collection of revenue, because they are but its creatures and have no sovereignty; have no power whatever to collect a single dollar of tax for any purpose whatever, unless it is conferred upon them by the legislature; their taxing powers are all derived from that source, and they are dependent upon its will for every cent of revenue they raise." *English v. Oliver*, 28 Ark., 317. See *Wallis v. Smith*, 29 Ark., 354.

takes, to some extent at least, of a police regulation. Neither in common speech nor in the customary revenue legislation would a burden of this nature be understood as embraced in the term tax; and statutory provisions for assessment are not therefore applicable to it unless made so in express terms.¹

Taxes not debts. It sometimes becomes a question whether a tax can be regarded as a debt in the ordinary sense of that term, so that the ordinary remedies for the collection of debts can be applied to it. In general it will be found that statutes imposing taxes make special provision for their collection, and do not apparently contemplate that any others will be necessary; but these may, nevertheless, fail; and the question then arises whether the tax must fail also, or whether resort may be had by the state to such remedies as would be available to individuals to enforce demands owing to themselves. But instances have occurred of tax laws which provided for laying the tax, but made no provision whatever for collection. In such a case it may well be held that the legislature contemplated the enforcement of the tax by the ordinary remedies; and therefore, if the tax was assessed against an

¹ See *Amenia v. Stanford*, 6 Johns., 92.

In *Sawyer v. Alton*, 3 Scam., 127, 130, a provision of the constitution that "the mode of levying a tax shall be by valuation, so that every person shall pay a tax in proportion to the value of the property he or she has in his or her possession," was held not to prevent the levy of a poll tax payable in labor. In *Town of Pleasant v. Kost*, 29 Ill., 490, 494, a highway assessment on property, payable in labor, was held not to be in the proper sense a tax. And see *Fox v. Rockford*, 38 Ill., 451; *Macomb v. Twaddle*, 4 Ill. App., 254; *State v. Halifax*, 4 Dev., 345. In the case above cited of *Amenia v. Stanford*, 6 Johns., 92, 93, where the question was whether one who had worked out a highway poll tax had gained a settlement under a statute which made the settlement depend on the payment of a tax, it is said, "Taxes, in the popular and ordinary sense of the term (and in that sense laws are generally to be read), mean pecuniary contributions; and when the word *paid* is added by way of defining it, the sense becomes more clear and certain." It was therefore held that a settlement was not gained by working out a highway assessment. And see *Starkesboro v. Heinesburgh*, 13 Vt., 215. An assessment of \$4 or two days' work on each male resident over twenty-one and under sixty was held to be a poll tax, and as such forbidden by the constitution of Nevada. *Hassett v. Walls*, 9 Nev., 387.

A commutation tax in lieu of working on the streets, held not to be a poll tax in *Johnson v. Macon*, 62 Ga., 645.

individual, that *assumpsit* would lie for its recovery.¹ The same reasoning would support a proceeding in equity to enforce a lien for the tax when assessed, not against an individual, but against property; and some courts have gone so far as to hold that the imposition and assessment of a tax create a legal obligation to pay, upon which the law will raise an *assumpsit*, notwithstanding the statute has given a special remedy.² But, in general, the conclusion has been reached that when the statute undertakes to provide remedies, and those given do not embrace an action at law, a common law action for the recovery of the tax as a debt will not lie.³ The assessment of

¹ *Baltimore v. Howard*, 6 H. & J., 383, 394; *Mayor v. McKee*, 2 Yerg., 167; *Rutledge v. Fogg*, 3 Cold., 554; *Succession of Irwin*, 33 La. An., 63; *State v. Severance*, 55 Mo., 378. See *Haas v. Misner*, 2 Idaho, 174; *San Francisco Gas Co. v. Brickwell*, 62 Cal., 641.

Compare *Dubuque v. Ill. Cent. R. R. Co.*, 39 Ia., 56.

Where an action lies the statute of limitations will apply to bar the remedy after the statutory period. *Burlington v. Railroad Co.*, 41 Ia., 134; *State v. Yellow Jacket, etc., Co.*, 14 Nev., 230.

But the time may be extended by statute at any time before it has fully run. *State v. Hernan*, 70 Mo., 420.

That where a municipal corporation is dissolved, its uncollected taxes are not assets which can be seized by attachment or other judicial process, and subjected to the payment of corporate indebtedness, see *Merriwether v. Garrett*, 102 U. S., 472.

The United States is not precluded, by anything in the revenue act of 1866, from employing common law remedies for the collection of its dues. *Savings Bank v. United States*, 19 Wall., 227. *Assumpsit* will lie against an importer for customs dues, notwithstanding the government has a lien on the goods and a bond for the payment of duties. *Meredith v. United States*, 18 Pet., 486.

In Louisiana it seems an action will lie for a special assessment, notwithstanding there is a lien on land. *New Orleans v. Day*, 29 La. An., 416. In Michigan an action only lies for taxes when expressly given by statute. *Staley v. Columbus*, 36 Mich., 38. See *Sherwin v. Savings Bank*, 137 Mass., 444.

² *Dugan v. Baltimore*, 1 Gill & J., 499; *State v. Steamship Co.*, 13 La. An., 497; *Burlington v. Railroad Co.*, 41 Ia., 134. *Assumpsit* held to lie where the statutory remedy was deemed inadequate. *Ryan v. Gallatin Co.*, 14 Ill., 78; *Dunlap v. Same*, 15 Ill., 7. The right to resort to a summary remedy of unusual harshness and rigor could not be implied in any case. *Succession of Irwin*, 33 La. An., 63, 75.

³ *Ruddock v. Gordon*, Quincy's Rep., 58; *Andover Turnpike v. Gould*, 6 Mass., 39, 44; *Pierce v. Boston*, 3 Met., 520; *Crapo v. Stetson*, 8 Met., 393; *Appleton v. Hopkins*, 5 Gray, 580; *Home Savings Bank v. Boston*, 131 Mass., 277; *Newport, etc., Co. v. Douglass*, 12 Bush, 673; *Johnston v. Louisville*, 11

the tax, though it may definitely and conclusively establish a demand for the purposes of statutory collection, does not constitute a technical judgment;¹ and the taxes are not "contracts between party and party, either express or implied; but they are the positive acts of the government, through its various agents, binding upon the inhabitants, and to the making and enforcing of which their personal consent individually is not required."² They do not draw interest, as do sums of money owing upon contract; but only when it is expressly given.³ They are not the subject of set-off, either on behalf of the state or the municipality for which they are imposed, or of the collector,⁴ or on behalf of the person taxed, as against such state, municipality or collector.⁵ The law abolishing imprison-

Bush, 527; *Camden v. Allen*, 26 N. J., 398; *Webster v. Seymour*, 8 Vt., 135, 140; *Shaw v. Peckett*, 26 Vt., 482; *Packard v. Tisdale*, 50 Me., 376; *Carondelet v. Picott*, 38 Mo., 125; *Perry v. Washburn*, 20 Cal., 318; *Richards v. Stogsdell*, 21 Ind., 74; *McCall v. Lorrimer*, 4 Watts, 351; *Miller v. Hale*, 26 Pa. St., 432; *Lane County v. Oregon*, 7 Wall., 71, 80; *Board of Education v. Old Dominion, etc., Co.*, 18 W. Va., 441. Compare *Durant v. Supervisors*, 26 Wend., 66; *Merriwether v. Garrett*, 103 U. S., 572; *Chrismon v. Reich*, 2 Utah, 111; *State v. Yellow Jacket, etc., Co.*, 14 Nev. 220; *Detroit v. Jepp*, 52 Mich., 458; *Faribault v. Misener*, 20 Minn., 396; *Hibbard v. Clark*, 56 N. H., 155; *Afferson v. Memphis*, 3 Flip., 363. A judgment for taxes cannot include interest without legislative authority. *Edmonson v. Galveston*, 53 Tex., 157. It has been decided in Vermont that if a tax be duly assessed against a *feme sole* who afterwards marries, the husband's property, including the personal property acquired by the marriage, is not liable to be distrained for the satisfaction of the tax. *Sumner v. Pinney*, 31 Vt., 717.

¹*Johnson v. Howard*, 41 Vt., 122, 125; *Pierce v. Boston*, 3 Met., 520.

²*Pierce v. Boston*, 3 Met., 520, per *Shaw*, Ch. J.; *Perry v. Washburn*, 20 Cal., 318; *Webster v. Seymour*, 8 Vt., 135, 140; *Johnson v. Howard*, 41 Vt., 122; *Finnegan v. Fernandina*, 15 Fla., 379; *Edmonson v. Galveston*, 53 Tex., 157.

A tax is not a debt provable in bankruptcy. *In re Duryee*, 2 Fed. Rep., 68. It is not assignable as a debt. *McInery v. Reed*, 23 Ia., 410.

³*Shaw v. Peckett*, 26 Vt., 482; *Haskell v. Bartlett*, 34 Cal., 281; *Himmelman v. Oliver*, 34 Cal., 246; *Edmonson v. Galveston*, 53 Tex., 157; *Perry and Hall Counties v. Railroad Co.*, 65 Ala., 391.

⁴*Pierce v. Boston*, 3 Met., 520; *Johnson v. Howard*, 41 Vt., 122. See *McCracken v. Eder*, 34 Pa. St., 239; *Hibbard v. Clark*, 56 N. H., 155; *Cobb v. Elizabeth City*, 78 N. C., 1; *Adrasaka City v. Gas Co.*, 9 Neb., 339.

But a state law may make municipal obligations a set-off to taxes, and there is no constitutional objection to doing so. *Amy v. Shelby Co. Taxing Dist.*, 114 U. S., 387.

⁵See cases cited in last note. Also *Trenholm v. Charleston*, 3 S. Car. (N. S.), 394; *Himmelman v. Spanagel*, 39 Cal., 389; *Hawkins v. Sumter*

ment for debt has no application to taxes; and the remedies for their collection may include an arrest if the legislature shall so provide.¹

The repeal of a tax law puts an end to all right to proceed to a levy of taxes under it, even in cases already commenced, unless the right is reserved in the repealing statute,² and statutory remedies for the enforcement of a tax are gone when the statute is repealed without an express saving.³ But in general, when a tax system is revised, with a repeal of the former law, it is safe to assume that the legislative intent is that the new

County, 57 Ga., 166. "To hold that a tax is liable to set-off would be utterly subversive of the power of government, and destructive of the very end of taxation." *Finnegan v. Fernandina*, 15 Fla., 379. It is no defense to the payment of a tax that an over-payment has been made in the tax of a former year. *New Orleans v. Davidson*, 30 La. An., 554. A similar point is decided in *Wayne v. Savannah*, 56 Ga., 448. A railroad company, in payment of county taxes, tendered past due coupons of county railroad aid bonds, which were not made receivable by law for taxes. Held, that the tender was bad, as the doctrine of set-off has no application to taxation. *Morgan v. Pueblo, etc.*, R. R. Co., 6 Col., 478. The fact that a county owes a person taxed a considerable sum is no ground for enjoining payment of a county tax. And county authorities have no power to contract in advance of the assessment of a tax, that when levied it shall be considered paid by the county indebtedness. *Scobey v. Decatur Co.*, 72 Ind., 551. No set-off of independent claims is admissible as against federal taxes, even when they are being collected by suit. *United States v. Pacific R. R. Co.*, 4 Dill., 66.

Taxes, not being debts, are payable in money alone, in the absence of express statutory provisions providing otherwise. *Shreveport v. Gregg*, 28 La. An., 836.

¹ *Appleton v. Hopkins*, 5 Gray, 530; *Harris v. Wood*, 6 T. B. Monr., 641; *Charleston v. Oliver*, 16 S. C., 47; *McCaskell v. State*, 53 Ala., 511. See *post*, ch. XIV.

² *Ross v. Lane*, 11 Miss., 695; *Abbott v. Britton*, 23 La. An., 511.

If, after an assessment is made, the constitution of the state is so amended as to limit the rate of tax that may be levied, a subsequent levy upon the assessment must keep within the limit. *Ketchum v. Pacific R. R. Co.*, 4 Dill., 41.

³ *Mount v. State*, 6 Blackf., 25; *McQuilkin v. Doe*, 8 Blackf., 581.

This is so, even as to assessments in process of collection. *Marion, etc., Gravel Road Co. v. Sheeth*, 53 Ind., 35.

See *Commonwealth v. Standard Oil Co.*, 101 Pa. St., 119.

If a statute giving a right of action is repealed without any saving of pending actions, the right is gone as to such actions. *St. Joseph Co. Court v. Ruckman*, 57 Ind., 96; *French v. State*, 53 Miss., 651.

enactment shall be of prospective force only, and shall not disturb existing valid assessments.¹

Taxation and protection reciprocal. It has been said already that the taxing power of a state is co-extensive with its sovereignty, and that whatever objects of government are within its reach are subject to it and may be made the basis of levies. It is commonly said that taxation and protection are reciprocal; and this, if rightly understood, is correct, though some subjects receive the protection of government which are not taxable, and some may be taxed though not protected. The vessels of a foreign nation or of its citizens and the property in them, and the citizens themselves when temporarily in the country for business or pleasure, are protected by our laws but not taxable under them; the consideration for the exemption being the like exemption of our own vessels, property and citizens when in foreign lands. Ambassadors and others connected with the public service of foreign countries, though residing here in such service, are also exempt as representatives of the government which accredits or employs them,² but

¹In *Warren R. R. Co. v. Belvidere*, 35 N. J., 584, 587, a tax law was repealed after tax was laid, and the court say: "Such repeal does not affect the tax assessed. That was a matter closed by the assessment, and besides, has been concluded by final judgment since the repeal." But in that case the collection of the tax was provided for not by the law which was repealed, but by a general law which remained in force. See *Belvidere v. Railroad Co.*, 34 N. J., 193. Also *Gorley v. Sewell*, 77 Ind., 316; *Clegg v. State*, 42 Tex., 605; *Pacific, etc., Tel. Co. v. Commonwealth*, 66 Penn. St., 70. It is competent for the legislature, after assessment has been made for municipal taxation, to repeal the law and refer the power to make the assessment to another authority, even though the constitution forbids retrospective laws. *State v. St. Louis, etc., R. Co.*, 9 Mo. App., 532.

In *State v. Waterville Savings Bank*, 68 Me., 515, an assessment for which an action was given was held to remain collectible, notwithstanding the repeal of the statute under which it was laid. See *Smith v. Auditor General*, 20 Mich., 398. As against the officer or municipality the legislature may undoubtedly take away the right to collect a tax even after proceedings begun. *Selma, etc., Association v. Morgan*, 57 Ala., 83. A tax is not defeated by the land for which it was levied being set off from the city levying it, but it may be enforced against the owner afterwards. *Deason v. Dixon*, 54 Miss., 585.

²*Vattel*, b. 1, c. 19, § 216; *Brown v. Smith*, 15 Beav., 444; *Attorney-General v. Napier*, 6 Ex., 217. It is not the mere employment, however, that exempts them, but the fact that they are resident in the country only for

alienage itself does not work an exemption if the alien is domiciled in the country, so far at least as he has property there to be protected by its laws; and tangible property in the country, as stock in trade or manufacture, or for sale, is taxable irrespective of the residence or allegiance of owners.¹ But a very large proportion of the subjects of government are never taxed at all, though they are entitled to protection and are in fact protected exactly as if they were. This is the case generally with all infants and married women not having independent property or business, and with many others who do not come within the rules which the state has prescribed for the apportionment of this species of burden. These rules are prescribed by the state on a consideration of what is wisest, and most for the general good; but the exemptions they give are only temporary and conditional, and may be changed at any time. Even as regards the exempted subjects, taxation and protection may be said to be reciprocal in the sense that those who are protected are liable to taxation whenever the state shall see fit to impose it.² On the other hand one purpose of taxation sometimes is to discourage a business, and perhaps to put it out of existence; and it is taxed without any idea of protection attending the burden. This has been avowedly the purpose in the case of some federal taxes,³ while in others the burden has been laid on subjects which by state legislation were put out of the protection of the law. The taxes have nevertheless been sustained.⁴ The persons who pay these taxes pay them, therefore, not for protection in respect to the subjects taxed, but in con-

the purposes of the employment and not domiciled there. Persons domiciled in a country, but made use of by other countries as consular agents, are taxable where they are domiciled.

¹ See *post*, ch. XII. As to what amounts to a surrender of domicile, see the discussion in *Borland v. Boston*, 132 Mass., 89.

² Vattel says that the right to tax an individual results from the general protection afforded to him and his property. B. 1, c. 20. See *Eggleston v. Charleston*, 1 Sou. Car. Const. R., 45; *Bank of U. S. v. State*, 12 S. & M., 456; *Warden v. Supervisors*, 14 Wis., 618; *De Pauw v. New Albany*, 23 Ind., 204; *Commonwealth v. Standard Oil Co.*, 101 Pa. St., 119; *Berlin Mills v. Wentworth's Location*, 60 N. H., 156; *Norris v. Waco*, 57 Tex., 635.

³ *Veazie Bank v. Fenno*, 8 Wall., 533.

⁴ See *License Tax Cases*, 5 Wall., 462; *Puryear v. Commonwealth*, 5 Wall., 475; *Commonwealth v. Holbrook*, 10 Allen, 200; *Block v. Jacksonville*, 36 Ill., 301; *Youngblood v. Sexton*, 32 Mich., 406.

sideration of the general benefits of organized society, which are supposed to be infinitely more to every citizen than the privilege of following any particular trade or calling.

Where a non-resident is owner of tangible property within the state, and the state imposes taxes upon it, the tax is not a charge against the owner personally, but must be enforced against the property itself. The state has no jurisdiction to assess a tax as a personal charge against non-residents;¹ neither can the personalty of a non-resident be taxed unless it has an actual *situs* within the state, so as to be under the protection of its laws.² The mere right of a foreign creditor to receive from his debtor within the state the payment of his demand cannot be subjected to taxation within the state. "It is a right that is personal to the creditor where he resides, and the residence or place of business of his debtor is immaterial. The power of taxation, however vast in its character, and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state. These subjects are persons, property and business. Whatever form taxation may assume, whether as duties, imposts, excises or licenses, it must relate to one of these subjects. It is not possible to conceive of any other, though as applied to them the taxation may be exercised in a great variety of ways. It may touch property in every shape, in its natural condition, in its manufactured form, and in its various transmutations. And the amount of the taxation may be determined by the value of the property, or its use, or its capacity, or its productiveness. It may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the federal constitution, the power of the state as to the

¹ *Dow v. Sudbury*, 5 Met., 73; *Herriman v. Stowers*, 43 Me., 497; *People v. Supervisors of Chenango*, 11 N. Y., 563; *St. Paul v. Merritt*, 7 Minn., 198; *Catlin v. Hull*, 21 Vt., 152. A non-resident who has voluntarily returned some of his personalty for taxation does not thereby consent to be taxed for all; and if the assessor taxes him for more, he is not obliged to appeal from the assessment, but may contest the collection. *Phelps v. Thurston*, 47 Conn., 477. Compare *Hilton v. Fonda*, 86 N. Y., 339.

² That personalty may be taxed where it is, though the owner is a non-resident, see ch. XII. Personal allegiance has no necessary connection with the right of taxation. An alien may be taxed as well as a citizen. See *Witherspoon v. Duncan*, 4 Wall., 210.

mode, form and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction."¹ These are conceded or adjudged principles, and have ceased to be the subject of discussion or argument. Corporations, it is also conceded, may be taxed like natural persons on their property and business.² But debts owing to foreign creditors by either corporations or individuals are not the subject of taxation. The creditor cannot be taxed, because he is not within the jurisdiction, and the debts cannot be taxed in the debtors' hands, through any fiction of the law which is to treat them as being, for this purpose, the property of the debtors. They are not property of the debtors in any sense; they are the obligations of the debtors, and only possess value in the hands of the creditors. With them they are property, "but to call them property in the hands of the debtors is simply to misuse terms."³ Shares in a corporation are also the shares of the

¹ *State Tax on Foreign Held Bonds*, 15 Wall., 300, 319. See *Oliver v. Washington Mills*, 11 Allen, 268; *De Vignier v. New Orleans*, 4 Woods, 206.

² In California it is said that it is a part of the fundamental law of the state that corporate franchises are property, and must be taxed in some method in proportion to value. *San Jose Gas Co. v. January*, 57 Cal., 614; *Spring Valley Co. v. Schottlee*, 62 Cal., 71.

³ *Case of State Tax on Foreign Held Bonds*, 15 Wall., 300, 319, 320, per *Field, J.*, overruling several Pennsylvania cases. See, also, *Hayne v. Delieseline*, 3 McCord, 374; *Oliver v. Washington Mills*, 11 Allen, 268; *De Vignier v. New Orleans*, 4 Woods, 206; *Commonwealth v. Chesapeake & O. R. Co.*, 27 Grat., 344. In *Mayor of Macon v. Jones*, 67 Ga., 489, it is said that, in the absence of express authority, a city empowered to tax "all property" will not be held authorized to tax its own bonds. As to the taxation of credits of a non-resident of the state, see *San Francisco v. Mackey*, 22 Fed. Rep., 602.

The fact that demands owing to a non-resident are secured by mortgages within the state does not give them a *situs* within it for purposes of taxation. *Goldgart v. People*, 106 Ill., 25; *State Tax on Foreign Held Bonds*, 15 Wall., 300. But a tax on money set apart by a corporation to pay interest accruing on foreign held bonds is not a tax on the bonds, but on the earnings of the corporation which pays the interest, and is sustainable. *Railroad Co. v. Collector*, 100 U. S., 595; *United States v. Railway Co.*, 106 U. S., 327. The statute of Pennsylvania required foreign corporations "doing business" in the state to pay a certain tax on their "capital stock." The Standard Oil Company, an Ohio corporation, bought crude petroleum in Pennsylvania through brokers and others, and shipped it out of the state to refineries. It also owned individual interests in partnerships doing business in Pennsylvania, and also shares of stock in Pennsylvania corporations. *Held*, that the ownership of individual interests in partnerships did, but the

stockholder wherever he may have his domicile, and if taxed to him as his personal estate are properly taxable by the jurisdiction to which his person is subject, whether the corporation be foreign or domestic.¹ But the state which grants corporate powers, or consents to their being exercised within its limits when the corporate grant is by some other sovereignty, may annex to the grant or consent such terms in respect to taxation as it shall deem expedient; and it may, and sometimes does, provide that the shares of stockholders shall be taxed at the place of corporate business, and the tax be paid by the corporation for all its members.² The state may give the shares of stock held by individual stockholders a special or particular *situs* for the purposes of taxation, and may provide special modes for the collection of the tax levied thereon; and it is often convenient, as well as perfectly just, to take that course.³

ownership of shares in corporations did not, constitute a "doing of business" within the state within the meaning of the act. Neither did the purchase of oil as aforesaid, or the ownership of interests in statutory limited partnerships. It was also held that it was not the purpose of the statute to tax such foreign corporations on their whole capital stock, but only to the extent that they should bring their property for employment within the state. Also, that the Standard Oil Company did not, by the facts above stated, bring all its capital stock within the state, either actually or constructively. *Commonwealth v. Standard Oil Co.*, 101 Pa. St., 119.

¹ *Great Barrington v. County Commissioners*, 16 Pick., 572; *Newark City Bank v. The Assessor*, 30 N. J., 18; *State v. Branin*, 23 N. J., 494; *State v. Bentley*, 23 N. J., 532; *Whitsell v. Northampton County*, 49 Pa. St., 526; *post*, chs. III, VI and XII.

A tax laid in California upon the stock of a corporation owned entirely by a non-resident, and with all its property in another state, was held void. The interest of the owner, it was said, being incorporeal and intangible, and having no *situs* apart from the person of the owner, and he being a non-resident, without the jurisdiction of the state, and the tangible property of the corporation of which the capital stock is the representative being also situate outside of the state, it was not, without some express constitutional or statutory provision making it so, if any such valid provision there could be, subject to the jurisdiction of the state, or to taxation within the state, through the medium of the shares of stock in the corporation; and it was held that the provisions of the constitution and the statute do not reach the case, there being no such express unqualified provision. *San Francisco v. Mackey*, 22 Fed. Rep., 602.

² *Baltimore v. City Passenger R. R. Co.*, 57 Md., 81.

³ *American Coal Co. v. County Commissioners*, 59 Md., 185; *Baltimore v. City Passenger R. R. Co.*, 57 Md., 81.

This right is recognized in the national currency acts.

If it were practicable to do so, the taxes levied by any government ought to be apportioned among the people according to the benefit which each receives from the protection the government affords him; but this is manifestly impossible. The value of life and liberty, and of the social and family rights and privileges, cannot be measured by any pecuniary standard;¹ and by the general consent of civilized nations, income or the sources of income are almost universally made the basis upon which the ordinary taxes are estimated. This is upon the assumption, never wholly true in point of fact, but sufficiently near the truth for the practical operations of government, that the benefit received from the government bears some proportion to the property held, or the revenue enjoyed under its protection;² and though this can never be arrived at

¹ Mr. Thorold Rogers says, in his *Treatise on Political Economy*, that if taxation were determined by the comparative protection accorded to individuals, women and children should pay a higher rate than strong and healthy adults, since they have more need of assistance; and, if the law be effectual, get more. And this, he shows, was in fact the theory of medieval (feudal) finance. "The lord protected his vassal, the vassal assisted his lord by his service or by his purse. But minors under the English military tenures, and women under some forms of the military assize, were in the hands of guardians, who were enabled to take the rents or profits of their estates, without account, during legal incapacity. The reason given was that there was no reciprocity of service in these cases, and the plea might be justified, because, in an age of violence, weakness taxes the energies of defense more than it excites the sentiment of pity. A more generous and less utilitarian theory has gradually prevailed. It is held that for practical purposes, and under the conditions of organized society, the strongest is too much indebted to the security which a wise and just government gives, to allow any such comparison between his condition and the condition of the weakest, as shall tend to lay a heavier impost on the latter." Ch. 21. See, also, Mill, *Pol. Econ.*, b. v, ch. 2, § 3.

² "The idea of property consists in an established expectation; in the persuasion of being able to draw such or such an advantage from the thing possessed, according to the nature of the case. Now this expectation, this persuasion, can only be the work of the law. I cannot count upon the enjoyment of that which I regard as mine, except through the promise of the law which guaranties it to me. It is law alone which permits me to forget my natural weakness. It is only through the protection of the law that I am able to inclose a field, and to give myself up to its cultivation with the sure though distant hope of harvest." . . . "Property and law are born together and die together. Before laws were made there was no property; take away laws and property ceases." Bentham, *Theory of Legislation; Works* (Edinb. ed.), vol. I, p. 308. And speaking of the right to property, he justly adds: "It is that right which has vanquished the natural aversion

with accuracy, through the operation of any general rule, and would not be wholly just if it could be, experience has given us no better standard, and it is applied in a great variety of forms, and with more or less approximation to justice and equality. But, as before stated, other considerations are always admissible; what is aimed at is, not taxes strictly just, but such taxes as will best subserve the general welfare of the political society.¹

The taxes governments have been accustomed to lay. In modern times, governments have been accustomed to levy a great variety of taxes; sometimes relying upon a single kind for all the needs of the state, and sometimes levying a number of different kinds with a view to distribute the burden more equally or more to the general acceptance. None of these can invariably operate with justice, but all have advantages that may make one desirable under one set of circumstances, and another the best when circumstances have changed. Those which have been most common will be briefly referred to

Capitation Taxes. These are not a common resort in modern times,² and only in a few cases could they be either just or

to labor; which has given to man the empire of the earth; which has brought to an end the migratory life of nations; which has produced the love of country and a regard for posterity." See Wayland, *Pol. Econ.*, b. 4, ch. 3, § 1; Rogers' *Pol. Econ.*, ch. 21.

¹ An early Maryland law recited that "fines, duties or taxes may properly and justly be imposed or laid with a political view for the good government and benefit of the community." Upon this Chancellor *Bland* comments as follows: "A citizen may have a fine imposed upon him as a punishment for his misdemeanor or crime; a duty may be imposed as a means of insuring good conduct, and in aid of the police, as in the form of a duty for a license to keep a tavern, to retail spirituous liquors, to keep a billiard table, etc.; a treble tax may be imposed with a political view, as upon non-jurors during a war, etc." *Williams' Case*, 3 *Bland*, Ch., 186, 257. In the same case the learned chancellor refers to statutes of the colony which taxed bachelors as such. This was not because they had more to be protected by the government than other persons, but probably from a variety of reasons, one of the most influential being that presumptively, they were better able to bear the burdens of government than men with families dependent upon them, or unmarried females whose income would commonly be less.

² The taxes assessed by this name have not always been taxes levied on persons, but sometimes taxes exacted from districts or provinces, and meas-

politic. As they regard only the person, they must be shared equally by all, except under governments where privileged orders are recognized, and where they might be graded according to the orders to which the several persons taxed belong. If the tax is graded by property, it is obviously something besides a capitation tax.

Land Taxes. These may be measured by the production, by the rent, or by the value. The first method has seldom been resorted to in enlightened periods.¹ To some extent it would operate as a discouragement to industry; and, while it might not be burdensome to the cultivators of very productive estates, it might preclude poor lands, whose production would barely pay for cultivation, from being cultivated at all; in other words, would be equal to the whole rental value. A tax, measured by rents, will usually come nearer to being a tax on the actual revenue of the land proprietor; and this standard is more common. A variety of land taxes, under different names, has been levied in England, merging at last in a general land tax, measured by rent, and apportioned to the municipal divisions. As, however, this tax has been based upon valuations made in the fourth year of William and Mary (1692), it is extremely unequal, and perhaps only continues to be acquiesced in because a very small portion only of the whole revenue is

ured by the *capita*. Such were the capitation taxes levied under the Roman Empire, in apportioning which among individuals, one might represent several *capita*, according to his wealth in land, while others escaped the tax entirely. Gibbon's *Decline and Fall*, ch. 17.

It is common, in providing for a labor tax for the repair of highways, to assess every able-bodied male adult one or more days' labor, as a capitation tax. But sometimes poll taxes are levied for school purposes. The requirement of a state constitution, that the poll tax shall be "applied exclusively in aid of the public school fund," will not preclude charging against it the cost of collection. *Shaver v. Robinson*, 59 Ala., 195.

¹ It was made use of under the Roman Empire. Gibbon's *Decline and Fall*, ch. 17. It has been occasionally employed in recent times. Tithes for the support of the Established Church in England were so measured.

Where land is assessed for taxation as such, it is not competent at the same time to assess, for separate taxation, rents which are to accrue thereafter from the same land, since rent to grow due is part of the land itself; an incident to it; and would therefore be included in the assessment of the land. *Scully v. People*, 104 Ill., 349.

raised by it.¹ In this country land taxes are commonly laid by value. This is subject to some objections. In order to insure equality, it is necessary, in a new and rapidly improving country, that there should be frequent valuations, and this requires a great official force and involves heavy expense. The apportionment of this expense among towns or other small divisions of territory, the people of which are allowed to choose the officers, reconciles them to the burden, and, in many of the states, a new valuation is made annually.² An objection, theoretically more serious, is that a tax by assessed value is often (where the land is poor and unproductive, or where it is wild and uncultivated) a tax which is paid from capital instead of from revenue. A tax to be thus paid cannot long continue, and is seldom to be purposely laid; but, in particular instances, almost any tax will be such. And in this country, where a considerable portion of the community invest in lands with a view to profit from the rise in value, unproductive and uncultivated lands cannot be exempted from taxation because of the hardships of individual cases, without exempting a large portion of the wealth of the state now legitimately invested where it is insuring large profits to the owner.

Taxes on Houses. These, except where the houses are treated as appurtenances to lands, have been measured by rents, and sometimes by hearths and windows. A hearth tax was obnoxious, because, among other reasons, it involved inquisitorial visits of officers to inspect rooms; and both hearth and window taxes tended to limit among the poor the use of these conveniences, so important not only to comfort, but to health. Both are now abolished in England.

¹ 1 Bl. Com., 307; 1 Broom & Hadley's Com., 368, 372. See *Queen v. Commissioners of Land Tax*, 2 El. & Bl., 694.

² In the light of the experience we have of the American system, it is interesting to note what is said by Adam Smith: "A land tax assessed according to a general survey and valuation, how equal soever it may be at first, must, in the course of a very moderate period of time, become unequal. To prevent its becoming so would require the continual and painful attention of government to all the variations in the state and produce of every different farm in the country," . . . "an attention so unsuitable to the nature of government, that it is not likely to be of long continuance, and which, if it is continued, will probably, in the long run, occasion much more trouble and vexation than it can possibly bring relief to the contributors." *Wealth of Nations*, b. v, ch. 2, pt. 2.

Taxes on Income. These may be on all incomes, or on all with such exemption as will enable the tax payer, in a frugal manner, to support himself and his family.¹ The latter is the course usually adopted, and, in some cases, incomes in excess of the exemption have been taxed a larger percentage as they increased in amount. The reasons which favor this discrimination would also justify a heavier proportionate tax on the thrifty classes in other cases; and the principle once admitted, there is no reason but its own discretion why the legislature should stop short of imposing the whole burden of government on the few who exhibit most energy, enterprise and thrift. Such a discrimination is a penalty on the possession of these qualities. But any income tax is also objectionable, because it is inquisitorial, and because it teaches the people evasion and fraud. No means at the command of the government have ever enabled it to arrive with anything like accuracy at the incomes of its citizens, and they resist its inquisitions in all practical modes, not only because they desire to avoid as far as possible the public burdens which they are certain are not to be equally imposed, but also because they are not willing that their private affairs and the measure of their prosperity should be exposed to the public.² The taxes imposed on incomes by the United States during and immediately following the late war were escaped by a large proportion of those who should have paid them, and the assessors' returns were a wholly inadequate indication of the annual private revenue of the country. In the United States, also, such a tax is unequal, because those holding lands for the rise in value escape it altogether — at least until they sell, though their actual increase in wealth may be great and sure.

Taxes on Employments. A tax on the privilege of carrying on a business or employment will commonly be imposed in the form of an excise tax on the license to pursue the employment; and this may be a specific sum, or a sum whose amount is reg-

¹ See *New Orleans v. Fourchy*, 30 La An., 910.

² Gibbon refers to torture employed under the Empire to ascertain the profits of employments. See *Decline and Fall*, ch. 17. Its employment upon the Jews in England is a familiar fact in history.

The states may tax income except as to any part thereof derived from non-taxable securities. *Opinions of Justices*, 53 N. H., 634.

ulated by the business done or income or profits earned. Sometimes small license fees are required, mainly for the purpose of regulation; but in other cases substantial taxes are demanded, because the persons upon whom they are laid would otherwise escape taxation in the main, if not entirely. Instances of hawkers, peddlers, auctioneers, etc., will readily occur to the mind. The form of a license, though not a necessary, is a convenient, form for such a tax to assume, because it then becomes a condition to entering upon the business or employment, and is collected without difficulty. But it is equally competent to impose and collect the tax by the usual methods.¹

Taxes on the Carriage of Property. There are various methods of imposing these; as by licensing the business, by taxing the vehicles employed, by tonnage duties, etc. As to tonnage duties, the powers of the states are restricted, as is elsewhere shown.

Taxes on the Wages of Labor. These, in a country where wages are only sufficient to supply the absolute needs of life, would necessarily fall on the employer; but when the accumulations of labor are relied upon for a competency, and even for wealth, the burden might be more felt by the laborer. In modern times such taxes have been unusual.

Taxes on Servants, Horses, Dogs, Carriages, etc. These are intended as taxes on luxury and ostentation, and can seldom prove burdensome. Each person assesses himself in determin-

¹ In *Ould v. Richmond*, 23 Grat., 464, 468, a city tax on lawyers was contested for the reason, among others, that the persons taxed held a *license* from the state to practice law, and the municipal tax went to nullify it. *Anderson, J.*, says: "Whilst a lawyer's license authorizes him to practice law in any court of the commonwealth, and it is not in the power of any municipality to deprive him of that right, or to take away his license, it is a civil right and privilege to which are attached valuable immunities and pecuniary advantages, and is a fair subject of taxation by the state, or by a municipal corporation where he resides and enjoys the privilege. It is a vested civil right; yet it is as properly a subject of taxation as property to which a man has a vested right. I cannot perceive that there would not be as much reason for saying that a man's property is not taxable, because he has a vested right in it, as for saying that a lawyer's license is not taxable because he has a vested right to it." See *post*, ch. XVIII.

ing how many he will employ or own.¹ The same may be said of taxes on plate and articles of display, when taxed directly.

Taxes on the Interest of Money. These are objectionable for the same reasons that apply to income taxes. They lead to the same evasions, and to some others which it is impossible to check or circumvent. They are seldom levied *eo nomine*.

Taxes on Dividends are more easily collected and do not usually involve inquisitorial proceedings. Dividends come from corporations whose proceedings are usually semi-public, and while the privacy of individuals is not invaded, neither are the demands of the government liable to serious evasions. This is a common method of raising revenue.

*Taxes on Legacies and Inheritances.*² These are laid in diminution of a new capital which now comes to the hands of parties on the death of former owners; and in theory they should not be burdensome. In fact, however, except when they are upon gifts by will to others than the immediate family, or are on collateral inheritances, they are likely to be felt severely. The property held by the head of the family is usually, for all purposes of supplying comforts and enjoyments, the property of all the family; and a tax upon their succession to it on his death comes in a time of unusual necessary disbursements to increase the embarrassments and burdens which accompany the loss of their main reliance and support. Sometimes these taxes are levied on testamentary gifts and collateral successions only.

¹ Whether the employees of a railroad company are "servants" within a revenue law, see *Attorney-General v. Railway Co.*, 2 H. & C., 792.

² In *Eyre v. Jacobs*, 14 Grat., 422, a tax on collateral inheritances was objected to as opposed to the requirement that taxation of property should be uniform. But the tax was sustained as not being a tax on property, but on the privilege of succeeding to the inheritance. The tax is spoken of in the case by *Lee, J.*, as one of great antiquity, imposed upon the Romans as early as the days of the Emperor Augustus, and often in early times by nations of Europe, as well as in modern times. See, also, *Williams' Case*, 3 Bland, Ch., 186, 259. A similar objection to such a tax in *Tyson v. State*, 28 Md., 577, was also overruled.

A succession tax is not a direct tax upon the land taken by descent, but is an impost upon the devolution of the estate, or the right to become benefi-

Taxes on Sales, Bills of Exchange, Gold and Silver Bullion, etc. These when laid on the instruments by means of which business is transacted, and imposed in the form of stamp duties, have the high recommendation that the cost of collection is but a small percentage of the sum realized, and few evasions of payment are practicable. They are besides paid in small sums, as business transactions take place from time to time, and are therefore not much felt. Indeed, on many accounts they are the least objectionable taxes that can be levied; and the repeal of the most of those which were levied by federal authority in this country is probably due to the strong interest in favor of taxation calculated to aid particular branches of trade. Notes issued with the intent that they shall circulate as currency are also sometimes taxed, with or without stamps.¹

Taxes on Newspapers. These would be likely to be imposed in the form of stamp taxes. The objections are very obvious, and were thought to be conclusive in this country even when the need of revenue was the greatest.

Taxes on Legal Process. These are usually imposed with a view to adjusting, on an equitable basis, as between suitors and the public, the expenses of the administration of justice. They may be imposed as stamp fees on process, fees for permission to enter a suit, etc.²

cially entitled thereto, or to the income thereof. *Scholey v. Rew*, 28 Wall., 331. A legacy tax imposed by the United States is not payable by one whose domicile is, in a foreign country. *United States v. Hunewell*, 13 Fed. Rep., 617. A devisee of real estate is liable to the succession tax, though in the division of the estate he receives the value of the land in other property. *Scholey v. Reed*, 28 Wall., 331. Further, as to legacy and succession taxes, see *Wright v. Blakeslee*, 101 U. S., 174; *Hellman v. United States*, 15 Blatch., 13; *United States v. Allen*, 9 Ben., 154; *Same v. Tappan*, 10 Ben., 284; *Same v. New York Life, etc., Co.*, 9 Ben., 413; *Same v. Hart*, 4 Fed. Rep., 292; *Same v. Townsend*, 8 Fed. Rep., 306; *Same v. Hazard*, 8 Fed. Rep., 330; *Same v. Brice*, 8 Fed. Rep., 381; *Same v. Leverich*, 9 Fed. Rep., 586; *Clapp v. Mason*, 94 U. S., 589; *Mason v. Sargent*, 104 U. S., 689. A tax on collateral inheritances is payable by a corporation, and an orphan asylum may be liable for it though its property is exempt from taxation. *Miller v. Commonwealth*, 27 Grat., 110.

¹ As to what is taxable as "circulation" under the federal revenue laws, see *U. S. v. Wilson*, 106 U. S., 620; *In re Aldrich*, 16 Fed. Rep., 369.

² There are express constitutional provisions for such taxation in Georgia, Nebraska, Nevada and Wisconsin. That they may be laid without any such

Taxes on Consumable Luxuries. Articles like spirituous and malt liquors, tobacco, etc., are generally subjected to heavy taxation as constituting mere luxuries, so that however severe

express authority, see *Harrison v. Willis*, 7 Heisk., 85; *State v. Howran*, 8 Heisk., 824. The right is easier defended than the policy, as the tax, if heavy, may in some cases be equivalent to a denial of justice. The heaviest taxes of this description have been those indirectly imposed in the form of fees to judicial officers. For several centuries such fees in England constituted the principal compensation of the judges; the regular salaries even of those of the highest courts being insignificant. Adam Smith found an advantage in this, for he says it happened that each of the superior courts of Westminster "endeavored by superior dispatch and impartiality, to draw to itself as many causes as it could. The present admirable constitution of the courts of England was perhaps originally in a great measure formed by this emulation, which anciently took place between their respective judges, each judge endeavoring to give in his own court the speediest and most effectual remedy which the law would admit for every sort of injustice." *Wealth of Nations*, b. v, ch. 1, pt. 2. These insignificant salaries continued until the seventeenth century. At times in this country an idea has prevailed that the courts should be made self-supporting; and in the case of the justices' courts this is now the general rule, at least as regards their civil jurisdiction.

The validity of a tax on the unsuccessful party to a lawsuit was questioned in *Harrison v. Willis*, 7 Heisk., 85, as "the imposition of a burthen upon the right of the citizen to go into the courts to have his wrongs redressed, and his rights vindicated," and as an infraction of that section of the bill of rights which declares that "all courts shall be open, and every man for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay." The court sustained the law, remarking that such laws had long existed, and this clause, taken from *Magna Charta*, was not to be understood as prohibiting such a tax, but to be interpreted in the light of the history of the times when adopted.

In Arkansas it is held that the fees required by law upon the issue of a writ or the recording of an instrument are strictly fees to the public and not taxes within the meaning of the clause in the constitution requiring all property to be taxed by valuation. *Lee County v. Abrahams*, 34 Ark., 166. A charge of \$3 to be included in the judgment on any criminal conviction does not violate that clause. *Murphy v. State*, 38 Ark., 514.

That entry fees and continuance fees in suits do not violate a constitutional provision that every person "ought to obtain right and justice freely and without purchase, completely and without denial, promptly and without delay," see *Perce v. Hallett*, 13 R. I., 363. Neither are they by implication prohibited by the constitution providing in terms that taxes may be levied on certain specified callings and kinds of business, and not expressly sanctioning the taxation of lawsuits. *State v. Lancaster Co.*, 4 Neb., 587. See *Hewlett v. Nutt*, 79 N. C., 263.

may be the tax, it will never, of necessity, prove burdensome to the needy classes. The taxes are laid in various forms; on the importation, the manufacture, and the sale. In the United States the inclination of late has been to make the tax on spirituous liquors as heavy as can be collected; but experience demonstrates that a point may be reached where any accession to the tax, by increasing the temptations to fraud and evasion, will tend to lessen the amount collected. Indeed the same may be said of all taxes; the higher they are the more numerous will be the frauds, perjuries, betrayals of official trust, and evasions of public duty; and when they reach a point where the chances of profit by clandestine manufacture or importation are in excess of the chances of loss by detection, added to the tax, the revenue will be certain to fall off very rapidly even though consumption is not diminished. It has recently been proved by the experience of the federal excise laws that a tax of fifty cents a gallon on spirits may be more productive than one of four times that amount. Great Britain at one time had a similar experience with taxes on tea.

Taxes on Exports. These, if the articles exported are a necessity to foreign countries, tend to transfer to such countries a part of the burden of supporting our own government. If not a necessity, they diminish exportation and production. In either case they will usually be impolitic; in the latter, almost certainly, and in the former by inviting retaliatory legislation by the countries affected. In this country the states cannot levy export duties without the consent of congress, except for the purposes of inspection,¹ and congress is also prohibited to lay any tax or duty on articles exported from any state.²

Taxes on Imports. These have generally been the chief reliance of the federal government for its revenue. They have been laid on almost every conceivable article of use, taste or ornament, and upon almost every possible theory and principle. Some tariff laws have perhaps been framed with a view to the just distribution of the burden, and for revenue purposes only; others, while having revenue mainly in view, have laid

¹ Const. U. S., art. I, § x.

² Const. U. S., art. I, § ix.

heavier duties on articles which would come in competition with home manufactures, while others, in some of their duties, have discarded the idea of revenue entirely, and looked solely to protection. We have thus had revenue tariffs, protective tariffs, and revenue tariffs with incidental protection. All have discriminated more or less against articles of mere luxury, but articles of prime necessity have, under some, been taxed very heavily, on the supposition that the burden imposed would be more than made up to those who shared it, by the incidental advantages they would receive from the building up of manufactures at home. Whether the result has answered expectations is a question foreign to the purpose of the present work.

Taxes on Corporate Franchises. These have been a source of large revenue in some states, while others have only placed corporations on the same footing with individuals, and taxed them on their property, or imposed some specific tax intended as an equivalent for a property tax. A tax on a corporate franchise may or may not be just or politic. If the business is one of which corporations have a monopoly, a tax on their franchises, however heavy, would not be burdensome, because the result would only be to add to the cost of whatever the corporations supplied to the public, so that the tax would really be paid by the community at large. If, on the other hand, the business is one open to free competition between corporations and individuals, and in respect to which corporations would enjoy no especial privileges or advantages, a tax upon the privilege of conducting the business under a corporate organization would be wholly unreasonable and unjust, because it would give individuals and partnerships an advantage in the competition; and their competition, keeping down prices, would prevent corporations from indirectly collecting any portion of the tax from the public, and leave them to bear the whole burden of a demand which, under such circumstances, must prove ruinous. While, therefore, a tax on the corporate franchises of banks of issue, which are not subject to competition, might be entirely just, one on the corporate organization of a trading company, with which every individual might compete, would usually be wholly unjust, and, if continued,

must result in the abandonment of a business which, under such circumstances, would be carried on at a ruinous disadvantage.

Taxes on the Value of Property. These have been the main reliance of the states. A common method of raising revenue has been to levy annual taxes on the value of all the real and personal property of the inhabitants, with limited exceptions, and irrespective of the income which, by means of the property, is or may be realized. This seems at first view to be just, and in the belief that it is just, it has been steadfastly adhered to notwithstanding the many and very serious difficulties attending it. These difficulties pertain, for the most part, to the taxation of personal property, which is subject to the following very important objections:

1. It cannot be assessed without inquisitorial process of some kind, instituted for the purpose of ascertaining that which is not open to public inspection, and which the individual, except under the compulsion of such process, would not consent to disclose.¹ Few persons will voluntarily make a complete exhibit of

¹The reader will find valuable information on this score in the accounts which the current histories of England give of taxation in that country under the house of Plantagenet. A very interesting account of taxation under Edward I is found in Audrey's *National and Domestic History of England*, b. 6, ch. 18. The assessment and valuation of articles was so minute and particular as to give us no small insight into the domestic life of that day, and into the extent of the comforts and conveniences enjoyed by different classes of society. Lingard, in his *History of England*, b. 4, ch. 2, has the following which relates to taxation under Edward III:

"The most ancient method of raising a supply was by a talliage on movable property, varying, according to circumstances, from a fiftieth to a seventh, and descending from the highest classes down to the villeins; and it is interesting to observe how rapidly the art of taxation improved in every succeeding reign.

"Under John, each individual was permitted to swear to the value of his own property, and the bailiffs of prelates, earls and barons swore in the place of their lords. The oaths were received by the itinerant justices who, for that purpose, proceeded regularly from hundred to hundred; and, according to the returns of the justices, the tax in its due proportion was levied by the sheriffs.

"By Henry III, every man was compelled to swear, not only to the amount of his own movables, but to that of the movables belonging to his two next neighbors; and, if the accuracy of his statement was disputed, the truth was inquired into by a jury of twelve good men of the county. The com-

their affairs to the public, and still fewer, perhaps, have their affairs in such shape that public officers can make an inventory of their personal possessions, including property in the hands of others or at a distance, and debts owing to them, without the assistance of the owners in preparing it. Statutes have recognized this difficulty, and provided for a list to be presented by the tax payer under oath, or allowed the assessor to tax every person according to his own judgment, leaving the person taxed to reduce the amount by his own oath if he shall see fit, and be able to do so. This is objectionable, not only as taking away a desirable privacy in business and family concerns, but also as holding out a strong temptation to false swearing in matters where a false oath would be difficult if not impossible of detection.¹

missioners were not the justices, but four knights appointed by the justices; and they were instructed to inquire into the value of every species of personalty, with the exception of church ornaments, books, horses, arms, gold, silver, jewels, furniture, the contents of the cellar and larder, and hay and forage for private use.

"Under the Edwards, the commissioners were appointed immediately by the crown. They called before them the principal inhabitants of each township, and bound four, six or more of them, by oath, to inquire into the value of the movables possessed by each householder on the day mentioned in the act, which was generally the feast of St. Michael. By movables, they were to understand not only corn, cattle and merchandise, but money, fuel, furniture and wearing apparel; and, if any such articles had been sold, removed or destroyed since the day specified, they were yet to include them within the amount. The exceptions allowed were few. The knights and esquires did not return their armor, horses or equipments, their plate of gold, silver or brass, their clothes or jewels, or those which belonged to their wives; and persons of inferior rank were exempted from payment for one suit of clothes for the husband and another for the wife, one bed, one ring, a clasp of gold or silver, a silk sash or girdle for daily use, and a cup of silver or porcelain. It is evident that, in these inquiries, as the temptation was great, so also were the means of concealment. But the ingenuity of the commissioners kept pace with the artfulness of the defaulters. Each year new regulations were issued from the exchequer, and, sometimes within a short period, the amount of tax from the same township was nearly doubled. This growing evil occasioned numerous remonstrances. The people complained that the collectors entered their houses and searched every apartment; that they defrauded the king, and that they received bribes to spare some, while at the same time, through pique and resentment, they aggrieved others."

¹ This difficulty has always existed. Latimer, in his sermon at Stamford, in the time of Henry VIII, inveighs against it in this language: "When the parliament, the high court of this realm, is gathered together, and there

2. The assessment of personalty holds out constant and very powerful temptations to defraud the state by concealing the knowledge of every thing which the tax payer believes cannot easily be discovered. This is so well understood that it is scarcely expected that citizens will voluntarily state what they possess, or that officers will make much if any effort to discover. Indeed, the assessment of personal property reaches so small a proportion of the amount really protected by government, that it might almost be said that laws for the purpose remain on the statute books rather as incentives to evasion and fraud in the dealings of the citizen with the state than as a means of realizing a revenue for public purposes.

3. Such taxes are usually unjust in their discrimination between residents and non-residents who enjoy the same protection of the laws. This will be manifest from an illustration: If money is loaned at ten per centum, and the tax upon credits is one per centum of the capital, the resident capitalist may count upon an income of nine per centum upon his investments. But the non-resident, who could not be taxed in the state upon his loans which are made there and protected and enforced by its laws, would, upon the like investment, count upon ten per centum; and this difference would not only be a serious discrimination against the citizen, but it would, and does, encourage further evasions and frauds, and particularly the loaning of moneys in the names of non-residents in order to escape taxation. It also presents an inducement to citizens, whose investments do not require personal attention, to take up their residence abroad; any saving of the tax being equivalent to an addition of that amount to their incomes.

4. Taxation of personalty leads to duplicate taxation in various ways. Other taxes besides those by valuation reach such property, being laid in the shape of duties, excise and license fees, etc.; and, moreover, when property is moved from one jurisdiction into another, where the time fixed for assess-

it is determined that every man shall pay a fifteenth part of his goods to the king, then commissioners come forth, and he that in sight of men, in his cattle, corn, sheep and other goods, is worth an hundred marks or an hundred pound, will set himself at ten pound; he will be worth to the king but after ten pound. Tell me, now, whether this be theft or no?"

ment is different, it may for that reason be twice assessed for a tax on valuation for the same period of time.

5. Such taxation requires a large addition to the force of revenue officers which otherwise would be sufficient, and it renders necessary more frequent assessments than would be requisite were taxation confined to that property, or those subjects, which are more permanent in characteristics and ownership. To make it just, it is generally thought necessary that the tax payer's debts should be deducted; and this complicates the difficulty of ascertaining what his estate is, and leaves every man, in effect, to make his own assessment, or subjects him to the arbitrary and capricious action of the assessors.¹ These are objections which every one feels and appreciates; others, which are more obscure, need not be mentioned. A tax on land is not open to these objections. Whenever the law seeks to tax land and personalty with equality, the general result is, that land pays much the greater proportion of the tax, because this can all be reached, and all be taxed; no inquisitorial proceedings are required to discover it, and no frauds or evasions can conceal it from view. These and other reasons have led some political economists to advocate the omission of personalty from the customary taxation by value, and the raising of the ordinary state revenue by a tax laid exclusively on land and a few other subjects which, like land, are open to constant public observation and inspection, and in respect to which neither would harsh sifting processes be required, nor evasions be practicable, nor frauds invited. Such a tax, it is claimed, while nominally falling upon a few, would in fact be diffused through the whole community, and collected from all by being added to the price of what is produced and distributed by the classes taxed, just as we have found that a tax upon any common article of consumption is paid in the end by the consumer,

¹ Many statutes leave the assessors to estimate the personal estate, but allow the tax payer to reduce an excessive valuation by a statement under oath. Under the almost universal custom of valuing property at from one-fourth to one-third its estimated value, this privilege to the tax payer becomes of no avail. A man having an estate of \$30,000 may be taxed upon that sum, and be without redress, because he cannot make oath that he is not worth so much, when if the general valuation is at one-third only, he should be taxed on but \$10,000.

and is no more burdensome to the dealer who nominally pays it than it is to any other member of the community of consumers. Adam Smith declared that "no tax can ever reduce for any considerable time the rate of profit in any particular trade, which must always keep its level with other trades in its neighborhood."¹ And, indeed, in this country, during and after the great civil war of 1861-5, it was generally found that a heavy tax upon any particular article of consumption gave the business that produced it a new and vigorous impulse of prosperity.²

Taxes on Amusements. These constitute a very considerable source of income to the cities and villages of the country, and sometimes to the state itself. When the amusements are of a public nature, like theatrical and other exhibitions and shows, concerts, games of skill or chance, publicly performed, whether for profit or otherwise, races, etc., they seem to be as proper subjects of taxation as property or ordinary business. In fact such a tax is in the nature of a tax on luxuries, and therefore as unobjectionable as a tax can well be. The limit to the right to tax amusements, if any exists, has never been judicially pointed out, but when the public are invited to share them the right must be clear. On the other hand, it would seem that strictly private and family amusements ought to be considered wholly exempt, except, possibly, when they involve such expense as to be beyond the enjoyment of the people generally, and for that reason to be properly taxable as luxuries.

The foregoing by no means embraces all the subjects of taxation; some others will be referred to as we proceed, but the

¹ *Wealth of Nations*, b. v, ch. 11, p. 11, art. 4.

² Mr. David A. Wells has treated this general subject with ability in many publications. A pamphlet embodying the remarks of Mr. Isaac Sherman before the New York assembly committee of ways and means, October, 1874, is exceedingly instructive and valuable. It is highly probable that if personalty were wholly exempted from taxation by value, the burden of state taxes would be no more unequal than now, and that the general tone of public morality, on the score of taxation, escaping the schooling in evasions which is now had, would be higher. In our enumeration of taxes we have not included charges for postage. These, though sometimes called taxes, are in this country looked upon rather as reasonable charges for a branch of transportation which the government undertakes. They are not burdens upon the people, because they regularly fall below the cost.

enumeration here made may be sufficient for our present purposes. Even marriages have sometimes been taxed; though as a rule the fees imposed in the case of marriages have been only such as were supposed sufficient to cover the cost of proper regulations.¹

¹ In the British internal revenue law in force near the close of the great wars with Bonaparte, marriage licenses were taxed ten shillings if ordinary and five pounds if special. The marriage certificate was also taxed five shillings. That law was very carefully prepared, with a view to producing as much revenue as possible without serious hardships. The discriminations against luxuries were properly very considerable. Thus, the keeper of one pleasure horse was taxed 2*l.* 17*s.* 6*d.*, but for two he was charged 9*l.* 4*s.*, and for every additional horse 6*l.* more, or thereabouts. One carriage with four wheels was taxed 12*l.*, and two, 26*l.* For one male servant the tax was 2*l.* 8*s.*, for ten it was 62*l.* No tax was charged on incomes less than 50*l.*; from that to 150*l.* a gradually increasing tax was imposed, and incomes above 150*l.* paid ten per cent. Occupations and legal instruments were specially taxed; the taxes on indentures of apprenticeship ranged from 15*s.* up to 50*l.*, and articles of clerkship in the office of an attorney or solicitor in the higher courts were taxed 120*l.* The window tax was 6*s.* 6*d.* on a house with six windows, and 84*l.* 10*s.* on one with fifty.

CHAPTER II.

THE NATURE OF THE POWER TO TAX.

In the creation of three distinct departments of the government, and the apportionment of power between them, the authority to tax necessarily falls to the legislative. This is manifest from the slightest consideration of what taxation is. It is the making of rules and regulations under which the necessary revenues for all the needs of government are to be apportioned among the people and collected from them. While the principles of the British constitution remained unsettled and in dispute, the authority to lay and collect taxes was claimed for the executive, but only as a branch of the supreme authority, which was his by divine right, to rule at discretion.¹ When this arrogant claim was repudiated and abandoned, it became one of the most inflexible principles of government that the executive could levy no taxes whatsoever except in the execution of laws that had been made for his observance. Indeed, the principle goes farther than this. It is, that taxes are a *grant* of the people who are taxed, and the grant must be made by the immediate representatives of the people. All revenue laws in Great Britain must, therefore, originate with the popular house of parliament; a body very tenacious of its privileges, and disposed to class as revenue laws whatever will, even indirectly, bring revenue to the state.² Following this

¹ "This power," said the attorney-general in *Hampden's Case*, "is innate in the person of an absolute king, and in the person of the kings of England. All magistracy, it is of nature; and obedience and subjection, it is of nature. This power is not any way derived from the people, but reserved unto the king when positive laws first began. For the king of England, he is an absolute monarch; nothing can be given to an absolute prince but what is inherent in his person. He can do no wrong. He is the sole judge, and we ought not to question him. Where the law trusts, we ought not to distrust." Hallam's *Const. Hist.*, ch. 7; 3 *State Trials*, 826; Broom's *Const. L.*, 306, and notes.

² 4 *Inst.*, 29; 1 *Bl. Com.*, 169; Vattel, b. 1, ch. 20, § 241. The house of lords is not permitted to amend money bills, and the commons deny the power even to reject them. See resolutions of 5th and 6th July, 1860.

It may be noted here, that while under the federal government the term most usually applied to the laws by which taxes are laid and collected is

precedent, the federal constitution requires all bills for raising revenue to originate in the house of representatives,¹ and there are corresponding provisions in the constitutions of nearly one-half the states.² While such provisions are of little or no importance in this country, where the members of both branches of the legislature are equally responsible to the people, the requirement that executive officers shall confine themselves strictly to executive duties is one of the most valuable principles of the government. Indeed, the division of the powers of government is the most important of the checks and balances by means of which the benefits of orderly government are secured and perpetuated; and the least encroachment by one department on the powers of the other is usurpation, for which the law is supposed to provide the adequate remedy. Executive and ministerial officers enforce the tax laws; but, in doing so, they must keep strictly within the authority those laws confer, and they cannot add to or vary, in the slightest degree, any tax lawfully levied.³ They neither

revenue laws, in a number of the states that term is seldom made use of as applying to the laws of the state for the corresponding purpose. There is no substantial difference, however, in the meaning of the two terms, *tax laws* and *revenue laws*. In *Peyton v. Bliss*, 1 Woolw., 170, 173, Mr. *Justice Miller* says: "Any law which provides for the assessment and collection of a tax to defray the expenses of the government is a revenue law. Such legislation is commonly referred to under the general term 'revenue measures,' and those measures include all the laws by which the government provides means for meeting its expenditures. I can imagine no definition of a government revenue which would not include all the money raised by any form of taxation." But an act imposing a penalty which goes to the government is not for that reason merely a revenue law. Revenue laws are those laws only whose principal object is the raising of revenue, and not those under which revenue may incidentally arise. *The Nashville*, 4 Biss., 188.

¹ During the second session of the forty-first congress, there was much discussion as to what constituted a bill for raising revenue, but nothing was settled.

² In the constitutions of Alabama, Arkansas, Delaware, Georgia, Indiana, Kentucky, Louisiana, Massachusetts, Maine, Minnesota, New Hampshire, New Jersey, Oregon, Pennsylvania, South Carolina and Vermont.

³ *State v. Bentley*, 23 N. J., 532; *State v. Flavell*, 24 N. J., 370. An assessment made by a treasurer of property omitted from the roll for a former year, being unauthorized by law, is void. *Hamilton v. Amsden*, 88 Ind., 304. If he takes a note for the tax that should have been assessed, but was not, the note is void. *State v. Illyes*, 87 Ind., 405. No tax can be levied unless the statute clearly intends it. *Stanley v. Mining Co.*, 6 Col., 415.

have, nor can have, any "roving commission to levy and collect taxes from the people without authority of law, but [they] can only do so in the manner prescribed by the law, which should be the governing rule for their conduct in levying taxes . . . in all cases."¹ So inflexible is this rule, that even the legislature itself, as will be more fully shown hereafter, cannot clothe them with its own authority for this purpose.² Where the people have located the power, there it must remain and be exercised.

The power not judicial. It is still more manifest that the power to tax is not judicial. "It is the province of the judicial power to decide private disputes between or concerning persons, but of legislative power to regulate public concerns, and to make laws for the benefit and welfare of the state."³ "The legislative makes, the executive executes, and the judiciary construes the laws."⁴ The legislature must therefore determine all questions of state necessity, discretion or policy involved in ordering a tax and in apportioning it; must make all the necessary rules and regulations which are to be observed in order to produce the desired returns, and must decide upon the agencies by means of which collections shall be made. "The judicial tribunals of the state have no concern with the policy of legislation. That is a matter resting altogether in the discretion of another coördinate branch of the government. The judicial

¹ *Barlow v. The Ordinary*, 47 Ga., 639, 642, per *Warner*, Ch. J.; *Vail v. Bentley*, 23 N. J., 532. A city has no power to employ as collector any one but the officer upon whom the law imposes the duty. *Fort Wayne v. Lehr*, 38 Ind., 62. A county treasurer charged by law with the duty of collecting county taxes cannot be empowered by the county board to employ counsel to assist him. *Miller v. Embree*, 88 Ind., 133.

² See the next chapter. The legislature cannot confer upon a state board a discretionary authority to add to the amount which the statute authorizes to be collected by state tax. *Houghton v. Austin*, 47 Cal., 646. And in Tennessee it has no power to delegate the right to tax to any but municipal corporations. *Waterhouse v. Public Schools*, 8 Heisk., 857; S. C., 9 Bax., 400.

³ *Richardson*, Ch. J., in *Merrill v. Sherburne*, 1 N. H., 199, 204.

⁴ *Marshall*, Ch. J., in *Wayman v. Southard*, 10 Wheat., 1, 46. See *Greenough v. Greenough*, 11 Pa. St., 489, 494; *Bates v. Kimball*, 2 Chip., 77; *Newland v. Marsh*, 19 Ill., 376, 382; *Beebe v. State*, 6 Ind., 501, 515; *Jones v. Perry*, 10 Yerg., 59, 69; *People v. Supervisors of New York*, 16 N. Y., 424, 433.

power cannot legitimately question the policy or refuse to sanction the provisions of any law not inconsistent with the fundamental law of the state."¹ And it is as incompetent for the legislature to confer the power to tax upon the judiciary as upon the executive.² If the legislature shall abuse its powers and transcend its legislative functions by the enactment of that which is called a tax law, but which is not such in fact,

¹ *Redfield*, Ch. J., in *Powers in re*, 25 Vt., 261, 265. See *Wheeler v. Platts-mouth*, 7 Neb., 270.

² *Hardenburg v. Kidd*, 10 Cal., 402. See *Bigler v. Sacramento*, 59 Cal., 698; *Merriwether v. Garrett*, 102 U. S., 472; *Ketchum v. Railroad Co.*, 4 Dill., 41; *Norris v. Waco*, 57 Tex., 635.

"The court of sessions under the constitution can only exercise powers of a judicial character. The legislature is incompetent to confer upon the court any other powers. The assessment of taxes is not a judicial act; it partakes of no element of a judicial character. It is a legislative act; it requires the exercise of legislative power, which for certain governmental purposes in the county may be devolved upon a board of supervisors, but cannot be delegated to any branch of the judicial department." *Hardenburg v. Kidd*, 10 Cal., 402. In *Heine v. Levee Com'rs*, 19 Wall., 655, a bill in equity was filed to compel the respondent to levy a tax for the payment of overdue corporation bonds. The bill was dismissed. *Miller*, J., says, "The power we are here asked to exercise is the very delicate one of taxation. This power belongs in this country to the legislative sovereignty, state or national. In the case before us the national sovereignty has nothing to do with it. The power must be derived from the legislature of the state. So far as the present case is concerned, the state has delegated the power to the levee commissioners. If that body has ceased to exist, the remedy is in the legislature, either to assess the tax by special statute, or to vest the power in some other tribunal. It certainly is not vested, as in the exercise of an original jurisdiction, in any federal court. It is unreasonable to suppose that the legislature would ever select a federal court for that purpose. It is not only not one of the inherent powers of the court to levy and collect taxes, but it is an invasion by the judiciary of the federal government of the legislative functions of the state government. It is a most extraordinary request; and a compliance with it would involve consequences no less out of the way of judicial procedure, the end of which no wisdom can foresee." See, further, *Merriwether v. Garrett*, 102 U. S., 472; *United States v. New Orleans*, 2 Woods, 230.

Where the legislature, through a failure to levy, leaves property free from taxation, and provides no means for an assessment, the courts cannot remedy the omission. *State v. Mobile Co.*, 73 Ala., 65. See *Rees v. Watertown*, 19 Wall., 107. There can be no valid tax under an unconstitutional law. *Brown v. Denver*, 7 Col., 805. The legislature must prescribe the rule of taxation, and cannot leave it to the local authorities. *State v. Hudson*, 37 N. J., 12.

then indeed the abuse may be arrested by the judicial arm;¹ but the interference does not proceed on the idea of any authority of the judiciary over the subject of taxation. The judiciary interposes on the application of any party whose rights are threatened by an unlawful exercise of authority; and it is immaterial with whom or what department the unlawful action originates, or by what name it is designated. But so long as the legislation in form and substance conforms to the constitution, and is not colorable merely, but is confined to the enactment of what is in its nature strictly a tax law, and so long as none of the constitutional limitations are exceeded, or the constitutional rights of the citizen violated in the directions prescribed for enforcing the tax, the legislation is of supreme authority, and the courts, as well as all others, must obey. Taxes may be, and often are, oppressive to the persons and corporations taxed; they may appear, to the judi-

¹ *Maltby v. Reading, etc.*, R. R. Co., 52 Pa. St., 140, 145. See *Gault's Appeal*, 33 Pa. St., 94; *N. Y. & Erie R. R. Co. v. Sabin*, 26 Pa. St., 242; *Wharton v. School Directors*, 42 Pa. St., 358; *Brodnax v. Groom*, 64 N. C., 244; *Pullen v. County Commissioners*, 66 N. C., 361; *McCullough v. State of Maryland*, 4 Wheat., 316, 428; *Providence Bank v. Billings*, 4 Pet., 514, 563; *Veazie Bank v. Fenno*, 8 Wall., 533, 548; *Heine v. Levee Commissioners*, 19 Wall., 655; *People v. Brooklyn*, 4 N. Y., 419; *Weber v. Reinhard*, 73 Pa. St., 370; *Sharpless v. Mayor of Philadelphia*, 21 Pa. St., 147; *Bank of Pennsylvania v. The Commonwealth*, 19 Pa. St., 144; *Perkins v. Milford*, 59 Me., 315, 318, per *Appleton*, Ch. J.; *De Pauw v. New Albany*, 22 Ind., 204; *Gibson v. Mason*, 5 Nev., 283; *Waters v. State*, 1 Gill, 802; *Alcorn v. Hamer*, 38 Miss., 652, 751; *King v. Portland*, 2 Or., 154; *Blackwell on Tax Titles*, 4th ed., ch. 1, and cases cited. "The courts have no more power to assess, or command the assessment of, taxes than the legislature has to adjudge or command the adjudication of lawsuits." *Reese, J.*, in *Justices of Cannon County v. Hoodenpyle*, 7 Humph., 145, 147. The case was one of an application for *mandamus* to compel the county court to levy a tax to pay county debts. And see *Delaware R. R. Tax*, 18 Wall., 206.

A court may cut down an assessment if it exceeds the legal or constitutional limit, but if it does not, it cannot assume the functions of the assessors by reducing the assessable value, nor by including omitted property which was taxable. Its functions are, not to value or assess, but simply to decide whether the rate is in excess; at that point its functions cease. And it has no more power to equalize assessments than to make them. *Ketcham v. Railroad Co.*, 4 Dill., 41. To same effect is *Kansas, etc., R. Co. v. Ellis County*, 19 Kan., 584. Regular action of a board of supervisors in matters of taxation is not subject to any review in the courts. *Bixler v. Sacramento County*, 59 Cal., 698.

cial mind, unjust and even unnecessary, but this can constitute no reason for judicial interference.¹

Tax legislation may be colorable merely, either because the purpose for which the tax is demanded is not a public purpose, or because of the absence of some other essential element in taxation. When that is the case, the judiciary is the efficient check, and it must protect individuals and protect the public against what, in such a case, would be an attempt at lawless exactions.²

In some of the states the county courts or county justices are empowered to make the county levies. But these, although exercising inferior judicial functions, are really administrative boards, possessing an authority corresponding to that which is exercised in other states by county commissioners or boards of supervisors. Their action in ordering taxes is *quasi* legislative, and governed by the same rules as other legislative action.

In some states, also, tax proceedings are reviewed and confirmed by the courts before any sales of property are ordered or demands conclusively fixed against individuals. But this

¹ See *Veazie Bank v. Fenno*, 8 Wall., 533, 548, per *Chase*, Ch. J.; *Weston v. Charleston*, 2 Pet., 449, 466, per *Marshall*, Ch. J.; *Delaware Railroad Tax*, 18 Wall., 206; *Davidson v. New Orleans*, 96 U. S., 97; *Williams v. Cammack*, 27 Miss., 209; *State v. Bell*, 1 Phil. (N. C.), 76, 85; *Bridge Proprietors v. State*, 21 N. J., 384, 386; S. C. on appeal, 22 N. J., 593; *Dailey v. Swope*, 47 Miss., 367; *State v. Rainey*, 74 Mo., 236; *Merriwether v. Garrett*, 102 U. S., 472.

² *Tyson v. School Directors*, 51 Pa. St., 9; *Covington v. Southgate*, 15 B. Monr., 491, 498; *Tide Water Co. v. Costar*, 18 N. J. Eq., 518; *Hammett v. Philadelphia*, 65 Pa. St., 146; S. C., 3 Am. Rep., 615; *Weisner v. Douglass*, 64 N. Y., 91; *Turner v. Althaus*, 6 Neb., 54; *Sedgw. Stat. and Const. Law*, 414. On this clear principle, that the power to tax was legislative and not judicial, and that the valuation of property for the purposes of taxation was an incident to the taxing power, it was held in *Auditor of State v. Atchison*, etc., *R. R. Co.*, 6 Kan., 500, that the supreme court could not be made an appellate tribunal to review the valuations of railroad property made by the board of county clerks.

The sale of land to satisfy a void street assessment which the legislature has unconstitutionally attempted to validate would be void as taking property without due process of law. *Brady v. King*, 53 Cal., 44.

Neither the constitution of the United States, nor that of South Carolina, inhibits the legislature from passing an act taking from the citizen an existing remedy by prohibition to stay the collection of taxes illegally assessed upon his property. *State v. Gurney*, 4 S. C., 520.

again is not legislative. Such a review is supposed to be favorable to the tax payer, as it gives him an opportunity to take the opinion of the court upon the legality of the demand made upon him, without waiting until the collector comes and seizes his person or his property. The proceeding is the institution of a suit on behalf of the state against each individual tax payer or item of property taxed, and it calls upon the court to apply the law to the issues which such a suit presents. Of the judicial nature of such a review no question could well be raised.¹

Law of the land. There is a constitutional guaranty which has come to us from Magna Charta, which declares that no person shall be deprived of life, liberty or property, except by the judgment of his peers or the law of the land. The alternative provisions of this guaranty have sometimes been supposed to mean the same thing, and the guaranty itself to entitle every person to have any demand made upon him submitted to the determination of a jury of the vicinage. Such a construction applied in tax cases would work a thorough and radical change in the principles on which taxation is now supposed to rest. It would cripple the legislative power, and subject the action of the department whose function it is to make laws on its own views of the questions of public interest and public policy which the laws involve, to a review and possible reversal at the hands of a jury. It would not so much strengthen the judicial department as it would weaken the legislative; for the courts themselves, though juries sit with and as a part of them, are compelled to recognize a large degree of independence in the action of these assistants. Such independence is often useful, and never can be seriously detrimental when a verdict determines a single controversy only; but to make juries the assessors of the claims of the state upon individuals could only introduce anarchy; one jury reaching one conclusion regarding the public needs and the justice of its demands, and another another, until the state would be without general rule, and must fall to pieces from the incurable insufficiency of its government. Such a construction of a clause

¹See *Davidson v. New Orleans*, 96 U. S., 97.

agreed upon as an important provision in a charter of government can never have been intended.¹

It has long been settled that while one is to be protected in his interests by the "law of the land," he has a right to "the judgment of his peers" only in those cases in which it has immemorially existed, or in which it has been expressly given by law. The clause recited from Magna Charta does not imply the necessity for judicial action in every case in which the property of the citizen may be taken for the public use. On the contrary, a legislative act for that purpose, when clearly within the limits of legislative authority, is of itself the law of the land. And an act for levying taxes and providing the means of enforcement is, as we have seen, within the unquestioned and unquestionable power of the legislature.² It is

¹ This is now agreed on all hands. See *Cruikshanks v. Charleston*, 1 McCord, 380; *State v. Mayhew*, 2 Gill, 487, 497; *Harper v. The Commissioners*, 23 Ga., 566; *State v. Frazier*, 48 Ga., 187; *Hagar v. Supervisors of Yolo*, 47 Cal., 223; *Cowles v. Brittain*, 2 Hawks, 204; *Commissioners v. Morrison*, 23 Minn., 178; *Davis v. Clinton*, 55 Ia., 549; *Howe v. Cambridge*, 114 Mass., 388. In *Harris v. Wood*, 6 T. B. Monr., 641, it is remarked that taxes are recoverable not only without a jury, but without a judge, and the assessment of ministerial officers has been made to operate as an execution on the citizen, and the collector could distrain, and any public collector could be subjected to judgment on motion for the amount. "This process is not founded on a judgment; it issues without a judgment, and it is for this very reason that it is adopted. The state cannot wait the tedious process of getting a judgment. If she were compelled to do this, her honor might be compromised, and the rights of her citizens jeopardized. Hence she clothes her collecting agents with the power to issue process *at once* which will *at once* command her means." Per *Nisbet, J.*, in *Doe v. Deavors*, 11 Ga., 79, 86.

For the meaning of "law of the land" in tax cases, see *Kelly v. Pittsburgh*, 104 U. S., 78; *Pearson v. Yewdall*, 95 U. S., 294; *Stuart v. Palmer*, 74 N. Y., 183; *Dingey v. Paxton*, 60 Miss., 1038; *Pritchard v. Madren*, 24 Kan., 486; *Astor v. Mayor*, 37 N. Y. Super. Court, 539, 561.

While the taxing power is great, it is not within the authority of the legislature to direct the collection by *ex parte* and arbitrary proceedings as a tax, a sum which is in fact payable as rent of lands. *McFadden v. Longham*, 58 Tex., 579.

² *Kelly v. Pittsburgh*, 104 U. S., 78; *Hagar v. Reclamation District*, 111 U. S., 701.

This subject was much considered in *Weimer v. Bunbury*, 80 Mich., 201, 212. The following is an extract from the opinion:

"There is nothing technical, or we think obscure, in the requirement that process which divests property shall be due process of law. The constitution makes no attempt to define such process, but assumes that custom

therefore the law of the land not merely in so far as it lays down a general rule to be observed, but in all the proceedings and all the process which it points out or provides for in order to give the rule full operation. As has been well said, "the mode of levying as well as the right of imposing taxes is completely and exclusively within the legislative power, which, it is to be presumed, will always be exercised with an equal regard to the security of the public and individual rights and convenience. The existence of government depending on the prompt and regular collection of revenue must, as an object of primary importance, be insured in such a way as the wisdom of the legislature may prescribe. There is a tacit condition annexed to the ownership of property that it shall contribute to the public revenue in such mode and proportion as the legislative will shall direct; and if the officers intrusted with the execution of the laws transcend their powers to the injury of

and law have already settled what it is. Even in judicial proceedings we do not ascertain from the constitution what is lawful process, but we test the action by principles which were before the constitution, and the benefit of which we assume that the constitution was intended to perpetuate. If there existed, before that instrument was adopted, well known administrative proceedings which, having their origin in a legislative conviction of their necessity, had been sanctioned by long and general acceptance, we are no more at liberty to infer an intent in the people to prohibit them by implication from any general language, than we should be to infer an intent to abridge the judicial authority by the use of similar words. The truth is, the bills of rights in the American constitutions have not been drafted for the introduction of new law, but to secure old principles against abrogation or violation. They are conservatory instruments rather than reformatory; and they assume that the existing principles of the common law are ample for the protection of individual rights, when once incorporated in the fundamental law, and thus secured against violation.

"We are, therefore, of necessity driven to an examination of the previous condition of things, if we would understand the meaning of due process of law, as the constitution employs the term. Nothing previously in use, regarded as necessary in government and sanctioned by usage, can be looked upon as condemned by it. Administrative process of the customary sort is as much due process of law as judicial process. We should meet a great many unexpected and very serious embarrassments in government if this were otherwise."

The appointment of a drain commissioner by a court, with power to lay out drains regardless of wishes of those concerned, and to levy taxes to pay the cost, at least when made without an opportunity for hearing, is unconstitutional and void. *Whiteford v. Probate Judge*, 53 Mich., 130.

an individual, the common law entitles him to redress. But to pursue every delinquent liable to pay taxes through the forms of process and a jury trial, would materially impede, if not wholly obstruct, the collection of the revenue."¹ There is no room for the supposition that in a matter of this public importance, where promptness in collection is always desirable, and often imperative, dilatory proceedings of this nature were within the contemplation of the people when consenting to any general provision of the constitution.² It is safer, and, as we believe, more correct, to say that our constitutions have been framed and agreed upon in view of an immemorial practice and rule of government, under which the whole subject has been intrusted to the legislative department; and they are to be understood and construed in the light of that practice wherever the people have not expressly undertaken to change it.

This subject has acquired additional importance since the adoption of the fourteenth amendment to the federal constitution, which provides, among other things, that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Since this amendment, whenever it is claimed that a revenue law, either in intent or

¹ *Taylor*, Ch. J., in *Cowles v. Brittain*, 2 Hawks, 204, 207; *Crockett*, J., in *Hagar v. Supervisors of Yolo*, 47 Cal., 222, 233. See *Reclamation District v. Evans*, 61 Cal., 104.

² See *Cowles v. Brittain*, 2 Hawks, 204, 207; *State v. Allen*, 2 McCord, 55, 60, per *Nott*, J.; *Sears v. Cottrell*, 5 Mich., 251; *High v. Shoemaker*, 23 Cal., 363; *Harper v. The Commissioners*, 23 Ga., 566; *Tift v. Griffin*, 5 Ga., 185, 191. And see *Robertson v. Land Commissioner*, 44 Mich., 274, for limitations upon this doctrine.

The sale of lands to satisfy a void street assessment, which the legislature has unconstitutionally attempted to legalize, would be depriving the owner of property without due process of law. *Brady v. King*, 53 Cal., 44. See *Harper v. Rowe*, 53 Cal., 233; *Dundee Mortgage Co. v. School District*, 19 Fed. Rep., 359.

The fact that the value of railroad property is to be ascertained by a state board and all other property by a county board, each being equally charged to ascertain the actual value of the property assessed, does not violate the fourteenth amendment to the federal constitution. *San Francisco, etc., R. Co. v. State Board*, 60 Cal., 12.

in administration, deprives the owner of his property without due process of law, or takes from any person his right to the equal protection of the laws with all others, a federal question may be raised upon which the decision of the federal supreme court will be authoritative and conclusive. It is therefore of high importance to know what that court has decided under this amendment in tax cases.

First, It has been decided that the revenue laws of a state may be in harmony with the fourteenth amendment, though they do not provide for giving a party an opportunity to be present when the tax is assessed against him, and to be then heard, if they give him the right to be heard afterwards in a suit to enjoin the collection, in which both the validity of the tax, and the amount of it, may be contested.¹ It is immaterial to this question that the party to the suit is required, as in other injunction cases, to give security when instituting the suit.² Second, It has been decided that due process of law did not require judicial proceedings in enforcing a tax,³ but that it was competent to provide for them, and therefore it was due process of law when the statute provided that the questions involved in the laying of an assessment should be submitted to a court of justice, with notice to the parties concerned, and opportunity on their part to appear and make contest; that neither the alleged excessive price paid for the work for which the assessment was laid, nor the relative importance of the work to the value of the land, nor the fact that the assessment was made before the work was done, and was unjust as regards benefits conferred, nor that personal judgments were rendered, would render the assessment void under the federal constitution.⁴ Third, It has been held that the federal courts could not inquire into the propriety or justice of legislative action in annexing adjacent territory to a city, with a view to restrain the collection of taxes levied for city purposes in the annexed territory, if in their opinion they should find the com-

¹ *McMillen v. Anderson*, 95 U. S., 37; *Hagar v. Reclamation District*, 111 U. S., 701. See *Pearson v. Yewdall*, 95 U. S., 294.

² *McMillen v. Anderson*, 95 U. S., 37.

³ *McMillen v. Anderson*, 95 U. S., 37.

⁴ *Davidson v. New Orleans*, 96 U. S., 97; *Hagar v. Reclamation District*, 111 U. S., 701.

plaints of land owners, that the taxes were so burdensome as substantially to destroy the value of the land, to be well founded. In strong terms the court affirmed the right of a state to determine for itself the bounds of its municipalities, and to devise its own system of taxation free from federal interference, and that a party is not deprived of his property without due process of law by the enforced collection of taxes by the mere fact that they worked hardship, and produced inequality in particular cases.¹ Fourth, It has been decided to be no unlawful deprivation of property when a resident of one state was compelled by its laws to pay taxes on a debt owed by a non-resident, and secured by mortgage on lands in another state.² Fifth, A state statute was sustained which provided for the drainage of any tract of low or marshy land in the state, on proceedings instituted by five or more owners of lots within the tract, and not objected to by the owners of the greater part of the tract, all being given an opportunity for a hearing; and it was held to be no wrongful deprivation of property, and no denial of the equal protection of the laws, to assess the cost of the drainage upon all the owners of lots.³

These cases settle very conclusively the construction of the fourteenth amendment, and decide that the federal courts have no general jurisdiction to prevent oppression under state tax laws, nor to give relief against hardships and inequalities in their workings.⁴

Some decisions of the federal circuit and district courts should be noticed. The right to notice at some stage in the tax proceedings has been strongly affirmed as a constitutional right in one case.⁵ The right of corporations to the same protection as individuals is also asserted; and therefore a provision of the constitution of California which subjected railroad mortgages to taxation, while exempting other mortgages, was held repugnant to the fourteenth amendment.⁶ A legislative

¹ *Kelly v. Pittsburgh*, 104 U. S., 78. See *Norris v. Waco*, 57 Tex., 635.

² *Kirkland v. Hotchkiss*, 100 U. S., 491.

³ *Wurts v. Hoagland*, 114 U. S., 806. See *Howe v. Cambridge*, 114 Mass., 388.

⁴ See, in general, the *Warehouse Case*, *Munn v. Illinois*, 94 U. S., 443.

⁵ *Santa Clara County v. Sou. Pac. R. Co.*, 18 Fed. Rep., 385, opinions by Justice *Field* and Judge *Sawyer*. See, also, 13 Fed. Rep., 722, and 7 *Sawyer*, 517.

⁶ *San Mateo County v. Sou. Pac. R. Co.*, 13 Fed. Rep., 722.

validation of an invalid assessment has been held void, as taking away the right to a hearing.¹ So it has been decided — contrary to the ruling in Kentucky — that a state law is void which discriminates in taxation for its public schools, and taxes only white persons for white schools and colored persons for schools for colored children.² A heavy license fee on the disinterment and removal of a dead body from the place of interment has been sustained, though obviously aimed at one class of persons only.³

Questions will no doubt continue to arise under this amendment, but the cases already decided will furnish rules for the determination of most of them.

¹ *Albany City Bank v. Maher*, 20 Blatch., 341. Compare *In re Van Antwerp*, 56 N. Y., 261.

² *Claybrooke v. Owensboro*, 16 Fed. Rep., 297.

³ *In re Wong Lung Quy*, 6 Sawy., 442. Only a person injured by an unlawful discrimination can complain of it. *United States v. Jackson*, 3 Sawy., 59.

CHAPTER III.

LIMITATIONS OF THE TAXING POWER BY PARAMOUNT LAW.

Great as is the power of any sovereignty to levy and collect taxes from its citizens, it is not in a constitutional country without limitations which are of very distinct and positive nature. Some of these inhere in its very nature, and exist whether declared or not declared in the written constitution; but some of them it is not uncommon to specify, either out of abundant caution, or to keep them fresh in the minds of those who administer the government.¹ Some others in this country spring from the peculiar form of the government, and the relation of the states to the common authority. Still others are expressly imposed, either by state constitution or by that of the Union.

Enforcement of limitations. The nature of some limitations is such that they address themselves exclusively to the legislative department of the government, and what it shall do will be subject to review by no other authority than the people acting in elections. Such, for example, is the limitation that taxes must be determined upon from public motives only, and with the public good in view. It is to be assumed that the legislature will observe it, but whether it has done so can never become a judicial question.² In most cases, however, a question whether the limitations upon the taxing power have been observed is or may be a judicial question, and the final determination upon it is with the courts.

¹ "Taxation is bounded in its exercise by its own nature, essential characteristics and purpose." *Agnew, J.*, in *Matter of Washington St.*, 69 Pa. St., 352, 363. See *McFadden v. Longham*, 58 Tex., 579. "In our time a French writer has recorded that after attending a debate in our House of Commons, he observed to an English statesman that he had heard no assertion of the general principles of constitutional freedom. The answer was, 'we take that for granted.'" *Knight's England*, vol. 3, p. 417. It is observable in the state constitutions that while they enter with considerable minuteness into declarations of individual right, many of the most important principles of government are usually not declared at all, but simply taken for granted.

² See *ante*, p. 45.

Public purposes. It is the first requisite of lawful taxation that the purpose for which it is laid shall be a public purpose. The decision to lay a tax for a given purpose involves a legislative conclusion that the purpose is one for which a tax may be laid; in other words, is a public purpose. But the determination of the legislature on this question is not, like its decision on ordinary questions of public policy, conclusive either on the other departments of the government, or on the people. The question, what is and what is not a public purpose, is one of law; and though unquestionably the legislature has large discretion in selecting the object for which taxes shall be laid, its decision is not final. In any case in which the legislature shall have clearly exceeded its authority in this regard, and levied a tax for a purpose not public, it is competent for any one who in person or property is affected by the tax, to appeal to the courts for protection. This subject will receive a more full consideration further on.¹

Territorial limitations. It has already been seen that persons and property not within the territorial limits of a state cannot be taxed by it. In such a case the state affords no protection, and there is nothing for which taxation can be an equivalent.² This rule is applicable to the lands of an Indian tribe, which, though they may be within the limits of the state, are exempt from its jurisdiction.³ It is also applicable to the Indians themselves while they retain within the state their tribal relations,⁴ and to persons who reside on lands purchased by or ceded to the United States for navy yards, forts, arsenals, etc., where the state has reserved no other jurisdiction or right than that to serve process.⁵ But it is not necessary that both

¹ *Post*, ch. IV.

² See *Dorwin v. Strickland*, 57 N. Y., 492. In *Dallinger v. Rapello*, 14 Fed. Rep., 32, it was held that under the statutes of Massachusetts the personal property of a deceased inhabitant was not taxable within the state after the appointment of an executor and before distribution, when the property was not within the state, and neither the executor nor any person in interest had a domicile there. The decision, however, was on the construction of the statute and not upon the point of state power.

³ *The New York Indians*, 5 Wall., 761.

⁴ *State v. Ross*, 7 Yerg., 74.

⁵ *Commonwealth v. Clary*, 8 Mass., 72. It is otherwise where the state in making the cession or consenting to the purchase reserves the right to tax.

person and property should be within the jurisdiction in order to be taxable; it is sufficient if either is. If a person is domiciled within the state, his personal property in contemplation of law has its *situs* there also, and he may be taxed in respect of it at the place of his domicile.¹ So at the option of the state, it may impose taxes on tangible personal property within the state, irrespective of the residence or allegiance of the owner.² But real property out of the state cannot be taxed

Fort Leavenworth R. Co. v. Lowe, 27 Kan., 749; S. C. in error, 114 U. S., 525. See *In re O'Conner*, 37 Wis., 379.

¹ *Inhabitants of Great Barrington v. County Com'rs*, 16 Pick., 572; *State v. Branin*, 23 N. J., 484; *State v. Bentley*, 23 N. J., 532; *Newark City Bank v. The Assessors*, 30 N. J., 13; *Nashua Savings Bank v. Nashua*, 46 N. H., 389; *Bemis v. Boston*, 14 Allen, 366; *Commonwealth v. Hays*, 8 B. Monr., 1, 2; *Wilkey v. Pekin*, 19 Ill., 160; *Rieman v. Shepard*, 27 Ind., 288; *Johnson v. Oregon City*, 2 Oreg., 327; *Same v. Same*, 3 Oreg., 13; *Griffith v. Carter*, 8 Kan., 565; *Blood v. Sayre*, 17 Vt., 609. But not in a state where it is merely passing through. *Hays v. Steamship Co.*, 17 How., 596; *Hoyt v. Commissioners of Taxes*, 23 N. Y., 224; *Parker Mills v. Commissioners of Taxes*, 23 N. Y., 242; *State v. Engle*, 34 N. J., 425; *Chauvenet v. Commissioners*, 3 Md., 259; *Hooper v. Baltimore*, 12 Md., 464; *Whitell v. Northampton Co.*, 49 Pa. St., 526; *McKeen v. Same*, 49 Pa. St., 519; *Union Bank v. State*, 9 Yerg., 489; *Conley v. Chedic*, 7 Nev., 336; *Mobile v. Baldwin*, 57 Ala., 62. A mortgage must be taxed to the owner where he lives, not where the land mortgaged is. *Latrobe v. Baltimore*, 19 Md., 13. Investments by residents of the state in bonds and stocks of foreign corporations may be taxed within the state. *Worthington v. Sebastian*, 25 Ohio St., 1. It is competent to provide by law for taxing shares in corporations at the place where the business is carried on. *Tappan v. Merchants' National Bank*, 19 Wall., 490.

² *Hood's Estate*, 21 Pa. St., 106, 114; *Maltby v. Reading R. R. Co.*, 52 Pa. St., 140; *State v. Falkinburge*, 15 N. J., 320; *Wilson v. New York*, 4 E. D. Smith, 675; *Hoyt v. Commissioners of Taxes*, 23 N. Y., 224; *People v. Ogdensburg*, 48 N. Y., 390; *Howell v. State*, 3 Gill, 14; *Rieman v. Shepard*, 27 Ind., 288; *Catlin v. Hull*, 21 Vt., 152; *Blackstone Manuf. Co. v. Blackstone*, 13 Gray, 488; *Leonard v. New Bedford*, 16 Gray, 292; *Steere v. Walling*, 7 R. I., 317; *Hartland v. Church*, 47 Me., 169; *Desmond v. Machias*, 48 Me., 478; *Mills v. Thornton*, 26 Ill., 300; *St. Louis v. Ferry Co.*, 40 Mo., 580; *People v. Insurance Co.*, 29 Cal., 538; *Green v. Van Buskirk*, 7 Wall., 139, 150. The same is true of business carried on within a state or municipality by non-residents. See *Corfield v. Coryell*, 4 Wash. C. C., 371; *Harrison v. Vicksburg*, 3 S. & M., 581; *Worth v. Fayetteville*, 1 Winst., 70; *State v. City Council of Charleston*, 2 Speers, 623; *Padelford v. The Mayor of Savannah*, 14 Ga., 438; *Pearce v. Augusta*, 37 Ga., 597; *Shriver v. Pittsburg*, 66 Pa. St., 446. Compare *Bennett v. Birmingham*, 31 Pa. St., 15; *Dallinger v. Rapello*, 14 Fed. Rep., 32.

Where the statute provides that the mortgagor may pay the tax on the

to the owner within it, while on the other hand all real estate of a non-resident is taxable where it is,¹ though the tax will be a lien upon the land only, and cannot be made a personal charge against the non-resident owner.² The shares owned by residents in foreign corporations may be taxed to the owners, even though the corporations themselves are taxed in the jurisdiction where their operations are carried on.³ And as no state is under obligation to permit a foreign corporation to carry on business, or exercise franchises, within its territory, the permission to do so may be granted under such restrictions, or permitted on such conditions regarding taxation, as the state may think proper or prudent to impose.⁴

mortgage security and be allowed the amount on his debt, if the mortgagee insists on full payment and receives it, and the mortgagor pays the tax afterwards, he may recover the amount of the mortgagee. *Blythe v. Luning*, 7 Sawy., 504. When a non-resident, owning lands in the state, sells by executory contract, and the contract is held in the state by his agent, it is taxable as personalty where it is held. The fiction of a debt following the person of the creditor does not govern in such a case. *Redmond v. Commissioners*, 87 N. C., 122. As to taxing personalty where located, see *Torrent v. Gager*, 52 Mich., 506. A boat may be so taxed though owned by a foreign corporation. *Irvin v. New Orleans, etc., R. R. Co.*, 94 Ill., 105. One having possession of tangible property on the day of assessment may be taxed for it though it has been sold to a non-resident. *Commonwealth v. Gaines*, 80 Ky., 489. But notes and accounts held by an attorney merely for collection and the remission of the moneys to the non-resident owner cannot be said to have a *situs* in the state for the purposes of taxation. *Herron v. Keeran*, 59 Ind., 472.

¹*Witherspoon v. Duncan*, 4 Wall., 210; *Turner v. Burlington*, 16 Mass., 206; *Jones v. Columbus*, 25 Ga., 610.

²See *Hilton v. Fonda*, 86 N. Y., 339. Where, however, land was personally assessed to a non-resident, and his agent appeared and only objected to the valuation, it was held that he could not afterwards, in a suit against the assessors, treat the assessment as void. *Ibid.*

³See *post*, chs. VI and XII.

⁴*Ducat v. Chicago*, 48 Ill., 172; *Fireman's Benevolent Association v. Lounsbery*, 21 Ill., 511; *Fire Department of Milwaukee v. Helfenstein*, 16 Wis., 136; *People v. Imlay*, 20 Barb., 68; opinion of *Taney*, Ch. J., in *Bank of Augusta v. Earle*, 13 Pet., 519; *Cincinnati Mutual Health Assurance Co. v. Rosenthal*, 55 Ill., 85; *Western, etc., Tel. Co. v. Lieb*, 76 Ill., 172; *Fire Department v. Noble*, 3 E. D. Smith, 440; *Same v. Wright*, 3 E. D. Smith, 453; *Degroot v. Van Dwyer*, 20 Wend., 390; *Trustees, etc., v. Roome*, 98 N. Y., 318; *Commonwealth v. Melton*, 12 B. Monr., 212, 218; *Tatam v. Wright*, 23 N. J., 429; *Paul v. Virginia*, 8 Wall., 168; *Liverpool Ins. Co. v. Massachusetts*, 10 Wall., 566; *Ducat v. Chicago*, 10 Wall., 410. A foreign

Taxation and representation. There is a maxim in our government that the representatives of the people must impose the taxes the people are to pay. The form it sometimes takes is, "taxation and representation go together." The maxim is familiar in English law, where it became established as the result of a long, and at times bloody, controversy between the representatives of the people on one side, and the crown on the other. The meaning there was the same that had been contended for in other countries; that the imposition of taxes was essentially a legislative power, and the sovereign could levy none except as they were granted by the representatives of the realm.¹ In America the corresponding contest assumed a different phase, and the maxim took on a different meaning as a rallying cry in the contest for independence. The American colonies insisted upon the right of the colonial legislatures to vote the local taxes; disputing any such right in the parliament of Great Britain, which was a body in which the colonists had and could have no representatives. That body, it was claimed, could legitimately exercise over them the authority only of an imperial legislature to regulate external concerns, and those of the empire at large, leaving internal concerns to the control of their own representatives. What the maxim really meant was, that the local legislature must make the local laws; it was violated in the particular of taxes, and consequently brought that subject prominently to notice, though the principle itself was general. The same principle has sometimes been appealed to as if it meant that *no person* could be taxed unless in the body which voted the tax he was represented by some one in whose selection he had a voice; but it never had any such meaning, and never could have, without excluding from taxation a very large proportion of all the property of the state. If the privilege of voting for representatives in the government were the only or even the principal benefit received

corporation doing business in New York may be taxed there on its business in that state, or on the amount of its capital made use of there. *People v. Fire Association*, 92 N. Y., 312.

¹ See Clermont's note to Fortescue's *De Laudibus*, p. 23; also *Bates' Case*, 2 State Trials, 371; S. C., Broom's Const. Law, 247; *Hampden's Case*, 3 State Trials, 825; S. C., Broom's Const. Law, 306, and note, 370. Similar but less successful contests for the same principle in France and Spain are narrated by Mr. Hallam and other writers.

from government, there might be the highest reason in exempting the non-voting infant or alien from taxation; but this privilege to any particular individual, as compared with the protection of life, liberty and property, is really insignificant. And so long as all persons cannot participate in government, the limits of exclusion and admission must always be determined on considerations of general public policy. It is not doubted that, so far as can be prudently and safely permitted, all who are to pay taxes should be allowed a voice in raising them; if for no other reason, because those they vote they will more willingly and cheerfully pay.¹ But the maxim that taxation and representation go together is only true when understood in a territorial sense which embraces the state at large; every person in the state being represented in its legislative body, and that body determining the taxation not only for the state at large, but also, within certain limits, for each division

¹The aim of all the contests from which have sprung the liberties of England and America has been to establish and defend the principle of self taxation, as that which must constitute the main security against oppression. Mr. Burke insists upon this in his speech on Conciliation of America. And see *Works of Madison*, III, 105. The sense of the oppression of any burden is greatly increased if they who are to bear it are to do so, not voluntarily, but at the command of others. Locke expresses this idea when, in his *Treatise on Civil Government*, he says, of a burden imposed as compared to one voluntarily assumed, that "it may be all one to the purse, but it worketh diversely to the courage." This is well illustrated in English history; for heavy taxation dates from the time when the right of the commons to grant the taxes became finally settled. But the chief importance in the right of those who pay taxes to vote them consists in this: that in monarchical countries it constitutes the only substantial and continuous check upon tyranny, and in any country the only security against robbery under the forms of law. As the Spanish Cortes said in one of their remonstrances, "there remains no other privilege or liberty which can be profitable to subjects if this be taken away." Hallam's *Middle Ages*, ch. IV. The idea is well expressed by *Lawrence, J.*, in *Harward v. Drainage Co.*, 51 Ill., 130. See, also, *Gage v. Graham*, 57 Ill., 144; *People v. Hurlburt*, 24 Mich., 44. It is very justly laid down that a tax law is to be so construed as to harmonize with the principle that the people are not to be taxed except with their own consent or that of officers truly representing them. *Keasy v. Bricker*, 60 Pa. St., 9. In Indiana it has been decided that where the boundaries of a township have been extended after it has voted aid to a work of internal improvement, the territory brought in cannot be subjected to the tax so voted. *Alvis v. Whitney*, 43 Ind., 83. See *Galesburg v. Hawkinson*, 75 Ill., 152; *Rader v. Road District*, 36 N. J., 273.

and municipality of the state.¹ The local right is subordinate to this general authority.

To what extent the federal government may rightfully levy taxes in districts not represented in the federal legislature is

¹ See *Steward v. Jefferson*, 8 Harr., 335, 336. That the property of persons who have not the right to vote is taxable, see *Wheeler v. Wall*, 6 Allen, 558; *Smith v. Macon*, 20 Ark., 17. In *State v. Ross*, 7 Yerg., 74, 77, *Catron*, Ch. J., has something to say about the tyranny of taxation without representation, but the case did not call for it. In *Marr v. Enloe*, 1 Yerg., 452, where the power to authorize a county court to levy taxes for county purposes was denied, stress was laid on the fact that the members of the court were not elected by the people. Upon the general right of the people to tax themselves through their representatives, see *Pope v. Phifer*, 3 Heisk., 682; *Sanborn v. Rice Co.*, 9 Minn., 258; *People v. Hurlburt*, 24 Mich., 44; *People v. Chicago*, 51 Ill., 58; *People v. Batcheller*, 53 N. Y., 128; *State v. Leffingwell*, 54 Mo., 458. It has often been decided that a state may compel a municipality to tax itself for police purposes. See *Taylor v. Board of Health*, 31 Pa. St., 73; *People v. Mehaney*, 18 Mich., 481. And for highways and other like purposes of general concern. See *Harrison Justices v. Holland*, 3 Grat., 247. But these subjects will be elsewhere considered. Tax laws are undoubtedly to be construed, if possible, so as not to impose taxes without the consent of the people taxed, or of their immediate representatives: so held of a tax for military bounty purposes. *Keasy v. Bricker*, 60 Pa. St., 9; and see *Lexington v. McQuillan's Heirs*, 9 Dana, 513, 517; *Madison Co. v. The People*, 58 Ill., 456, 463; *Hampshire v. Franklin*, 16 Mass., 75, 83; *Cheaney v. Hooser*, 9 B. Monr., 330; *Maltus v. Shields*, 2 Met. (Ky.), 553. And we shall endeavor to show further on, that, in some cases, this assent is necessary.

That a stranger, coming into a town, becomes liable to a license tax as an "inhabitant and member of the corporation," see *Plymouth v. Pettijohn*, 4 Dev., 591; *Whitfield v. Longest*, 6 Ired., 268. "It is just that it should be so; for, as the defendant has, in the security of his property, the benefit of the night watch and of the other police establishments, he ought to contribute reasonably towards their expenses." Per *Ruffin*, Ch. J., in *Wilmington v. Roby*, 8 Ired., 250, 254; and see *Edenton v. Capeheart*, 71 N. C., 156. In *Falmouth v. Watson*, 5 Bush, 660, 661, an act was sustained which empowered the town of Falmouth to impose a license tax not exceeding \$100 on the sale, by retail, of all spirituous, vinous or malt liquors in said town, or within one mile thereof. This was put on the ground of police regulation. A city ordinance, taxing wagons used in the city for pay, cannot apply to wagons owned by those residing outside who employ them in hauling into and out of the city. If it could, it would be taking property for private use — for the use of that particular community of which the owner formed no part. *St. Charles v. Nolle*, 51 Mo., 122.

Where a town is authorized to tax non-residents doing business within it, with a proviso that those taxed should have the right to vote at municipal elections, this proviso may be repealed without affecting the right to tax.

perhaps not entirely clear. In the District of Columbia, which by the national constitution was set apart for federal purposes and placed under the exclusive jurisdiction of congress, the power is unlimited, and whoever becomes a resident of the district must do so with the understanding that he can participate in the government only to the extent that congress may permit.¹ There can be no doubt also of the right of the federal government to levy stamp taxes and imposts of every description, by laws which shall have uniform operation throughout all the states and territories within the jurisdiction of the general government. But taxes for territorial purposes, corresponding to the taxes which are levied by the states for state purposes, it is theoretically at least the right of the people of the territory, when organized with a local legislature, to levy and expend for themselves. It is not to be supposed that the right will be denied by the general government, and if it should be, and the local taxes be imposed and expended by the direct interposition of congressional authority, it is not too much to say that such action would be inconsistent with the maxim of government now under consideration, whether valid in law or not.²

The power not to be delegated. It is a general rule of constitutional law that a sovereign power conferred by the people upon any one branch or department of the government is not to be delegated by that branch or department to any other.³

The maxim that taxation and representation go together only applies to political communities. *Moore v. Fayetteville*, 80 N. C., 154.

The state undertook to provide a park for the city of St. Louis, outside the city limits, and created a board of commissioners who were to levy taxes within the district of the park, for its establishment and support. The commissioners did not live within the district. Held, that they did not constitute a municipal corporation; that the park was not established for municipal but for general purposes, and the proposed taxes were unwarranted by the constitution. *State v. Leffingwell*, 54 Mo., 458.

¹*Loughborough v. Blake*, 5 Wheat., 317, 324. See, also, *Kendall v. United States*, 12 Pet., 524.

²Upon the subject of territorial powers of taxation, the following cases are instructive: *Miners' Bank v. Iowa*, 12 How., 1; *Vincennes University v. Indiana*, 14 How., 268; *Williams v. Bank of Michigan*, 7 Wend., 539; *Swan v. Williams*, 2 Mich., 427.

³*Dillon, Mun. Corp.*, §§ 60, 567, 618, and notes; *Coolcy, Const. Lim.* (5th ed.), 139-148.

This is a principle which pervades our whole political system, and, when properly understood, admits of no exception. And it is applicable with peculiar force to the case of taxation. The power to tax is a legislative power. The people have created a legislative department for the exercise of the legislative power; and within that power lies the authority to prescribe the rules of taxation, and to regulate the manner in which those rules shall be given effect. The people have not authorized this department to relieve itself of the responsibility by a substitution of other agencies. But it is never assumed by the people that the legislature can take such supervision of all the infinite variety of interests in the state, and of all local as well as general affairs, as to be able to determine in every instance precisely what is needed in matters of taxation, and precisely what purposes shall at any time, under the particular circumstances, be provided for. There is a difference between making the law and giving effect to the law; the one is legislation and the other administration. We conceive that the legislature must, in every instance, prescribe the rule under which taxation may be laid; it must originate the authority under which, after due proceedings, the tax gatherer demands the contribution; but it need not prescribe all the details of action, or even fix with precision the sum to be raised or all the particulars of its expenditure. If the rule is prescribed which, in its administration, works out the result, that is sufficient; but to refer the making of the rule to another authority, would be in excess of legislative power. An illustration or two may possibly sufficiently explain the principle. The legislature, with the utmost propriety, may provide for a court of claims or a state board of audit, whose adjudications against the state shall be final upon it; and may direct that the amounts awarded shall go into the general levy for the year. Here is a rule to be properly worked out by a proper agency. A like provision for the adjustment of claims against counties, cities and townships may also be made. A fund for contingent expenses may be put at the disposal of the executive or of other state officers, to be used for public purposes not previously enumerated in detail by the legislature. But to leave to a court of claims or any state officer or board the power to determine whether a tax should be laid for the current year, or at what rate, or upon

what property, or how it should be collected, and whether lands should be sold or forfeited for its satisfaction,—all this prescribes no rule, and originates no authority; it merely attempts to empower some other tribunal to prescribe a rule and set in motion the tax machinery. And this is clearly incompetent. The legislature must make the law, but it may prescribe its own regulations regarding the ministerial agents that are to execute it.

There is, nevertheless, one clearly defined exception to the rule that the legislature shall not delegate any portion of its authority. The exception, however, is strictly in harmony with the general features of our political system, and it rests upon an implication of popular assent which is conclusive. This exception relates to the case of municipal corporations. Immemorial custom, which tacitly or expressly has been incorporated in the several state constitutions, has made these organizations a necessary part of the general machinery of state government, and they are allowed large authority in matters of local government, and to a considerable extent are permitted to make the local laws. This indulgence has been carried into matters of taxation; the state in very many cases doing little beyond prescribing rules of limitation within which for local purposes the local authorities may levy taxes; but with full reserved power, nevertheless, to limit or recall the delegation at pleasure.¹

¹ *Caldwell v. Justices*, 4 Jones, Eq., 323; *Taylor v. Newbern*, 2 Jones, Eq., 141; *Thompson v. Floyd*, 2 Jones, Law, 813; *Wingate v. Sluder*, 6 Jones, Law, 552; *Commissioners v. Patterson*, 8 Jones, Law, 182; *Wilmington v. Roby*, 8 Ired., 250; *Steward v. Jefferson*, 3 Harr., 335; *Lockhart v. Harrington*, 1 Hawks, 408; *Cheaney v. Hooser*, 9 B. Monr., 330; *Slack v. Railroad Co.*, 13 B. Monr., 1, 9; *Battle v. Mobile*, 9 Ala., 234; *Stein v. Mobile*, 24 Ala., 591; *Osborn v. Mobile*, 44 Ala., 493; *Harrison v. Vicksburg*, 8 S. & M., 581; *Smith v. Aberdeen*, 25 Miss., 458; *Hope v. Deaderick*, 8 Humph., 1; *Trigally v. Memphis*, 6 Cold., 882; *Bull v. Read*, 18 Grat., 78; *Case of County Levy*, 5 Call, 139; *Kuhn v. Board of Education*, 4 W. Va., 499; *Logansport v. Seybold*, 59 Ind., 225; *People v. Kelsey*, 34 Cal., 470; *Washington v. State*, 13 Ark., 752; *State v. Noyes*, 10 Fost., 279, 292; *Burgess v. Pue*, 2 Gill, 11; *Alexander v. Baltimore*, 5 Gill, 383; *Kinney v. Zimpleman*, 36 Texas, 554, able opinion by *Walker, J.*; *St. Louis v. Laughlin*, 49 Mo., 559; *St. Louis v. Savings Bank*, 49 Mo., 574; *People v. Hurlburt*, 24 Mich., 44, 108; *Butler's Appeal*, 73 Pa. St., 448; *Baldwin v. City Council*, 53 Ala., 437; *Slack v. Ray*, 26 La. An., 674; *New*

The legislature, however, in thus making delegation of the power to tax, must make it to the corporation itself, and provide for its exercise by the proper legislative authority of the corporation. It cannot confer upon merely ministerial or administrative officers the power to make rules for taxation; and if such officers are given authority to levy and collect taxes, it must be under rules laid down for them. Neither can the legislature confer upon private corporations the power to tax,¹ though it may doubtless create municipal corporations for that especial purpose when not forbidden by the state constitution to do so. In Illinois this is forbidden.²

In delegating the authority, the state is not limited to the exact measure of that which is exercised by itself, but it may permit the municipalities to tax subjects which for reasons of

Orleans v. Kaufman, 29 La. An., 283; *State v. Leffingwell*, 54 Mo., 458; *Cooley's Const. Lim.*, *191, and cases cited. For an early case denying the power of the legislature to delegate to county boards the power to tax, see *Marr v. Enloe*, 1 Yerg., 452. In the subsequent case of *Hope v. Deaderick*, 8 Humph., 1, the right to empower local bodies to levy local taxes was fully sustained. In *Arbegust v. Louisville*, 2 Bush, 271, 275, 276, *Williams, J.*, speaking of an extension of city boundaries which was complained of as permitting unjust local taxation of suburban property, says: "Whatever may be said of the intrinsic justice of such measures, there is no power in the courts to control this, when the taxing power is conferred in good faith, to uphold local government, and give police regulations to the population, and not merely to embrace taxable property for revenue purposes in order to lighten the burdens of others." See, also, *Swift v. Newport*, 7 Bush, 87. While a legislature cannot confer upon a municipality a power to tax which it does not itself possess, it has full discretion to give the power within the limits of its own discretion, but for municipal purpose; and the omission of the state to tax a particular occupation does not preclude its authorizing a municipality to do so. *Montgomery v. Knox*, 64 Ala., 463. In the colony of Massachusetts, the right to raise money by taxation of the interests of the proprietors of a town seems to have been conferred on the proprietors as a corporation, and they enforced the tax by sale of such interests, but they did not sell interests set off in severalty. *Bott v. Perley*, 11 Mass., 169.

¹ See *Cypress Pond Draining Co. v. Hooper*, 2 Met. (Ky.), 350. The proposition stated in the text is believed to be unquestionably sound, though the cases of *Anderson v. Kerns Draining Co.*, 14 Ind., 199, and *Drainage Co. Case*, 11 La. An., 338, both appear to assume the contrary.

² A corporation created to construct levees along a river for the benefit of its members cannot be given the power to assess the cost on the lands of those who receive the benefit. *Board of Directors v. Houston*, 71 Ill., 318. See, further, ch. XX.

And see as to Tennessee, *Waterhouse v. Public Schools*, 8 Heisk. 857.

public policy it has not been deemed wise to tax for more general purposes. It is not uncommon, therefore, to find cities and villages empowered by law to tax trades and occupations which the state, for its purposes, abstains from taxing.¹

What is true of the state is equally true of the municipalities; that the power they possess to tax must be exercised by the corporation itself and cannot be delegated to its officers or other agencies. This rule applies to whatever is to be done which is legislative in its nature and involves the exercise of discretion, and a city, therefore, cannot delegate to an administrative officer the plan and extent of a municipal improvement for which it orders a tax,² and if it should assume to do so, mere acts in affirmance afterwards would not supply to the officer the want of authority.³ Nor can the city council delegate to a committee of its members the power to determine when sidewalks shall be repaired,⁴ nor refer to commissioners the question what portion of the expense of an improvement shall be assessed on the owners of premises benefited, when the charter requires this to be determined by the council itself.⁵ Boards of supervisors cannot refer to commit-

¹ *Johnston v. Macon*, 62 Ga., 645; *Montgomery v. Knox*, 64 Ala., 463. The power conferred, however, can be exercised only for the purpose specified in giving it. A power to tax for street lighting cannot be exercised for street improvement. *Webster v. People*, 98 Ill., 343. See *Murphy v. Jacksonville*, 18 Fla., 318.

² *Thompson v. Schermerhorn*, 6 N. Y., 92; *St. Louis v. Clemens*, 52 Mo., 133; *People v. Clark*, 47 Cal., 456; *Johnston v. Macon*, 62 Ga., 645; *Hyde v. Joyes*, 4 Bush, 464.

³ *Hyde v. Joyes*, 4 Bush, 464. And see *Randolph v. Gawley*, 47 Cal., 458. *State v. Saalman*, 37 N. J., 156; *State v. Koster*, 38 N. J., 308; *Waterhouse v. Public Schools*, 8 Heisk., 857.

⁴ *Macon v. Patty*, 57 Miss., 378; *Bryan v. Chicago*, 60 Ill., 507. See *Davis v. Read*, 65 N. Y., 566. But it is no delegation of power when a board is commanded to levy a certain percentage on the tax for delinquency in payment. *San Francisco, etc., R. Co. v. State Board*, 60 Cal., 12. And in Kentucky it has been held to be no delegation of the taxing power to refer to the city engineer and a committee of the council to determine when repairs in a street improvement are needed, and how much of the old improvement can be used in making them. *Covington v. Boyle*, 6 Bush, 204.

⁵ *Scofield v. Lansing*, 17 Mich., 437. A city cannot delegate to its ministerial officers the power to tax, though they may be authorized, under general regulations, to issue licenses when the taxes are paid. See *East St. Louis v. Wehrung*, 46 Ill., 392. The following cases have discussed to some extent what constitutes a delegation of the power to tax: *State v. Sickles*,

tees the power of examining the assessment rolls and equalizing the valuations, but these duties must be performed by the boards as such, though after changes are determined upon, the act of making them is merely clerical.¹ And where by law a school district is empowered at its annual meeting to vote a precise and definite sum as a tax upon the people, the meeting cannot delegate to the trustees a discretionary power as to the amount of the tax to be levied.² These cases amply illustrate an important general principle.

Restriction or relinquishment of the power by contract. In some cases the state legislature is found to have pledged the state, in definite and formal manner, that on some particular subject of taxation the state should refrain, either wholly or for some definite period, from levying any taxes whatever, or should levy them only to a certain extent. Such pledges are commonly impolitic and unwise, and it is always among the possibilities that, if sustained, they might be carried to the extreme of crippling the sovereign power of the state to perform its accustomed functions. There has always, therefore, been a strong protest against the doctrine that such pledges could constitutionally be made; the protestants insisting that no legislature is competent to limit the power of its successor, but must transmit to those to come after it the complete power which it received from its predecessor. But the federal Supreme Court in an early case, in which the facts were that a state had exchanged lands with an Indian tribe, and stipulated by legislative act that those conveyed to the Indians should not thereafter be subject to any tax, decided that this stipulation was binding upon the state as a contract; that the state could not impose taxes in contravention of the stipulation, and that the exemption was available on behalf of those who subsequently by legislative permission became purchasers from

24 N. J., 125; *Meuser v. Risdon*, 36 Cal., 239; *Brooklyn v. Breslin*, 57 N. Y., 591; *McIneny v. Reed*, 23 Ia., 410; *Ould v. Richmond*, 23 Grat., 464, 471; *Foss v. Chicago*, 56 Ill., 354; *Warren v. Grand Haven*, 30 Mich., 24; *Johnson v. Sanderson*, 34 Vt., 94. The subject was largely considered in *Houghton v. Austin*, 47 Cal., 646.

¹ *Bellinger v. Gray*, 51 N. Y., 610.

² *Robinson v. Dodge*, 18 Johns., 351; *Trumbull v. White*, 5 Hill, 46. See further, *San Francisco, etc., Co. v. State Board*, 60 Cal., 12.

the Indians.¹ The contract derived its character of inviolability from the clause of the constitution of the United States inhibiting the states from passing any law impairing the obligation of contracts; a clause which applies to the contracts of a state equally with those of individuals.²

The pledge, however, in order to constitute a contract, must have the elements of a contract, and the vital elements are consent and consideration. Consent to the exemption on the part of the state is never by itself sufficient; but there must be something received by the state for the relinquishment, or something surrendered on the other side which can be deemed a legal equivalent. In the case first referred to the consideration was manifest; the state was bargaining away its lands, and was presenting the exemption from taxation as an inducement for better terms on the other side. So if the legislature by law, in order to secure the establishment of a charitable institution, charter a corporation, and in the charter declare that its property shall be exempt from taxation, and individuals, in reliance thereon, invest their means to secure the accomplishment of the object of the law, a consideration for

¹ *New Jersey v. Wilson*, 7 Cranch, 164. Compare *Armstrong v. Athens Co.*, 16 Pet., 281. The history of this important New Jersey case is sufficiently curious to justify allowing a summary of it in this place. After the federal court had decided that the lands were not taxable, the state, in 1814, assessed them again, and from that time until 1877 they were regularly taxed and the taxes paid. At the last named date the tax was disputed, but the state court before which the controversy was brought decided that such a contract, like any other, was subject to be abrogated by consent, or the benefit of it lost to the party seeking to enforce it, under rules applied in other cases; and that the facts of the case raised a presumption, which must be deemed conclusive, that by some convention with the state the right of exemption had been surrendered. *State v. Wright*, 41 N. J., 478.

See, for peculiar cases, *Palmer v. Louisville, etc., Co.*, 19 Fla., 231, affirmed in 109 U. S., 244, overruling *Gonzales v. Sullivan*, 16 Fla., 791; *State v. Nor. Cent. R. Co.*, 44 Md., 131; *Hand v. Savannah, etc., Co.*, 17 S. C., 219; *Elizabethtown, etc., R. Co. v. Trustees*, 12 Bush, 233; *Louisiana v. Pillsbury*, 105 U. S., 278.

Immunity from taxation by statute is not a franchise. *Ches. & O. R. Co. v. Miller*, 114 U. S., 176; *Detroit Railway Co. v. Guthard*, 51 Mich., 180. This becomes important sometimes as bearing on the reserved power to amend charters.

² *New Jersey v. Wilson*, 7 Cranch, 164; *Dartmouth College v. Woodward*, 4 Wheat., 518; *Hall v. Wisconsin*, 103 U. S., 5; *University v. People*, 99 U. S., 309; *Antoni v. Greenhow*, 107 U. S., 769.

the state promise is thus made out.¹ The case would be still plainer if the state received a bonus for the grant of a franchise, stipulating in the grant to give exemption from taxation,² or if it made the grant to a corporation on a surrender by it of valuable rights.³

The contract of exemption may either be perpetual or limited to a defined period,⁴ and it may be for the taxes generally,

¹Home of the Friendless v. Rouse, 8 Wall., 430. The court in this case said that no consideration was necessary beyond the benefits to the community which it was to be assumed were to be anticipated from the formation of the corporation to accomplish the purpose in view. See, also, Ohio Trust Co. v. Debolt, 16 How., 416.

This case should be compared with Christ's Church v. Philadelphia, 24 How., 300; East Saginaw Salt Manuf. Co. v. East Saginaw, 19 Mich., 259; S. C. in error, 13 Wall., 373. In the first of these cases was considered a legislative act which provided that "the real property, including ground rents, now belonging and payable to Christ's Church Hospital, in the city of Philadelphia, so long as the same shall continue to belong to the said hospital, shall be and remain free from taxes." Held, that the exemption so given was a mere privilege, *bene placitum*, and might be revoked at the pleasure of the sovereign authority. And the privilege being recalled by a subsequent act, the property of the hospital became taxable like any other. In the second case a legislative act had provided that companies and corporations formed, or that might be formed, for the boring for and manufacturing salt in the state of Michigan, should be entitled to certain benefits conferred by the act, one of which was that "all property, real and personal, used for the purpose mentioned, shall be exempt from taxation for any purpose." This was considered a mere bounty law, dependent for its continuance upon the dictates of public policy, and the voluntary good faith of the legislature. And see Welch v. Cook, 97 U. S., 541; Detroit v. Plankroad Co., 43 Mich., 140.

²Gordon v. Appeal Tax Court, 3 How., 133, followed in Farrington v. Tennessee, 95 U. S., 679; and in Wendover v. Lexington, 15 B. Monr., 258, 264.

³Lucas v. Lottery Commissioners, 11 G. & J., 490. That the franchise to set up a lottery is not a contract, see Moore v. State, 48 Miss., 147; but see, also, Broadbent v. Tuscaloosa, etc., Association, 45 Ala., 170.

⁴An act exempting the stock of a railroad company and its real estate from taxation for thirty-six years was sustained as a contract, in Tomlinson v. Branch, 15 Wall., 460; as was a perpetual exemption in Humphrey v. Pegues, 16 Wall., 244. See, also, Pacific R. R. v. Maguire, 20 Wall., 36; Louisville, etc., Co. v. Gaines, 3 Fed. Rep., 266; Sou. Pac. R. Co. v. Laclede, 57 Mo., 147. An exemption from taxation for ten years, of lands which had been donated to the state for reclamation, was held not subject to repeal after the lands had been sold. McGee v. Mathis, 4 Wall., 143. See this case for the construction of such an exemption. Also Railroad Co. v. Loftin, 105 U. S., 258.

or only for some portion of them, or it may be a limitation of the tax within some specified bounds.¹ The same principles apply in each case. Where a certain sum is specified, or a certain percentage upon valuation, or upon receipts or acquisitions in any form, this is in the nature of a commutation of taxes, the state agreeing that the sum named is, under the circumstances, a fair equivalent for what the customary taxes would be, or the fair proportion which the person bargained with ought to pay, and the power thus to commute, though liable to abuse, is undoubted.² And this rule applies when a bonus is paid for complete future exemption, to the same extent and on the same reasons as when the commutation is for an annual payment.³

It is perfectly well settled, however, that an exemption granted from motives of state policy merely, and where the state and the citizen do not meet on a basis of bargain and consideration, is to be deemed expressive only of the present will of the state on the subject; and the law granting it, like laws in general, is subject to modification or repeal in the legislative discretion,⁴ and it is immaterial that while it continued in force parties have acted in reliance upon it.⁵ It is also well

¹ *Dodge v. Woolsey*, 18 How., 331; *Ohio Trust Co. v. Debolt*, 16 How., 416.

² The federal decisions are very full on this subject. See *Piqua Bank v. Knoop*, 16 How., 369; *Dodge v. Woolsey*, 18 How., 331; *Mechanics' Bank v. Debolt*, 18 How., 380; *Mechanics' Bank v. Thomas*, 18 How., 384; *Jefferson Bank v. Skelly*, 1 Black, 436; *Franklin Bank v. State*, 1 Black, 474; *Wright v. Sill*, 2 Black, 544; *Delaware Railroad Tax*, 18 Wall., 206. These decisions are of course conclusive, but the same principle has been declared by the state courts in many cases. See, among others, *Gardner v. State*, 21 N. J., 557; *United, etc., Co. v. Commissioner*, 37 N. J., 240; *State Lottery v. New Orleans*, 24 La. An., 86; *Leroy v. Railroad Co.*, 18 Mich., 233; *State Bank v. People*, 5 Ill., 303; *St. Louis v. Savings Bank*, 49 Mo., 574; *Farmers' Bank v. Commonwealth*, 6 Bush, 127; *Mobile v. Insurance Co.*, 53 Ala., 570.

³ *Gordon v. Appeal Tax Court*, 8 How., 133; *State Bank v. Bank of Smyrna*, 2 Houst., 90.

⁴ See *Asylum v. New Orleans*, 105 U. S., 362; *Parmley v. Railroad Companies*, 3 Dill., 25; *Robertson v. Land Commissioner*, 44 Mich., 274; *Tucker v. Ferguson*, 23 Wall., 527; *West Wis. R. Co. v. Supervisors*, 93 U. S., 595; *Hoge v. Railroad Co.*, 99 U. S., 348; *State v. Baltimore, etc., R. Co.*, 48 Md., 49; *Central R. Co. v. State*, 54 Ga., 401; *State v. Georgia R. Co.*, 54 Ga., 423; *Goldsmith v. Georgia R. Co.*, 62 Ga., 485; *State v. Dexter, etc., R. Co.*, 69 Me., 44; *New Jersey v. Yard*, 95 U. S., 104.

⁵ An exemption from taxation of the property of members of the National Guard may be repealed even as to one who enlists while it is in force, and

settled that the contract must be clearly made out. The power to tax being essential to the very existence of the state, there can be no presumption that it has been either abandoned or restricted, and whoever claims that it has been should be able to show by clear words that an intent is expressed to do so, and that consideration existed therefor. And when thus the contract is made out, it cannot be extended by implication beyond the fair import of its terms.¹ As has been said by the federal Supreme Court, "if, on any fair construction of the legislation, there is a reasonable doubt whether the contract is made

who is in service at the time of the repeal. *People v. Assessors of Brooklyn*, 84 N. Y., 610.

A statute imposed a certain rate of taxation on insurance companies then in existence or thereafter to be chartered. Held, that the rate might be increased as to subsequently formed companies. *Holly Springs, etc., Co. v. Marshall Co.*, 52 Miss., 281. If a legislature, in extending the boundaries of a city, provides that the lands annexed shall be taxed only at a certain rate, this is no contract and may be repealed. *Washburn v. Oshkosh*, 60 Wis., 453.

It is, perhaps, hardly necessary to observe that an unconstitutional law cannot establish a contract. *Ramsay v. Haeger*, 76 Ill., 438. Therefore, any exemptions which the legislature undertakes to grant in disregard of the provisions of the constitution are of no force.

¹ *Jones, etc., Manuf. Co. v. Commonwealth*, 69 Pa. St., 137. See, also, *Commonwealth v. Bird*, 12 Mass., 443; *Dale v. Governor*, 3 Stew., 387; *Brainard v. Colchester*, 31 Conn., 407, 410; *Easton Bank v. Commonwealth*, 10 Pa. St. 442, 450; *Herrick v. Randolph*, 18 Vt., 525, 531; *People v. Roper*, 35 N. Y., 629; *People v. Commissioners of Taxes*, 47 N. Y., 501; *Bradley v. McAttee*, 7 Bush, 667; S. C., 3 Am. Rep., 309; *Nor. Mo. R. R. Co. v. Maguire*, 49 Mo., 490; S. C., 8 Am. Rep., 141; *Pacific R. R. Co. v. Cass Co.*, 53 Mo., 17; *Sloan v. Pacific R. Co.*, 61 Mo., 24; *Wendover v. Lexington*, 15 B. Monr., 258, 262; *Baltimore & Ohio R. R. Co. v. Marshall Co.*, 3 W. Va., 319; *Stein v. Mobile*, 17 Ala., 234; S. C., 24 Ala., 591; *State v. Bank of Smyrna*, 2 Hous., 99; *Erie R. R. Co. v. Commonwealth*, 66 Pa. St., 84; *Commonwealth v. Pottsville Water Co.*, 94 Pa. St., 516; *Gilman v. Sheboygan*, 2 Black, 510, 513; *Armstrong v. Athens Co.*, 16 Pet., 281; *Lord v. Litchfield*, 36 Conn., 116; S. C., 4 Am. Rep., 41; *Bridge Proprietors v. State*, 21 N. J., 334, 336; S. C. on appeal, 22 N. J., 593; *Stetson v. Bangor*, 56 Me., 274; *Portland, etc., R. R. Co. v. Saco*, 60 Me., 196, 198; *Oliver v. Memphis, etc., R. R. Co.*, 30 Ark., 123; *People v. Lawrence*, 41 N. Y., 137; *Academy of Fine Arts v. Philadelphia*, 22 Pa. St., 496; *Miller v. Kirkpatrick*, 29 Pa. St., 226; *Macon v. Central R. R. and Banking Co.*, 50 Ga., 620; *Smith v. Macon*, 20 Ark., 17; *Providence Bank v. Billings*, 4 Pet., 514, 563; *Philadelphia, etc., R. R. Co. v. Maryland*, 10 How., 376, 393; *Minot v. Philadelphia, etc., R. R. Co.*, 18 Wall., 206; *Nor. Mo. R. R. Co. v. Maguire*, 20 Wall., 46; *Erie Railway v. Pennsylvania*, 21 Wall., 497; *Tucker v. Ferguson*, 22 Wall., 527.

out, this doubt must be solved in favor of the state. In other words, the language used must be of such a character as, fairly interpreted, leaves no room for controversy."¹

By repeated decisions of the federal supreme court it has been authoritatively and conclusively determined that the charter of a private corporation is to be regarded as a contract between the corporators on the one hand, and the state on the other, and that whatever stipulations are contained therein which are intended for the benefit of the corporators, and operate as an inducement to them to accept the charter, are promises by the state based on valid and sufficient consideration, and not subject to recall except with the assent of the corporation itself.² Stipulations respecting taxation come within the principle, and are, therefore, irrepealable and not subject to change at the mere will of the state, to the prejudice of those on whose behalf they are made.³ But the right to amend or repeal may be reserved in the charter, and when it is reserved it is a part of the contract, and may be exercised by the state at pleasure,⁴ unless conditions are imposed in respect to its exercise, in which case the conditions must be observed.⁵ To avoid the force of the principle that a corporate charter is a contract, which oftentimes operates in some unexpected manner, and, perhaps, unjustly to the public at large, the people of some of the states have made express provision by their con-

¹ *Bailey v. Maguire*, 22 Wall., 215. See *Moore v. Holliday*, 4 Dill., 52; *Weston v. Supervisors*, 44 Wis., 242; *People v. Common Council*, 76 N. Y., 20.

Naming a rate of taxation, but not expressly limiting it, does not preclude its being raised. *State v. Parker*, 32 N. J., 426. Compare *Louisville R. R. Co. v. Louisville*, 4 Bush, 478; *Erie R. R. Co. v. Commonwealth*, 66 Pa. St., 84; *St. Louis v. Boatmen's Ins. and Trust Co.*, 47 Mo., 150; *Union Passenger R. Co. v. Philadelphia*, 83 Pa. St., 429. See *Delaware R. R. Tax*, 18 Wall., 206, for the same principle.

² *Dartmouth College v. Woodward*, 4 Wheat., 518; *Trustees of University v. Indiana*, 14 How., 268; *Binghamton Bridge Case*, 3 Wall., 51.

³ *Piqua Bank v. Knoop*, 16 How., 369; *Dodge v. Woolsey*, 18 How., 831; *Home of the Friendless v. Rouse*, 8 Wall., 430; *Washington University v. Rouse*, 8 Wall., 439; *Wilmington, etc., R. Co. v. Reid*, 13 Wall., 264; *Humphreys v. Pegues*, 16 Wall., 244; *Pacific R. Co. v. Maguire*, 20 Wall., 36; *New Jersey v. Yard*, 95 U. S., 104.

⁴ *West Wisconsin R. Co. v. Supervisors*, 85 Wis., 257; *New Orleans v. Asylum*, 81 La. An., 292; *Bangor, etc., R. Co. v. Smith*, 47 Me., 84; *Commonwealth v. Fayette Co. R. Co.*, 55 Pa. St., 452.

⁵ See *Flint, etc., P. Co. v. Woodhull*, 25 Mich., 99.

stitutions that all charters of private incorporation granted by the legislature shall be subject to amendment or repeal at the legislative will. A provision of this nature is a limitation upon the power of the legislature in granting charters; and while it cannot affect any that are in existence when it takes effect, it attaches the quality of modification and repealability to any afterwards granted, and all who accept them do so with full notice of the fact. The charters are still contracts, but contracts with a reserved right on the part of the state to amend or terminate them.¹ The rule would be the same if the charter were granted while a general law of the state was in force which declared that all grants of the kind should be subject to the legislative power of alteration and repeal; for the grantees would accept their franchises with notice of and qualified by such a declaration.²

Contracts of a state, like the contracts of individuals, may be modified to any extent, subject to constitutional provisions, if any, having a bearing upon the right, by the mutual consent of the parties thereto; which, in the case of a charter of private incorporation, would be the state on the one side and the incorporators on the other. The state consents to the modification when it adopts legislation which will have that effect,³ and the corporation when it accepts such legislation.⁴

¹ *Tomlinson v. Jessup*, 15 Wall., 454; *Miller v. State*, 15 Wall., 478; *Penn. Col. Cases*, 13 Wall., 190; *Holyoke Co. v. Lyman*, 15 Wall., 500; *Parmley v. Railroad Co.*, 3 Dill., 25; *Hewitt v. New York, etc., R. Co.*, 12 Blatch., 452; *State v. Miller*, 30 N. J., 368; *Same v. Same*, 31 N. J., 521; *State v. Newark*, 35 N. J., 157; *Commonwealth v. Fayette Co. R. Co.*, 55 Pa. St., 452; *Iron City Bank v. Pittsburgh*, 37 Pa. St., 340; *Union Improvement Co. v. Commonwealth*, 69 Pa. St., 140; *West Wis. R. Co. v. Supervisors*, 35 Wis., 257; *S. C. in error*, 93 U. S., 595; *Atlantic, etc., R. Co. v. State*, 55 Ga., 312; *New Orleans v. Metropolitan, etc., Co.*, 27 La. An., 648.

Although a charter exempting railroad property from taxation contain a clause reserving the right to the legislature to alter and repeal, until such right is exercised by the legislature, taxation is forbidden. *Petersburg R. R. Co. v. Commissioners*, 81 N. C., 487.

² *Miller v. State*, 15 Wall., 478; *Railroad Co. v. Maine*, 96 U. S., 499.

³ *Railroad Co. v. Commissioners*, 87 N. C., 414.

⁴ *Macon, etc., R. Co. v. Goldsmith*, 62 Ga., 463; *Petersburgh v. Railroad Co.*, 29 Grat., 773; *State v. Commissioners, etc.*, 37 N. J., 240.

When a corporate charter is subject to legislative amendment, it may be so amended as to make stockholders personally liable for taxes. *Anderson v. Commonwealth*, 18 Grat., 295. A provision in a charter, that it might be

A different rule prevails in the case of charters of municipal incorporation. These are not contracts, but regulations of government; and if they contain provisions respecting taxation, such provisions, like everything else in the charter, are subject to change, as the legislative judgment may change respecting questions of policy and expediency, or as changing circumstances may seem to require.¹

The Constitution a Law. The constitution of a state is, in the strictest sense, a law: the fundamental and organic law. And the state being disabled to pass any law impairing the obligation of contracts, it can no more do so by incorporating provisions in its constitution that might have that effect, than by laws enacted by the legislature.²

State Repudiation. The contracts of a state respecting taxation, though their obligation cannot constitutionally be impaired, may nevertheless in some cases be subject to repudiation from the impossibility of finding a remedy for its prevention. The difficulty springs from the fact that the state, as a sovereignty, is subject to suits only as it may have consented to be; and therefore, if a remedy can only be found in a suit at law or in equity, it may not be found at all, because the state may not have consented to such a suit. By the constitution of the United States, the federal judicial power, in its application to the states as political entities, is practically limited to suits between states, and to other suits in which states may be plaintiffs; it does not extend to suits brought against states by

amended or repealed, but that this should not alter the corporate rights, held not to preclude a change in respect to taxation. *Detroit Railway Co. v. Guthard*, 51 Mich., 180.

A contract in a charter as to taxation is not repealed by a subsequent inconsistent constitutional provision. *University v. People*, 99 U. S., 309; *Scotland County v. Railroad Co.*, 65 Mo., 123. See *Appeal Tax Court v. Cemetery Co.*, 50 Md., 432.

¹See *Dartmouth College v. Woodward*, 4 Wheat., 518; *Merriwether v. Garrett*, 108 U. S., 472; *Story on Const.*, 5th ed., 387; *Cooley, Const. Lim.*, 5th ed., 231.

²*Dodge v. Woolsey*, 18 How., 331; *Railroad Co. v. McClure*, 10 Wall., 511; *Gunn v. Barry*, 15 Wall., 610; *White v. Hart*, 13 Wall., 646; *Pacific R. Co. v. Maguire*, 20 Wall., 36; *Marsh v. Burroughs*, 1 Woods, 463; *Keith v. Clark*, 97 U. S., 454; *University v. People*, 99 U. S., 309.

citizens of other states, or by their own citizens, or citizens or subjects of foreign states.¹ Therefore, if an individual is holder of a demand against one of the states of the Union, which for any reason it sees fit not to perform or recognize, he is entirely without remedy, except as the state may furnish one by its own laws. His own state cannot, for the purpose of obtaining justice for him, take an assignment of his demand and bring suit upon it in his interest, since this would be mere evasion of a constitutional inhibition.² The consequence is, that even if a state issues securities which it expressly agrees to receive in payment for taxes, but afterwards it determined not to receive them, there is commonly no remedy. *Mandamus* will not lie to compel the state officers to receive the obligations in payment of taxes, since the suit against them would be in legal effect a suit against the state itself;³ the collector cannot be enjoined at the suit of the creditor from refusing to receive the obligations,⁴ nor is he liable in an action on the case for his refusal.⁵

Nevertheless, any legislative enactment calculated and designed to impair the obligation of the state contract is to be treated everywhere as void in law;⁶ and if the case is such that the state, through its officers, is compelled to resort to affirmative proceedings in order to give the void enactment effect, the party proceeded against may defend his rights as he might in any other case of attempted wrong. The same remedies are open to him as in other cases; for the officer who assumes to act against him, being without warrant of law for his action, must stand before the law as an individual wrong-doer, and cannot claim that a suit against him as a tort-feasor is a suit against the state which has tried, but ineffectually, to give him authority to do what he has attempted. Where, therefore, the terms of an act under which state securities are issued are such that the coupons to the same are receivable for taxes,

¹ Const., art. 3, § 2; Amendment 11.

² *New Hampshire v. Louisiana*, 108 U. S., 76; *New York v. Same*, *Ibid.*

³ *Antoni v. Greenhow*, 107 U. S., 769. See *Louisiana v. Jummal*, 107 U. S., 711; *Elliott v. Wiltz*, *Ibid.*

⁴ *Marye v. Parsons*, 114 U. S., 325.

⁵ *Carter v. Greenhow*, 114 U. S., 817.

⁶ *Hartman v. Greenhow*, 102 U. S., 672; *Poindexter v. Greenhow*, 114 U. S., 270.

and it is made the duty of collectors to receive them when tendered, if afterwards the state forbids their reception, and a collector refuses a tender and proceeds to enforce the tax by distraint of goods, the tax payer may bring suit for the goods seized, as he might in any case of wrongful dispossession, and proof of the tender of the coupons will be held an effectual answer to any attempted justification by the officer of the seizure.¹ Thus indirectly, in such a case, would the contract of the state be enforced.

Municipal Repudiation. It is customary, as will be shown hereafter, for the state to permit the municipalities to vote and levy the taxes for their own local purposes, and to determine what the amount of these shall be, within limits prescribed by the state to prevent oppression, and also to determine the purposes to which the sums raised shall be appropriated. A municipal debt is in many cases the first step in taxation; the levy of taxes being the only means whereby the debt can be paid. It sometimes happens that a municipality is found to have contracted indebtedness to an extent that is felt to be extremely burdensome; and then a local sentiment may spring up in favor of refusing to raise the necessary taxes for its payment. The purpose may be either to avoid the payment altogether or to postpone it for a time, or perhaps to force a compromise with creditors and an abatement. Whatever may be the purpose, the refusal to levy taxes to meet municipal obligations according to their terms is a public wrong; and as the state has ample power to remedy it, its honor is concerned in taking the necessary steps for that purpose. The most prompt and effectual remedy may be found to be the levy of a tax to provide for the indebtedness under a law specially adapted to the purpose, and by means of agencies appointed by the state. The power of the state to adopt this course is unquestionable.² But if the existing law, or any law that should be adopted for the purpose, required the municipality itself to levy the tax, its officers might be compelled by *mandamus* to do so.³ It is only

¹ *Pointexter v. Greenhow*, 114 U. S., 270; *White v. Same*, 114 U. S., 307; *Chaffin v. Taylor*, 114 U. S., 309; *Allen v. Railroad Co.*, 114 U. S., 311.

² *Dunovan v. Green*, 57 Ill., 63. And see *post*, ch. XXI.

³ *Whiteley v. Lansing*, 27 Mich., 131; *Morgan v. Commonwealth*, 55 Pa. St., 456; *Robinson v. Supervisors*, 43 Cal., 353; *Nelson v. St. Martins*, 111 U. S., 716. And see *post*, ch. XXIII.

necessary for this purpose that the amount of the demand shall be conclusively fixed and determined, and that the time has arrived when it has become the duty of the municipality to provide for it;¹ and if the amount has been fixed by judgment, the court which has rendered the judgment has jurisdiction by *mandamus* to compel the levy of a tax for its payment.² By one or the other of these remedies, therefore, it is supposed municipal creditors will secure payment of all just demands.

It is possible, however, that the state itself may so far sympathize with a debtor municipality as to be disposed to aid it in its obstructive methods to prevent collection; and it may seek to do this by so limiting the municipal power to tax that it shall be impossible for it to pay its debts by taxes raised within the legal limit. Where such obstruction has been attempted, however, it has been judicially determined that the limitation of the power to tax under such circumstances was an impairment of the obligation of contracts, and therefore inoperative. The argument shortly stated is, that the state, in conferring upon its municipalities the power to contract debts and to levy taxes for their satisfaction, impliedly contracts with those who become creditors in reliance upon the power, that such power shall not, while their demands remain unpaid, be so limited, impaired or hampered as to preclude the municipality providing for and satisfying such demands according to their terms. Any subsequent legislation, therefore, which could have such injurious effect upon the interests of creditors, and deprive them of the resource of taxation which they had a constitutional right to rely on, will be treated as inoperative and void, and a levy of taxes may be compelled, as it might have been if no such legislation had been attempted.³ And where

¹ *Nelson v. St. Martins*, 111 U. S., 716; *Dayton v. Rounds*, 27 Mich., 82; *State v. New Orleans*, 34 La. An., 477.

² See *United States v. Mobile*, 4 Woods, 537; *post*, ch. XXIII.

³ The leading case on this subject is *Von Hoffman v. Quincy*, 4 Wall., 535, followed in *Galena v. Amy*, 5 Wall., 705; *Riggs v. Johnson Co.*, 6 Wall., 166; *Rees v. Watertown*, 19 Wall., 109; *United States v. Jefferson Co.*, 5 Dill., 310; S. C., 1 McCrary, 356; *United States v. New Orleans*, 2 Woods, 230; *Sibley v. Mobile*, 3 Woods, 535; *Brodie v. McCabe*, 33 Ark., 690.

See to the same effect, *Saloy v. New Orleans*, 33 La. An., 79; *State v. Shreveport*, 33 La. An., 1179; in which it was held that the municipality might complain of the diminution of its power to tax which would preclude payment of its contracts, even if the creditors did not. It is immaterial

contracts have been entered into under a settled construction of the state constitution by its judiciary, they cannot be invalidated afterwards by a change in such construction,¹ or by any change in the constitution itself.²

whether the incompetent restriction is attempted by legislation or by constitutional amendment. *Ibid.* See Opinions of Justices, 58 N. H., 623.

¹ *Gelpcke v. Dubuque*, 1 Wall., 175; *Olcott v. Supervisors*, 18 Wall., 678; *Douglas v. Pike County*, 101 U. S., 677.

² *White v. Hart*, 13 Wall., 646; Opinions of Justices, 58 N. H., 623. But where, at the time a contract is entered into, only realty is taxable for the payment, a subsequent extension to embrace personalty is a mere gratuity, and may be repealed. *Foote v. Howard Co. Court*, 1 McCrary, 218.

The power which has been conferred upon a municipal corporation to tax or contract debt in aid of a railroad may be taken away at any time before the tax is actually laid or the debt contracted, even though the people have voted the aid. And a subscription made by the municipal officers after by legislation the power is taken away is void. *Lieb v. Wheeling*, 7 W. Va., 501.

The following cases have an interest in this connection :

After paving contracts had been made, wards were added to the municipality, and it was provided that the residents should not be liable for previous municipal debts. Held, that there were no contract obligations between the paving contractors and the newly added residents which would make this incompetent. *United States v. Memphis*, 97 U. S., 284.

If an act unconstitutional because not taxing railroads uniformly is repealed, and a different law substituted, the fact that a railroad company has acted upon the repealed act does not establish a contract between it and the state which would preclude the substitution. *Railroad Cos. v. Gaines*, 97 U. S., 697.

The fact that a saloon-keeper has complied with all the provisions of a tax law before an amendment to it became operative does not give him a vested right to sell under the conditions of the former law. The legislature may amend the law so as to prohibit sales on legal holidays, and the fact of previous payment of the tax will not excuse disobedience. *Reithmiller v. People*, 44 Mich., 280. See as to recalling licenses, ch. XVIII.

The grantee of an exclusive privilege of furnishing a city with water for a term of years, with a privilege in the city to purchase the works, is taxable upon them while he holds them. *Mobile v. Stein*, 54 Ala., 23.

The right given by statute to damages for injury from a mob is not founded on contract, and if legislation after the recovery of a judgment changes the rate of taxation that may be levied for its payment, the federal courts cannot interfere. *Louisiana v. New Orleans*, 109 U. S., 285. When *mandamus* is applied for to compel taxation for the payment of a judgment, the court will look to see whether the judgment is grounded in contract or tort; if the former, and the contract appears to have been made upon the faith of taxes to be levied, laws modifying the taxing power to the prejudice of the creditor are unconstitutional if thereby he is deprived of all adequate and efficacious remedy. *Nelson v. St. Martins*, 111 U. S., 716.

If the state, however, in the amplitude of its power over the municipalities of the state, should see fit to take away altogether the corporate powers of the debtor body, and create instead one or more entirely new corporations, which should in law be, not the successors of the other under new names, but new and distinct creations, the creditors might, perhaps, except as to the property of the defunct body, be without remedy. The corporation having ceased to exist, there could no longer be enforcement of their demands through taxation under the old law, and without law it is impossible that taxes should be laid. This was so held where the state by general law abolished a considerable number of municipalities, and made the several communities embraced in the territorial limits of such municipalities respectively taxing districts, in order to provide the means of local government for the peace and safety and general welfare of the district.¹ And it was also held that the property of individual citizens of the abolished municipalities could not by judicial proceedings be subjected to the payment of corporate debts; neither could the property which the municipalities themselves had held for public uses, such as public buildings, streets, squares, parks, promenades, wharves, landing places, fire engines, hose, etc., or in general, anything held for governmental purposes. All such public property would pass, when the municipality ceased to exist, under the immediate control of the state. Even the taxes levied according to law before the general law was passed could only be collected under legislative authority, and if no such authority existed, the remedy of the creditors would be an appeal to the legislature, which alone could grant relief.² It is possible, therefore, for the state to make use of its power unjustly, and under circumstances where the political remedy is the only one within the reach of parties wronged.

Taxing Contracts. It has never been supposed that the clause in the constitution of the United States which forbids the states to pass laws impairing the obligation of contracts had deprived the states of the power to tax contracts; and it

¹Merriwether v. Garrett, 102 U. S., 472.

²Merriwether v. Garrett, 102 U. S., 472. See Luehrman v. Taxing District, 3 Lea, 425. These taxing districts are municipal corporations, and suable as such. Uhl v. Taxing District, 6 Lea, 610.

has been customary for them to tax contracts for the payment of money, or having a money value, as the personal property of the owner. The right to do this, if ever in doubt, is now settled.¹

But to render a contract taxable it must be subject to the jurisdiction of the government that assumes to tax it; and it is not within its jurisdiction unless the owner is domiciled there, or the contract itself is there in the possession and control of an agent of the owner and for the owner's purposes, and not as mere temporary custodian. Corporation bonds given in one state by one of its corporations, but owned and held by persons domiciled in another state, cannot be taxed in the state where they are issued, even though they are payable in that state and are secured there by mortgage on realty. Therefore a law imposing such a tax, and requiring the treasurer of the corporation to pay it and retain the amount from the sum payable to the bond holder, is a law which undertakes to tax that which is not within its reach, and is for that reason void.² This principle is as much applicable to public securities as to any others, and it is not, therefore, competent for a city which has issued obligations whereby it has promised to pay certain definite sums, to diminish these payments under the guise of taxing them. A city may be empowered to tax all property within it, but debts are not property, and credits are not property within a city when not held or owned there.³ So while a franchise tax might be imposed upon a corporation, measured by dividends, it is not competent for a state to levy a tax directly upon the dividends of foreign stockholders,

¹See *Catlin v. Hull*, 21 Vt., 152; *Champaign Co. Bank v. Smith*, 7 Ohio St., 42; *Cook v. Smith*, 30 N. J., 387. That a state may tax mortgages held by residents on lands in other states is affirmed in *Kirkland v. Hotchkiss*, 43 Conn., 426; S. C. in error, 100 U. S., 491. And see further, *People v. Home Ins. Co.*, 29 Cal., 534; *Maltby v. Reading, etc., Co.*, 52 Pa. St., 140. The mere fact that a part of the capital of a bank is invested abroad does not exempt that part from taxation under the internal revenue law. *Nevada Bank v. Sedgwick*, 104 U. S., 111.

²*State Tax on Foreign Held Bonds*, 15 Wall., 300. See, also, *Railroad Co. v. Jackson*, 7 Wall., 262; *Murray v. Charleston*, 96 U. S., 432; *Hartman v. Greenhow*, 102 U. S., 672; *De Vignier v. New Orleans*, 16 Fed. Rep., 11; *Oliver v. Washington Mills*, 11 Allen, 268.

³*Murray v. Charleston*, 96 U. S., 432; *De Vignier v. New Orleans*, 16 Fed. Rep., 11.

and require the corporation to pay the tax and deduct it from the dividend paid over.¹

What Impairs a Contract. The obligation of a contract is the law which binds the parties to perform their agreement.² This law must govern and control the contract in every shape in which it is intended to bear upon it, whether it affect its validity, construction or discharge. Any law which enlarges, abridges, or in any manner changes the intention of the parties discoverable in it, necessarily impairs the contract itself, which is but evidence of that intention. The manner or the degree in which this change is effected can in no respect influence this conclusion; for, whether the law affect the validity, the construction, the duration, the mode of discharge or the evidence of the agreement, it impairs the contract, though it may not do so to the same extent in all the supposed cases.³ It is not by the constitution to be impaired at all. This is not a question of degree or cause, but of encroaching in any respect on its obligation; dispensing with any part of its force.⁴ There is no room for any question, therefore, that when the state has stipulated by contract to give exemption from taxation, or has commuted the uncertain taxes for a definite and fixed sum or sums, and afterwards undertakes to tax, in the same manner as it taxes other subjects, the persons, corporations or property which were the subject of the exemption or commutation, the obligation of the contract is impaired. So if the state by a bank charter agrees that the bills of the bank shall be received in payment of taxes, the agreement constitutes a contract between the state and those who shall afterwards become owners of the bills, and any law which denies the right to make such payment impairs the obligation of

¹ *Oliver v. Washington Mills*, 11 Allen, 268.

The registered public debt of a state, whether exempted or taxed by the debtor state, is taxable by another state when owned there. "Taxation of the debt within the debtor state does not change the legal *situs* of the debt for any other purpose than that of the tax which is imposed. Neither does exemption from taxation." *Bonaparte v. Tax Court*, 104 U. S., 592.

² *Sturges v. Crowninshield*, 4 Wheat., 122.

³ *Washington, J.*, in *Ogden v. Saunders*, 12 Wheat., 218, 256.

⁴ *Planters' Bank v. Sharp*, 6 How., 801, 827. To the same effect is *Green v. Biddle*, 8 Wheat., 1, 84. See *Rivet v. New Orleans*, 35 La. An., 134.

the contract, and is void.¹ And if the state, in issuing its own bonds, shall make a like stipulation for their reception in payment of taxes, the obligation of the contract is impaired by any subsequent law which seeks to preclude the exercise of the right.² So if the state, in the case of contracts made and payable within it, but held by persons domiciled abroad, were to attempt indirect taxation of the holders by requiring the debtor to pay the tax and retain the amount from the creditors, this would be a plain impairment of the obligation of the contracts, since it would deprive the creditors of a portion of the sum agreed to be paid to them.³

The remedy for the enforcement of a contract is a necessary part of it, without which it could have no legal obligation whatever. But there is, and can be, nothing unchangeable in remedies, and the state must be left at liberty to change them at discretion.⁴ In the recognition of this right, however, it is always assumed that no change will be made which will leave the party without a remedy for the enforcement of his contract substantially equal to and as efficient and valuable as that the law entitled him to claim when his contract was made. If the remedy is wholly, in some distinct and important part, taken away, or is hampered with conditions or restrictions, or otherwise seriously impaired in value, the obligation of the contract is impaired in this particular.⁵

Where, however, the issues of a certain bank were by law receivable for taxes, and an act was passed which provided that there should be no other remedy in any case of the collection of revenue, or an attempt to collect the same illegally, or in funds only receivable by the collector under the law—the same being other or different funds than such as the tax payer

¹ *Woodruff v. Trapnall*, 10 How., 190; *Furman v. Nichol*, 8 Wall., 44; *Keith v. Clark*, 97 U. S., 454.

² *Hartman v. Greenman*, 102 U. S., 672; *Poindexter v. Greenhow*, 114 U. S., 270.

³ *State Tax on Foreign Held Bonds*, 15 Wall., 300. There would be nothing incompetent in similar legislation if the tax itself were lawful and the corporation were thus indirectly made the collector of sums its members were legally bound to pay. See ch. XIV.

⁴ *Bronson v. Kinzie*, 1 How., 811.

⁵ See *Von Hoffman v. Quincy*, 4 Wall., 535, and numerous cases cited; *Tennessee v. Sneed*, 96 U. S., 69; *Poindexter v. Greenhow*, 114 U. S., 270.

may tender or claim the right to pay—than by paying the tax under protest, and within thirty days suing the collector to recover it; the judgment recovered, if any, to be a first claim on the treasury,—it was held that this act did not leave a party without adequate remedy for enforcing his right to pay his taxes in the bills, and did not, therefore, impair the obligation of the state contract.¹ But if, under the law which provides for the issue of obligations, a tender thereof for taxes is a discharge, the tender, notwithstanding any subsequent legislation, will have that effect, and the tax payer, if his property is seized for the taxes, may reclaim it on legal process.²

Exemption of agencies of government. No state can impose taxes on persons, property or other subjects of taxation which are not within its jurisdiction. This is self-evident, but it has peculiar application in this country under the federal constitution, which apportions the sovereign authority between the state and the nation, and gives to each over certain subjects an exclusive jurisdiction. Whatever pertains to this exclusive jurisdiction is excluded from the taxing power of the other as much as if it were beyond its territorial limits. The rules upon this subject, as they have been laid down by the authorities, appear to be the following:

1. *General Liability.* Every person within a state owing temporary or permanent allegiance to it; all property of every description within the state and entitled to the protection of its laws; every private franchise, privilege, business or occupation, is subject to be taxed by the state, in return for the benefits received and anticipated from state government and protection. But they are also on precisely the same grounds subject to be taxed by the federal government, whenever its necessities or policy shall be thought to require it.³

¹ *Tennessee v. Sneed*, 96 U. S., 69. Compare *Poindexter v. Greenhow*, 114 U. S., 270.

² *Poindexter v. Greenhow*, 114 U. S., 270.

³ It is said in *Lane County v. Oregon*, 7 Wall., 71, that with the exception of the restrictions expressly imposed by the constitution of the United States, the state power of taxation in respect to property, business and persons within its limits remains entire. There is nothing in the constitution which contemplates authorizing any direct abridgment of this power by the national legislature.

2. *National and State Powers Exclusive.* It is the theory of our system of government that the state and the nation alike are to exercise their powers respectively in as full and ample a manner as the proper departments of government shall determine to be needful and just, and as might be done by any other sovereignty whatsoever. This theory by necessary implication excludes wholly any interference by either the state or the nation with an independent exercise by the other of its constitutional powers. If it were otherwise, neither government would be supreme within what has been set apart for its exclusive sphere, but, on the other hand, would be liable at any time to be crippled, embarrassed, and perhaps wholly obstructed in its operations, at the will or caprice of those who for the time being wielded the authority of the other. And that an exercise of the power to tax might have that effect is manifest from a consideration of the nature of the power. Any "power which in its nature acknowledges no limits,"¹ and which, even in a lawful and legitimate exercise, may be carried to the extent of an absolute appropriation of property, or destruction of the franchise or privilege upon which it is exerted,² must, as a power of one sovereignty, be incapable of being admitted within the jurisdiction of another for exercise at the discretion of the power wielding it.³ And the state and the nation having each their separate and distinct sphere, within which they are permitted, by the fundamental law, to exercise independent authority, the principle which excludes from one sovereignty the taxing power of another is as much applicable within the American Union to the taxation of state and nation respectively, as it is elsewhere.

3. *Federal Agencies.* It follows as a necessary and inevitable conclusion, that the means or agencies provided or se-

¹Per *Marshall*, Ch. J., in *Weston v. Charleston*, 2 Pet., 449, 466; *Lane County v. Oregon*, 7 Wall., 71; *Bank of Commerce v. New York*, 2 Black, 620; *Carroll v. Perry*, 4 McLean, 25; *Cheaney v. Hooser*, 9 B. Monr., 330, 339; *Veazie Bank v. Fenno*, 8 Wall., 533, 548; *State v. Bell*, 1 Phil. (N. C.), 76. Compare *Berney v. Tax Collector*, 2 Bailey, 654.

²*McCullough v. Maryland*, 4 Wheat., 316, 431, per *Marshall*, Ch. J.; *Veazie Bank v. Fenno*, 8 Wall., 533, 548, per *Chase*, Ch. J.; *National Bank v. United States*, 101 U. S., 1; *Savings Association v. Marks*, 3 Woods, 553.

³See *Railroad Co. v. Husen*, 95 U. S., 465.

lected by the federal government as necessary or convenient to the exercise of its functions cannot be subjected to the taxing power of the states, since, if they could be, a state dissatisfied therewith, or disposed for any reason to cripple or hamper the operations of the federal government, might tax them to an extent that would impair their usefulness, or even put them out of existence. On this ground the power of the states to tax the United States Bank was denied, the bank having been chartered as an agency of government.¹ This principle is applicable to the national banks now in operation, which also have been called into existence by the federal government for its purposes — or at least on grounds of national policy.² But the sovereignty in whose interest the exemption exists is fully protected if it controls in respect to taxation; and it may, in its discretion, permit its own agencies or its own property to be taxed by the other, under limitations prescribed by itself, as the federal government has permitted the states to tax the national banks as they tax other moneyed corporations within their jurisdiction.³ On the general principle above stated, the states are precluded from taxing the salaries or emoluments of national officers,⁴ or the loans of the United States contracted under its constitutional power to borrow money for its purposes,⁵ or the

¹ *McCulloch v. Maryland*, 4 Wheat., 316; *Osborne v. Bank of United States*, 9 Wheat., 738.

² *Van Allen v. Assessors*, 3 Wall., 578; *Austin v. Boston*, 14 Allen, 359; *Flint v. Boston*, 99 Mass., 141; *State v. Newark*, 89 N. J., 380; *National Bank v. Mobile*, 62 Ala., 284; *Sumter Co. v. National Bank*, 62 Ala., 464.

³ *Van Allen v. Assessors*, 3 Wall., 578; *National Bank v. Commonwealth*, 9 Wall., 353; *Union Nat. Bank v. Chicago*, 3 Biss., 82.

⁴ *Dobbins v. Commissioners of Erie County*, 16 Pet., 435. In *Melcher v. Boston*, 9 Met., 78, a clerk in a postoffice was held taxable by the state on his income. See *Sweat v. Boston, etc., R. Co.*, 5 N. B. R., 249.

⁵ *Weston v. Charleston*, 2 Pet., 449; *Bank of Commerce v. New York*, 3 Black, 620; *Bank Tax Case*, 2 Wall., 200; *Van Allen v. Assessors*, 3 Wall., 578; *People v. The Commissioners*, 4 Wall., 244; *Bradley v. People*, 4 Wall., 459; *The Banks v. The Mayor*, 7 Wall., 16; *Bank v. Supervisors*, 7 Wall., 26; *German Am. Bank v. Burlington*, 54 Ia., 609. Compare *State v. Jackson*, 33 N. J., 450; *Commonwealth v. Hamilton Manuf. Co.*, 12 Allen, 298; *Commonwealth v. Provident Inst.*, 12 Allen, 812; *Coite v. Society for Savings*, 32 Conn., 178. A tax on the franchise of a corporation whose capital is in part invested in United States securities is not a tax on such securities. *Society for Savings v. Coite*, 6 Wall., 594; *Provident Institution v. Massachusetts*, 6 Wall., 611; *Hamilton Company v. Massachusetts*, 6 Wall., 633;

revenue stamps issued by the United States and held by individuals,¹ or treasury notes issued and circulating as money,² or the messages of the government sent by telegraph.³ But the mere fact that a corporation receives its charter and pecuniary or other aid from the United States does not fix its character as a federal agency, nor does the fact that the United States sometimes makes use of it for its purposes, as it might of a similar convenience brought into existence in some other way.⁴ And a state may tax the property of federal agencies with other property in the state, and as other property is taxed, when no law of congress forbids, and when the effect of the taxation will not be to defeat or hinder the operations of the national government. A different rule, as has been well said, "would remove from the reach of state taxation all the property of every agent of the government. Every corporation engaged in the transportation of mails or of government property, of every description, by land or water, or in supplying materials for the use of the government, or in performing any service of whatever kind, might claim the benefit of the exemption,"⁵ and the effect would be to embarrass and injure the state to the benefit of individuals rather than of the nation.⁶

4. *State Agencies.* The federal government is also without power to tax the corresponding means or agencies of the states, or the salaries of state officers; the state in the exercise of its functions being entitled to the same immunity from congress-

People v. Home Ins. Co., 92 N. Y., 323. The fact that federal obligations are above par does not make the premium taxable. *People v. Com'rs of Taxes*, 76 N. Y., 64. When income is taxed it will not be presumed to have been received in something not taxable. *New Orleans v. Fourchy*, 30 La. An., 910.

¹ *Palfrey v. Boston*, 101 Mass., 329.

² *Montgomery Co. v. Elston*, 33 Ind., 27; *Bank of N. Y. v. Supervisors*, 7 Wall., 26; *Ogden v. Walker*, 59 Ind., 460; *Horne v. Green*, 52 Miss., 452. In this last case it was held that the rule of exemption applied to national bank notes.

³ *Telegraph Co. v. Texas*, 105 U. S., 460.

⁴ *Huntington v. Cent. Pac. R. Co.*, 2 Sawy., 503; *Railroad Co. v. Peniston*, 18 Wall., 5. See *Thompson v. Pacific R. Co.*, 9 Wall., 579.

⁵ *Thomson v. Pacific R. Co.*, 9 Wall., 579, 591.

⁶ See *Railroad Co. v. Peniston*, 18 Wall., 5.

sional interference that the nation is from that of the state.¹ And a state municipal corporation, being only a portion of its sovereign power, created as a convenient if not a necessary part of the machinery of state government, is as much exempt from the taxation of the federal government, in all its revenues and property, as the state itself.²

5. *Inadmissible Personal Taxes.* A tax upon persons may possibly, in some cases, tend to embarrass the operations of either national or state government, in which case it would be void unless imposed by the government which was liable to be inconvenienced by it. And, on this ground, it has been held

¹ *Ward v. Maryland*, 12 Wall., 418, 427, per *Clifford, J.*; *The Collector v. Day*, 11 Wall., 113; *Railroad Co. v. Peniston*, 18 Wall., 5; *Freedman v. Siegel*, 10 Blatch., 327; *Warren v. Paul*, 22 Ind., 276, 279; *State v. Gaston*, 32 Ind., 1; *Fifield v. Close*, 15 Mich., 505; *Union Bank v. Hill*, 3 Cold., 335; *Smith v. Short*, 40 Ala., 385; *Jones v. Keep's Estate*, 19 Wis., 390; *Sayles v. Davis*, 22 Wis., 217; *Moore v. Quirk*, 105 Mass., 49; S. C., 7 Am. Rep., 499; *Cooley's Const. Lim.*, 5th ed., 598, and cases cited. A railroad wholly owned by a state and operated by it is not taxable under the United States revenue laws. *Georgia v. Atkins*, 1 Abb. (U. S.), 22.

² *United States v. Railroad Co.*, 17 Wall., 322. In this case the facts were that the city of Baltimore held bonds of the Baltimore & Ohio R. R. Co. to a large amount. The internal revenue law of the United States then in force required every railroad company indebted upon bonds or other evidence of indebtedness bearing interest, or upon coupons representing the interest, to pay a tax of five per cent. upon all such interest or coupons, and authorized the company to retain the amount so paid as a tax from the creditor. The railroad company in this case refused to make the payment, so far as concerned the interest on bonds held by the city of Baltimore, and the court sustained it in the refusal, holding that the tax was not a tax upon the railroad company, but upon its creditors, and in the case of the interest in question was no more competent than if imposed directly upon the city.

That the state may tax its own municipalities or their property, if it shall see fit to do so, is undoubted; but there is always a presumption against an intent to do so. See *post*, ch. VI, where the cases on the subject are collected. But the presumption that public property is not intended to be taxed ceases when it has been sold, even though the title has not yet passed; and the interest of the purchaser is commonly taxed. But statutes generally provide for such cases, so as to protect the public interest. A sale of state lands for taxes is void (*McCarlin v. State*, 99 Ind., 478), even though the lands had come to the state by escheat, and the fact of escheat was not known when the tax was imposed. *Reid v. State*, 74 Ind., 252. See *Louisville v. Commonwealth*, 1 Duv., 295; *Piper v. Singer*, 4 S. & R., 354.

that a state tax of a certain sum on every person leaving the state by public conveyance was invalid; the tendency being to embarrass the functions of the national government, by obstructing the travel of citizens and officers of the United States in the business of the government and the transportation of armies and munitions of war.¹

ii. *Public Property.* It is customary for the federal government, in receiving a new state to the Union, to require from it—though probably without necessity²—a stipulation that

¹*Crandall v. Nevada*, 6 Wall., 35. See *Telegraph Co. v. Texas*, 105 U. S., 460. The like principle was recognized in *State v. Jackson*, 33 N. J., 450, where a bounty voted to relieve a town from a draft was held invalid, as tending to defeat the legislation of congress on the subject. That case was decided by a divided court, and the decision is opposed to the current of authority. In *State Treasurer v. Philadelphia, etc., R. R. Co.*, 4 Houston, 158, a law which imposed a state tax on railroad companies of ten cents on every passenger carried within the state, excepting soldiers and sailors of the United States, was held to be not a tax upon the business of the carrier, measured by the number of persons carried, but a tax upon the persons carried, to be collected by the carrier for the state, and, consequently, so far as it operated upon persons entering into, departing from, or passing through the state, was, in effect, a regulation of commerce between the states, and, consequently, within the decision in *Crandall v. Nevada*. The case is reasoned by Chancellor *Bates* with his accustomed ability, but it will be seen from the statement of the case that some of the objections to the Nevada act could not be made to this.

²See *Blue Jacket v. Johnson Co.*, 3 Kan., 290. Lands purchased by the United States at a tax sale are not taxable by the state. *People v. United States*, 93 Ill., 30. The state has a right to tax a private corporation upon railroad property situated within the bounds of a government reservation. *Fort Leavenworth, etc., Co. v. Lowe*, 27 Kan., 749. And to tax equitable interests and improvements held or owned by individuals in government lands. *Hodgdon v. Burleigh*, 4 Fed. Rep., 111; *Oswalt v. Hallowell*, 15 Kan., 154; *Quincy v. Lawrence*, 1 Idaho, 313; *People v. Mining Co.*, 1 Idaho, 409; *Ivinson v. Hance*, 1 Wy., 270. A possessory interest in public lands for mining purposes may be taxed as a species of property. *People v. Shearer*, 30 Cal., 645; *People v. Cohen*, 31 Cal., 210; *People v. Donnelly*, 58 Cal., 144; *People v. Mining Co.*, 37 Cal., 54.

Property occupied for the United States, but not owned by it, was held taxable to the owner in *Speed v. St. Louis County Court*, 42 Mo., 382. And the fact that the government has an interest in real estate does not preclude the taxation of other interests to the owners. *State v. Moore*, 12 Cal., 56. As, for example, ore taken from the lands. *Forbes v. Gracey*, 94 U. S., 762.

Buildings erected by the United States for government use on leased lands are not taxable by the state. *Andrews v. The Auditor*, 28 Grat., 115. A

the public domain, lying within its limits, shall not be taxed by the state. The disability remains effective until the United States has made sale, or other disposition, of the lands, but it then terminates, notwithstanding the title may not have passed by the actual execution and delivery of patent of conveyance; the land being actually severed from the public domain by the sale itself.¹ But this principle will not apply in any case until the right to a patent is complete, and the equitable title fully vested in the party without anything more to be paid or any act to be done, going to the foundation of the right.² Nor will it apply where, as one of the conditions of the

postoffice and custom-house cannot be assessed for a street improvement. *Fagan v. Chicago*, 84 Ill., 227.

A right in a railroad company to make use, for its purposes, of property owned by the United States, is not, under the statutes of Iowa, separately liable to taxation. *Chicago, etc., R. Co. v. Davenport*, 51 Ia., 451. Lands in Nebraska granted to Alabama for school purposes held not taxable until the state had sold them. *Stoutz v. Brown*, 5 Dill., 445.

¹ *Carrol v. Perry*, 4 McLean, 25; *Witherspoon v. Duncan*, 21 Ark., 240; S. C., 4 Wall., 210; *Puget Sound Agricultural Co. v. Pierce County*, 1 Wash. T'y Rep., 180; *Carrol v. Safford*, 3 How., 441; *Astrom v. Hammond*, 8 McL., 107; *People v. Shearer*, 80 Cal., 645; *Hall v. Dowling*, 18 Cal., 619; *Iowa Homestead Co. v. Webster County*, 21 Ia., 221; *McGoon v. Scales*, 9 Wall., 23; *Railway Co. v. McShane*, 22 Wall., 444; *Hunnewell v. Cass Co.*, 23 Wall., 464; *Colorado Co. v. Commissioners*, 95 U. S., 259; *Bronson v. Kukuk*, 3 Dill., 490; *Nor. Wis. R. R. Co. v. Supervisors*, 8 Biss., 414; *Central, etc., R. R. Co. v. Howard*, 51 Cal., 229; *Ross v. Outagamie Co.*, 12 Wis., 83. If, previous to the passage of an act of congress confirming to a state certain lands long claimed by it, a tax is laid on such lands in the hands of grantees from the state, the confirming act makes the state's title relate to the time when the state claimed it, and makes valid the tax. *Litchfield v. Hamilton Co.*, 40 Ia., 66. Railroad grant lands are taxable as soon as earned. *Dickerson v. Yetzer*, 53 Ia., 681; *Railroad Co. v. Morris*, 18 Kan., 302. Unless some condition precedent is to be first performed. *White v. Railroad Co.*, 5 Neb., 393. See *Railway Co. v. Prescott*, 16 Wall., 603; *Railway Co. v. Trempealeau Co.*, 93 U. S., 595.

Land confirmed to a private owner under a treaty with a foreign country becomes taxable when by law or treaty the title passes, but not before. *Colorado Co. v. Commissioners*, 95 U. S., 259; *Commissioners v. Improvement Co.*, 2 Col., 628.

² *Railway Company v. Prescott*, 16 Wall., 603, in which case one of the conditions of the grant was, that the cost of the government surveys, selections, etc., should be prepaid by the grantee before the lands should be conveyed. See to the same effect, *Cass Co. v. Morrison*, 28 Minn., 257. Land purchased of the United States on a forged warrant, which is afterwards ex-

grant, the lands not sold by the grantee within a time named are to be open to pre-emption and settlement like any portion of the public domain.¹

7. *Occasional Agencies.* Railroads owned and controlled by private corporations are, in a certain sense, public conveniences and agencies, but they constitute no branch or part of the government, either state or national, and are not properly governmental agencies, even though the government may employ them for the transportation of its troops, its mails, etc., or for other purposes. The corporations owning them are consequently entitled to claim no exemption based on any implication that they are essential to the operations of the government.²

changed for money, is taxable from the time of entry. *Wheeler v. Merri- man*, 80 Minn., 372.

The fact that lands are granted by congress for the sole purpose of constructing a railroad does not preclude the legislature from taking them after they have been earned by and become the property of the railroad company. *West Wis. R. Co. v. Supervisors*, 35 Wis., 257.

¹ *Railway Co. v. Prescott*, 16 Wall., 608. Compare *Tucker v. Ferguson*, 22 Wall., 527. Land taken up under the United States homestead law is not taxable until the proofs are made which entitle the occupant to a patent. *Long v. Culp*, 14 Kan., 412; *Chase Co. Com'rs v. Shipman*, 14 Kan., 532. Or at least until he is entitled to make such proofs. *Bellinger v. White*, 5 Neb., 399; *Moriarty v. Boone Co.*, 39 Ia., 634. And see, in general, *McGregor, etc., R. R. Co. v. Brown*, 39 Ia., 655; *Doe v. Railroad Co.*, 54 Ia., 657; *Grant v. Railroad Co.*, 54 Ia., 673; *Reynolds v. Plymouth Co.*, 55 Ia., 90; *Donovan v. Kloke*, 6 Neb., 124; *Central, etc., R. R. Co. v. Howard*, 52 Cal., 228; *Bronson v. Kukuk*, 3 Dill., 490; *Hunnewell v. Cass Co.*, 23 Wall., 464; *Colorado Co. v. Commissioners*, 95 U. S., 259; *Litchfield v. Webster Co.*, 101 U. S., 773.

² *Thompson v. Pacific R. R.*, 9 Wall., 579; *Central, etc., R. R. Co. v. Board of Equalization*, 60 Cal., 35. Compare *People v. Central Pacific R. R. Co.*, 43 Cal., 398; *Huntington v. Same*, 2 Sawyer, 503; *Inhabitants of Worcester v. Western R. R. Corp.*, 4 Met., 564, 568; *Boston & Me. R. R. v. Cambridge*, 3 Cush., 237. In the case of the Union Pacific R. R. Company, chartered by congress, and in which the government has important interests with some power of control, the states have no power to tax the operations of the road, though they may tax the property. *U. P. R. R. Co. v. Peniston*, 18 Wall., 5. A bridge owned by the United States, over which a railroad has a right of passage as over its own track, by reason of its paying half the cost of building, is not taxable. *Chicago, etc., R'y Co. v. Davenport*, 51 Ia., 451.

Lands held by the United States in trust for an Indian tribe are not made taxable by the fact that an individual has made a contract of purchase on which he has paid nothing. *Railroad Co. v. Morris*, 13 Kan., 302.

A state bank chartered for the benefit of the state, and with the faith and credit of the state pledged for its support, is not subject to taxation by a municipal corporation. *Nashville v. Bank of Tennessee*, 1 Swan, 269.

They are therefore taxable as natural persons would be, whom the government might employ for the performance of similar services.¹

Taxes on commerce: Imports and Exports. The federal constitution provides that "No state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any state on imports or exports shall be for the use of the treasury of the United States."² The inspection fees which may properly be imposed under this clause are in no sense a duty on imports or exports, but are a compensation for services;³ and the net produce of charges nominally made for inspection is for the United States only when they are imposed for revenue purposes.⁴ A charge for inspection will be void as constituting a regulation of commerce if it applies only to an article brought into the state from one or more others named and not from all.⁵

The provision of the constitution above recited has no application to articles transported merely from one state into another.⁶ Articles imported from foreign countries and the duties paid thereon do not lose their character as imports, so as to become subject to state taxation as a part of the mass of property of the state, until they have either passed from the control of the importer or been broken up by him from the original cases; and a state tax is void whether imposed upon them distinctively as imports or as constituting a part of the importer's

¹ See *Thompson v. Pacific R. Co.*, 9 Wall., 579. The right to tax a railroad company is not affected by the fact of its property being mortgaged to the United States. *Ibid.* As to the right to tax telegraph companies which are made use of by the federal government for its purposes, see *West. U. Tel. Co. v. Richmond*, 26 Grat., 1.

² Art. 1, § 10.

³ *Pace v. Burgess*, 92 U. S., 373.

⁴ *Padelford v. Mayor*, 14 Ga., 438. See *Turner v. State*, 55 Md., 240; *Adison v. Saulnier*, 19 Cal., 82.

⁵ *Higgins v. Casks of Lime*, 130 Mass., 1.

⁶ *Woodruff v. Parham*, 8 Wall., 123; *Hinson v. Lott*, 40 Ala., 123; *S. C. in error*, 8 Wall., 148. See *Brown v. Maryland*, 12 Wheat., 419; *Pierce v. State*, 13 N. H., 536; *Standard Oil Co. v. Combs*, 96 Ind., 179; *Brown v. Houston*, 33 La. An., 843; *State v. Pinckney*, 10 Rich., 478.

property.¹ And a license tax imposed on the importer as such is in effect a tax on imports, and therefore forbidden.² So is a tax on an auctioneer measured by the amount of goods sold, so far as it applies to imports sold for the importer in the original packages.³ But a tax on premiums received for invoicing imports, though they still remain in the bonded warehouse, is not to be deemed a tax on imports.⁴

An article of commerce which has been purchased by the subject of a foreign country for export, and in the hands of his agent in port awaiting shipment, is to be regarded as an export, and therefore, under this provision of the constitution, not taxable by the state.⁵

Tonnage Duties. The same clause of the constitution forbids the states to lay any duty of tonnage without the consent of congress. Notwithstanding this prohibition, vessels are taxable as property in the same manner as other property is taxed;⁶ but taxes levied by a state upon ships and vessels as instruments of commerce and navigation are forbidden; and it makes no difference whether the ships or vessels taxed belong to the citizens of the state which levies the tax or to cit-

¹ *Low v. Austin*, 13 Wall., 29; citing *Brown v. Maryland*, 12 Wheat., 419; *License Cases*, 5 How., 575.

² *Brown v. Maryland*, 12 Wheat., 419.

³ *Cook v. Pennsylvania*, 97 U. S., 566.

⁴ *People v. National Fire Ins. Co.*, 27 Hun, 188. It was held in *Almy v. California*, 24 How., 169, that a state stamp tax on a bill of lading for the transportation of gold and silver from any point within the state to any point without the state was a tax on exports, and therefore inadmissible. The bill in question was drawn for a carriage from one of the states to another; and it was justly said by Mr. Justice *Miller* in *Woodruff v. Parham*, 8 Wall., 118, 137, that "it seems to have escaped the attention of counsel on both sides and of the chief justice who delivered the opinion that the case was one of interstate commerce." The case is not reconcilable with the case last mentioned, and though followed as authority in *Brumagim v. Tillinghast*, 18 Cal., 265, has since the decision of *Woodruff v. Parham* been regarded as overruled. In *Ex parte Martin*, 7 Nev., 140, a state stamp tax on a bill of exchange drawn in one state and payable in another was sustained.

⁵ *Blount v. Munroe Co.*, 60 Ga., 61.

⁶ *State Tonnage Tax Cases*, 12 Wall., 204, 213; *Transportation Co. v. Wheeling*, 9 W. Va., 170; *S. C. in error*, 99 U. S., 273; *The North Cape*, 6 Biss., 505; *Guenther v. Baltimore*, 55 Md., 459; *People v. Com'rs of Taxes*, 58 N. Y., 242.

izens of another state, as the prohibition is general, withdrawing altogether from the states the power to lay any duty of tonnage under any circumstances without the consent of congress.¹ Nor is it important that the vessel is engaged exclusively in navigating the waters of the state which taxes it.² A duty of tonnage, in the most obvious and general sense, is a duty measured by the capacity or size of the ship or vessel on which it is laid;³ but other duties may be within the intent of this prohibition, if they are laid on the vessel as an instrument of commerce, and even though not laid for the benefit of the state itself, but as fees for officers. A fixed sum of \$5, required to be paid to the masters and wardens of a port for every vessel arriving, whether they performed, in respect to it, any service or not, has been held a duty of tonnage;⁴ and it has been well said that "the tax, instead of being called a tax on the vessel, may be called a tax upon the master or upon the cargo, or upon some privilege to be enjoyed by the vessel; as the privilege of coming into a certain port, or of riding at a particular anchorage, or of being served, as she may have occasion, by the wardens of a port, or the privilege of engaging in a particular trade — as the trade in wood, in corn or in oysters — yet if really and substantially it is a duty of tonnage, it is equally within the prohibition as if the tax had been called by its right name."⁵

¹ State Tonnage Tax Cases, 12 Wall., 204, 213; citing *Gibbons v. Ogden*, 9 Wheat., 202; *Sinnot v. Davenport*, 22 How., 238; *Foster v. Davenport*, 22 How., 245; *Perry v. Torrence*, 8 Ohio, 524. See, also, *Sheffield v. Parsons*, 8 Stew. & Port., 302; *Harbor Master v. Railroad Co.*, 3 Strob., 594; *State v. Charleston*, 4 Rich., 286; *Lott v. Morgan*, 41 Ala., 246; *Johnson v. Drummond*, 20 Grat., 419; *Hays v. Steamship Co.*, 17 How., 596; *Steamship Co. v. Portwardens*, 6 Wall., 31; *Cannon v. New Orleans*, 20 Wall., 577; *Inman Steamship Co. v. Tinker*, 94 U. S., 238; *New Orleans v. Eclipse Tow Boat Co.*, 33 La. An., 647; *Harbor Commissioners v. Pashley*, 19 S. C., 815.

² State Tonnage Tax Cases, 12 Wall., 204, 219, 225; *Lott v. Morgan*, 41 Ala., 246. Vessels employed in a harbor as lighters are within the protection of this clause. *Lott v. Morgan*, *supra*.

³ State Tonnage Tax Cases, 12 Wall., 204, 225; *Steamship Co. v. Portwardens*, 6 Wall., 31; *Johnson v. Drummond*, 20 Grat., 419, 423.

⁴ *Steamship Co. v. Portwardens*, 6 Wall., 31. A license fee imposed on corporations running tow boats to and from the Gulf of Mexico was held not to be a tonnage tax in Louisiana. *New Orleans v. Eclipse Tow Boat Co.*, 33 La. An., 647.

⁵ *Johnson v. Drummond*, 20 Grat., 419-424.

Nor is it important that the duty is imposed as a means of enforcing some authority which unquestionably belongs to the state; such as the power to establish quarantine regulations.¹ A state may erect wharves and charge wharfage for their use; and a city may do the same and measure the charge by tonnage;² but a state act which, with certain exceptions, requires that all ships or vessels which enter a port, or load or unload or make fast to any wharf therein, shall pay a certain rate per ton, does not impose a charge for wharfage, but a tonnage duty, and is therefore void.³ On the other hand, a license fee required of those operating ferry-boats is not a tonnage tax, even though the boats ply between different states.⁴

¹ *Peete v. Morgan*, 19 Wall., 581; *Johnson v. Drummond*, 20 Grat., 419, 424; *Morgan's R. Co. v. Board of Health*, 36 La. An., 666.

² *Packet Co. v. Catlettsburg*, 105 U. S., 559. See *Cannon v. New Orleans*, 20 Wall., 577. A duty of tonnage is a charge for the privilege of entering or trading or lying in a port or harbor; wharfage is a charge for the use of a wharf. *Bradley, J.*, in *Transportation Co. v. Parkersburg*, 107 U. S., 691, 696. A state may authorize a city to collect a wharfage charge on all vessels touching at its own wharves. *Marshall v. Vicksburg*, 15 Wall., 146; *Steamship Co. v. Tinker*, 94 U. S., 238; *Packet Co. v. Keokuk*, 95 U. S., 80; *Packet Co. v. St. Louis*, 100 U. S., 423; *Vicksburg v. Tobin*, 100 U. S., 490. But it cannot make such charge to a vessel coming from another state, when it makes none to vessels coming from ports in its own state. *Guy v. Baltimore*, 100 U. S., 434. Nor can it discriminate in the fees between boats coming through canals within or without the state. *The John M. Welch*, 18 Blatch., 54.

³ *Northwestern U. P. Co. v. St. Paul*, 8 Dill., 454; *Inman Steamship Co. v. Tinker*, 94 U. S., 238. On the general subject see, further, *Sou. Exp. Co. v. Mayor*, 49 Ala., 404; *Lott v. Trade Co.*, 53 Ala., 570; *Lott v. Cox*, 43 Ala., 697.

That wharfage fees can be charged only when the proprietor has constructed works at his own expense which afford facilities to vessels loading and unloading, see *New Orleans v. Wilmot*, 31 La. An., 65. This applies to towns also, and the town must have legislative authority to impose such a charge. And the charge must be fixed in advance, though it seems it may be graded by tonnage. *Muscantine v. Packet Co.*, 45 Ia., 185; *Keokuk v. Packet Co.*, 45 Ia., 196. See, further, *N. W. Packet Co. v. St. Louis*, 4 Dill., 10. That the states, in the absence of any legislation by congress on the subject, may prescribe wharfage charges and regulate the subject generally, see *Cooley v. Board of Wardens*, 13 How., 299; *Transportation Co. v. Wheeling*, 99 U. S., 273; *Packet Co. v. St. Louis*, 100 U. S., 423; *Guy v. Baltimore*, 100 U. S., 434; *Packet Co. v. Catlettsburg*, 105 U. S., 559.

⁴ *Wiggins Ferry Co. v. East St. Louis*, 107 Ill., 560; *S. C. in error*, 107 U. S., 365. See *Conway v. Taylor*, 1 Black, 603; *Chilvers v. People*, 11 Mich., 43; *Marshall v. Grimes*, 41 Miss., 27; *Fanning v. Gregoire*, 16 How., 524; *Commonwealth v. Gloucester Ferry Co.*, 98 Pa. St., 105.

Neither is a toll imposed for the use of a state improvement of navigable waters,¹ or a toll imposed on the carriage of freight by railroads.²

Foreign and Interstate Commerce, etc. The federal constitution also provides that congress shall have power "To regulate commerce with foreign nations, and among the several states and with the Indian tribes."³ This constitution, and the laws and treaties made in pursuance thereof, being supreme over all the states, any exercise of state power, whether by taxation or otherwise, in conflict therewith must be void.

In most respects this power over commerce is exclusive to the extent to which it is conferred; so that a regulation by a state of foreign or interstate commerce, or commerce with Indians still maintaining their tribal relations, would be void.⁴ But in other respects state power is only excluded to the extent that congress sees fit by its legislation to occupy the field; and therefore state regulations will be admissible and valid unless expressly annulled by congress, or unless they conflict with federal legislation. Such is the case with state regulations of ports, and of the subject of pilotage and wharfage; these are to be deemed local regulations of police, and will be valid unless they are superseded by congressional legislation, or unless they are void for some other reason.⁵ But the cases to which this principle applies are few and of minor importance. A tax distinctly laid on the commerce that comes under the regulation of congress is void, even though congress has refrained from legislating on the subject.⁶ And a tax is laid

¹ See *Palmer v. Cuyahoga Co.*, 3 McLean, 226; *Thames Bank v. Lovell*, 18 Conn., 500; *Huse v. Glover*, 15 Fed. Rep., 292; *Nelson v. Cheboygan Nav. Co.*, 44 Mich., 7.

² *Pennsylvania R. Co. v. Commonwealth*, 3 Grant, 128. This case was reversed in the federal supreme court, but upon another ground. See *Case of the State Freight Tax*, 15 Wall., 232.

³ Art. 1, § 8, cl. 3.

⁴ *Brown v. Maryland*, 12 Wheat., 419; *State Freight Tax*, 15 Wall., 232; *Walton v. Missouri*, 91 U. S., 275; *Cook v. Pennsylvania*, 97 U. S., 566.

⁵ See *Cooley v. Board of Wardens*, 12 How., 299; *Mobile Co. v. Kimball*, 102 U. S., 691; *Packet Co. v. Catlettsburg*, 105 U. S., 599. They will be void if they discriminate for or against vessels coming from different states or by different routes. See *The John M. Welch*, 18 Blatch., 54.

⁶ *McCullough v. Maryland*, 4 Wheat., 316, 425; *Brown v. Maryland*, 12 Wheat., 419, 437. A charge imposed for the use of a state improvement in

upon commerce when importers, as such, are required to pay a license or other tax;¹ the principle being that when the burden of the tax falls on a thing which is the subject of taxation, the tax is to be considered as laid on the thing rather than on him who is charged with the duty of paying it into the treasury.²

An importer's sales are exempt from state taxation because he purchases, by the payment of the duty, a right to dispose of the merchandise as well as to bring it into the country; and the tax, if it were admissible, would intercept the import, as an import, in the way to become incorporated with the general mass of property, and would deny it the privilege of becoming so incorporated until it should have contributed to the revenue of the state.³ So a license fee exacted from dealers in goods not produced or manufactured in the state, before they can be sold from place to place within the state, is a tax upon the goods themselves, and inadmissible when no such fee is exacted from those who deal in goods produced or manufactured in the state.⁴ So is a tax on the sale of foreign wine and beer separately from other liquors, when none is placed on that of domestic manufacture.⁵ A stamp tax on a bill of exchange or its navigable waters is not to be regarded as a tax on commerce. See *Wis. Riv. Imp. Co. v. Manson*, 43 Wis., 255; *Benjamin v. Manistee R. Imp. Co.*, 42 Mich., 628.

¹ *Brown v. Maryland*, 12 Wheat., 419; *Low v. Austin*, 13 Wall., 29.

² *Telegraph Co. v. Texas*, 105 U. S., 460, 465; *Brown v. Maryland*, 12 Wheat., 419; *Welton v. Missouri*, 91 U. S., 275; *Cook v. Pennsylvania*, 97 U. S., 566; *Webber v. Virginia*, 103 U. S., 344. A state tax upon a licensed trader within an Indian reservation is void. *Foster v. Commissioners*, 7 Minn., 84.

³ *Waring v. Mayor*, 8 Wall., 110, 152, per *Clifford, J.*, citing *Brown v. Maryland*, 12 Wheat., 419, 448, and *Almy v. California*, 24 How., 169, 173. See *State v. Allmond*, 2 Houston, 612; *Hinton v. Lott*, 40 Ala., 123; *S. C. in error*, 8 Wall., 148.

⁴ *Welton v. Missouri*, 91 U. S., 275; *State v. McGinnis*, 37 Ark., 362; *In re Watson*, 15 Fed. Rep., 511.

⁵ *Tiernan v. Rinker*, 102 U. S., 123. But one cannot complain of such a tax unless he sells wine or beer so as to be affected by the discrimination. *Ibid.* See *Cook v. Pennsylvania*, 97 U. S., 566; *Daniel v. Richmond*, 78 Ky., 543; *Woodruff v. Parham*, 8 Wall., 123. If a law by which peddlers in Tennessee of Connecticut-made sewing machines are taxed levies a tax "upon all peddlers of sewing machines, without regard to place of growth or produce of material or of manufacture," it does not discriminate in favor of citizens of the state which enacted it, and is valid. *Machine Co. v. Gage*,

bill of lading drawn in one state and payable in another is a tax on commerce.¹

A tax on freight, taken up within a state and carried out of it, or taken up out of a state and brought within it, is a tax upon commerce between the states, and therefore inadmissible; and it is immaterial that no distinction is made between freight carried wholly within the state and that brought into or carried through or out of it.² And property delivered to a carrier for transportation, and in its hands for a reasonable time awaiting shipment to points out of the state, is within the protection of this rule and not taxable.³ And if the property is purchased by one who is resident abroad, and is distinctly set apart for export, it is not taxable, though not yet on shipboard.⁴ Still more plainly would the property be non-taxable if it were merely in transit through the state.⁵ A tax of a specific sum, levied as an occupation tax on telegraph companies for each message sent, is void as a tax on interstate and foreign intercourse.⁶ Locomotives, cars and vessels made use of in the commerce that comes under the regulation of congress may be taxed as property, but their use as vehicles of commerce cannot be taxed;⁷ and, therefore, the cars of a palace car company which is a corporation chartered by and doing business in one state, cannot be taxed in another into which they are taken in the carriage of passengers.⁸ Neither can the company owning

100 U. S., 676; *Webber v. Virginia*, 108 U. S., 344. Compare *Seymour v. State*, 51 Ala., 52. If a statute makes no difference between resident and non-resident sample merchants, the latter cannot complain of a tax. *Ex parte Thornton*, 4 Hughes, 220. As to exemption of home manufactures from taxation, see *Machine Co. v. Gage*, 9 Bax., 510.

¹ *Almy v. California*, 24 How., 169. See *Woodruff v. Parham*, 8 Wall., 123, 187.

² *State Freight Tax Cases*, 15 Wall., 232. See *Erie Railway Co. v. State*, 81 N. J., 531.

³ *Ogilvie v. Crawford Co.*, 7 Fed. Rep., 745; *State v. Carrigan*, 89 N. J., 35.

⁴ *Blunt v. Munroe*, 60 Ga., 61; *Clarke v. Clarke*, 3 Woods, 405.

⁵ *Standard Oil Co. v. Bachelor*, 89 Ind., 1; *State v. Carrigan*, 89 N. J., 35; *State Freight Tax Cases*, 15 Wall., 232.

⁶ *Telegraph Co. v. Texas*, 105 U. S., 460.

⁷ *Minot v. Railroad Co.*, 2 Abb. (N. S.), 323; *S. C. in error*, 18 Wall., 206. A vessel cannot be taxed as property in a port where it is temporarily merely for loading. *People v. Niles*, 35 Cal., 232.

⁸ *Appeal Tax Court v. Pullman Palace Car Co.*, 50 Md., 452. The cars in this case were assessed and taxed as property. See *Gloucester Ferry Co. v.*

such cars be required by such other state to pay a privilege tax as a condition of their being made use of within it while transporting passengers from state to state.¹ A tax upon the masters of vessels engaged in foreign commerce, of a certain sum on account of every passenger brought from a foreign country into the state, is a tax upon commerce.² On the other hand, a tax on exchange and money brokers,³ a tax on legacies to aliens,⁴ and a tax on the gross receipts of a railway company engaged in interstate commerce,⁵ have all been sustained against the objection that in effect they were a tax upon commerce, and an interference with the constitutional powers of congress.⁶

Pennsylvania, 114 U. S., 196; *Baltimore & Ohio R. Co. v. Allen*, 23 Fed. Rep., 376; *State v. Pullman Palace Car Co.*, 16 Fed. Rep., 193.

¹ *Pullman Sou. Car Co. v. Nolan*, 22 Fed. Rep., 276. *Contra*, *Pullman Sou. Car Co. v. Gaines*, 3 Tenn. Ch., 587. A New Jersey corporation engaged wholly in the transportation of persons and property between states, while subject in Pennsylvania to ordinary taxation on the value of its property in that state, cannot be taxed there on the appraised value of its capital stock. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S., 196.

² *Passenger Cases*, 7 How., 288. It would make no difference that the master was permitted to give an indemnity bond in lieu of payment. *Henderson v. Mayor*, 92 U. S., 259. A tax on alien passengers is none the less a tax on commerce because of being levied in aid of state inspection laws. Those laws apply to property, not to persons. *People v. Compagnie, etc.*, 107 U. S., 59. And see *Commissioners v. North German Lloyd*, 92 U. S., 259; *Chy Lung v. Freeman*, 92 U. S., 275.

But an act of congress requiring the collector of a port to demand and receive from the master, owner or consignee of each vessel arriving from a foreign port a certain sum for each passenger he brings into port who is not a citizen, is valid. The power to pass such acts is not in the states, but in the United States. The burden imposed is not strictly a tax, but it is imposed under the power to regulate immigration, and in the very act of exercising that power, and is therefore constitutional. *Head Money Cases*, 112 U. S., 580.

A parish may require a license tax of the owner of a steamer used for trading and peddling upon its waters. *Steamer Block v. Richland*, 26 La. An., 642.

³ *Nathan v. Louisiana*, 8 How., 73.

⁴ *Mager v. Grima*, 8 How., 490.

⁵ *State Tax on Railway Gross Receipts*, 15 Wall., 284, 289.

⁶ A steamship company chartered in Pennsylvania and engaged in foreign and interstate commerce may be taxed in that state on gross receipts. *Phil. & Sou., etc., Co. v. Commonwealth*, 104 Pa. St., 109. An

Property which constitutes a part of the general mass of property of a state is taxable, though it may have been or may be designed to be the subject of commerce under congressional regulation. We have seen already that goods imported under the laws of congress may be taxed by the states with other property when they have passed from the importer's hands, or have become a part of the general property of the state by the breaking up of the packages;¹ and property bought within a state to be shipped out of it, but not yet started on its destination, and awaiting a finishing process, is taxable with other property within the state;² and so is grain bought on commission for shipment;³ and so are cattle

express company may be taxed a percentage on receipts. *Am. U. Exp. Co. v. St. Joseph*, 66 Mo., 675. See *West. U. Tel. Co. v. Mayer*, 28 Ohio St., 521.

In *Indiana v. Am. Exp. Co.*, 7 Biss., 227, it was held that a state cannot tax a foreign corporation on gross receipts *not received in the state*, nor on receipts for transportation of merchandise taken up and delivered out of but carried through the state. To the same effect is *Indiana v. Pullman Palace Car Co.*, 11 Biss., 561; S. C., 16 Fed. Rep., 193. A tax on carriers of ten cents on each passenger carried is a tax on commerce. *State Treasurer v. Railroad Co.*, 4 Houst., 158. In *People v. Gold & Stock Tel. Co.*, 98 N. Y., 67, a tax on a telegraph company, whose line was partly within and partly without the state, measured by its capital stock, was held not violative of any provision of the federal constitution, and *People v. Home Ins. Co.*, 92 N. Y., 328, and *People v. Eq. Trust Co.*, 96 N. Y., 387, were cited. In Alabama it is held competent to make the amount of privilege tax required of a telegraph company depend upon whether its operations extended beyond the state, or, on the other hand, were limited to the state or to the city. *Southern Exp. Co. v. Mobile*, 49 Ala., 404. See *Montgomery v. Shoemaker*, 51 Ala., 114.

A privilege tax required of steamboat and railroad agents was held in *Lightburne v. Taxing District*, 4 Lea, 220, not to be a tax on commerce.

¹ *Brown v. Maryland*, 4 Wheat., 419, 437; *Waring v. Mayor*, 8 Wall., 110. Articles imported may be taxed after they have passed from the hands of the importer, even though they remain in the original packages. *Waring v. The Mayor*, 8 Wall., 110. See *Low v. Austin*, 18 Wall., 29; *Kenny v. Harwell*, 42 Ga., 416.

² *Powell v. Madison*, 21 Ind., 335; *Rieman v. Shepard*, 27 Ind., 288; *Standard Oil Co. v. Combs*, 96 Ind., 179; *Carrier v. Gordon*, 21 Ohio St., 605. In this last case it is held that property not yet removed from the place of its purchase cannot be considered as *in transitu* because of any intent to ship it. See *Cole v. Randolph*, 31 La. An., 535.

³ *Walton v. Westwood*, 73 Ill., 125. Coal brought into a state for sale is taxable there. *Brown v. Houston*, 33 La. An., 843.

owned out of the state but kept in it several months for pasturage.¹

A tax on travel may be as clearly void as any other tax on interstate or foreign intercourse. The state cannot tax the privilege of passing out of or coming into the state, either directly by levying the tax on the person going or coming, or indirectly by requiring carriers to pay a tax in respect to each person carried or brought by them.²

Taxes in abridgment of the privileges and immunities of citizens. The federal constitution provides that the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states.³ The obvious purpose is to preclude the several states from discriminating in their legislation against the citizens of other states.⁴ A state law, therefore, which imposes upon citizens of other states higher taxes or duties than are imposed upon citizens of the states laying them, is void,⁵ and the principle applies to privilege taxes and taxes upon business, and will preclude a state from levying upon traders from other states a license tax greater than is required of its own citizens.⁶ A state law is void which provides that no person shall be licensed to engage in a particular employ-

¹ *Hardesty v. Fleming*, 57 Tex., 395. In *State v. Railroad Co.*, 40 Md., 22, a tax on all coal received by carriers, and to be carried to points either within or without the state, was held to be a tax on commerce.

² *Passenger Cases*, 7 How., 283; *Crandall v. Nevada*, 6 Wall., 35; *Henderson v. Mayor*, 92 U. S., 259; *State Treasurer v. Railroad Co.*, 4 Houst., 158. See *New York v. Miln*, 11 Pet., 102.

³ Art. 4, § 2, par. 1.

⁴ *Corfield v. Coryell*, 4 Wash. C. C., 371; *Paul v. Virginia*, 8 Wall., 168; *Ward v. Maryland*, 12 Wall., 418; *Williams v. Bruffy*, 96 U. S., 176, 183; *Lemon v. People*, 20 N. Y., 562; *Ex parte Archy*, 9 Cal., 147; *Jackson v. Bullock*, 12 Conn., 38.

⁵ *Corfield v. Coryell*, 4 Wash. C. C., 371, 380, per *Washington, J.*; *Wiley v. Parmer*, 14 Ala., 627; *Scott v. Watkins*, 22 Ark., 556, 564; *Oliver v. Washington Mills*, 11 Allen, 268.

⁶ *Ward v. Maryland*, 12 Wall., 418; *State v. North*, 27 Mo., 464; *Crow v. State*, 14 Mo., 237; *Gould v. Atlanta*, 55 Ga., 678; *McGuire v. Parker*, 32 La. An., 832; *Marshalltown v. Blum*, 58 Ia., 184. A tax is held void which discriminates in favor of goods bought from a resident who has paid his occupation tax against those bought from a non-resident who was liable to no such tax. *Albertson v. Wallace*, 81 N. C., 479.

ment unless he has been a resident of the state for a year;¹ but mere matters of detail in revenue legislation, which make distinctions in forms and procedure in the taxation of residents and non-residents, but which have in view the securing of uniformity in the burden, and are adopted because supposed to be necessary to that end, are not objectionable, where a difference in circumstances seems to justify different regulations.²

Corporations are not citizens within the meaning of the clause of the constitution now under consideration.³ It is therefore no violation of the privileges and immunities of citizens of other states to require a corporation, of which such citizens are stockholders, to submit to such taxation as the state shall see fit to impose as a condition of doing business therein.⁴

Violations of treaty. Congress, in its legislation, may disregard a treaty if it shall see fit to do so,⁵ but a state law imposing taxation which would be repugnant to treaty stipulations would be void; the treaty being "supreme law," anything in

¹ *In re Watson*, 15 Fed. Rep., 511. The ground of decision in this case was, however, referred to the commerce power. So it was also in *Welton v. Missouri*, 91 U. S., 275, where the discrimination was against goods the produce or manufacture of other states. Possibly in each case the invalidity of the law might have been referred to the clause now under consideration. See *Machine Co. v. Gage*, 100 U. S., 676. The right to follow the ordinary employments is one of the privileges of citizens, though the state may regulate them under its police power. *Slaughter House Cases*, 16 Wall., 86. And may require the taking out of a license by those pursuing them, provided there is no discrimination in doing so against citizens of other states. *State v. Norris*, 78 N. C., 443; *Corson v. State*, 57 Md., 251. And a state may impose a license tax on one who is engaged in hiring laborers to be employed in another state — no distinction being made in the tax against non-residents. *Shepperd v. Sumter Co.*, 59 Ga., 535.

² See *Redd v. St. Francis Co.*, 17 Ark., 416.

³ *Paul v. Virginia*, 8 Wall., 168; *Warren Manuf. Co. v. Aetna Ins. Co.*, 2 Paine, 501; *Commonwealth v. Milton*, 12 B. Monr., 212. See *McCready v. Virginia*, 94 U. S., 391, on the general subject; also *Bradwell v. State*, 16 Wall., 130; *Bartemeyer v. Iowa*, 18 Wall., 129; *United States v. Cruikshanks*, 92 U. S., 542.

⁴ *Paul v. Virginia*, 8 Wall., 168; *Liverpool Ins. Co. v. Massachusetts*, 10 Wall., 566; *Ducat v. Chicago*, 10 Wall., 410.

⁵ *The Cherokee Tobacco*, 11 Wall., 616. See S. C., 1 Dill., 264; *Ropes v. Clinch*, 8 Blatch., 804.

the constitution or laws of the state to the contrary notwithstanding.¹

Other restraints on the power of taxation. Great as is the power of the state to tax, the people may limit its exercise by the legislative authority at pleasure. This, however, can only be done by the constitution of the state; and limitations or restrictions upon the exercise of this essential power of sovereignty can never be raised by implication, but the intention to impose them must be expressed in clear and unambiguous language.² But it is almost a matter of course to impose some restraint; and provisions to that end will be considered further on. A limitation by constitution of the rate of taxation is self executing,³ and so is any provision which takes from a state or its municipalities the power to tax or to contract debts for a specified purpose.⁴

Taxes may be laid to pay debts contracted prior to the adoption of a constitution, without regard to any limitation thereon as to the amount leviable. Such a limitation must be understood as making tacit exception of debts contracted while the power of the state to tax for their payment was unhampered; and it would require terms in the constitution plainly applying the restriction to the previous debts to give it that effect.⁵ And

¹ Const., art. 6.

² *Lane County v. Oregon*, 7 Wall., 71, per *Chase, J.*; *State v. Parker*, 33 N. J., 426, 435; *Eyre v. Jacob*, 14 Grat., 422, 426.

³ *St. Joseph Board Pub. Sch. v. Patten*, 62 Mo., 444. When a county debt reaches the constitutional limitation any further indebtedness is void, and any tax to pay it is void. *Hebard v. Ashland Co.*, 55 Wis., 145.

⁴ See *Hansen v. Vernon*, 27 Ia., 28; *Phillips v. Albany*, 28 Wis., 340; *Supervisors v. Railroad Co.*, 121 Mass., 460; *Middleport v. Insurance Co.*, 82 Ill., 562. This principle is not disputed; it is recognized in all the railroad aid cases, and in all others where similar questions have arisen.

⁵ *Trull v. Board of Commissioners*, 72 N. C., 388; *Clifton v. Wynne*, 80 N. C., 145. Town officers are bound by charter limitations, except in raising money to pay debts contracted before the limitation was enacted. *Cobb v. Elizabeth City*, 75 N. C., 1. The power to contract a debt implies a power to levy a tax for its payment unless expressly negatived. *United States v. New Orleans*, 98 U. S., 831; *Wolff v. New Orleans*, 103 U. S., 358; *Ralls Co. Court v. United States*, 105 U. S., 733; *Commonwealth v. Alleghany Co. Com'rs*, 37 Pa. St., 277. See *United States v. Macon Co.*, 99 U. S., 532; *Merriwether v. Garrett*, 102 U. S., 472; *Lilly v. Taylor*, 88 N. C., 439.

with the exception of the limitations and restrictions in this chapter mentioned or referred to, it must be taken as the general fact that the power to tax is limited in extent, in purpose and in methods only by the will of the state as expressed in its laws.¹

¹ A limitation imposed by the law under which county bonds are issued upon the rate of taxation that may be levied for their payment enters into the contract and is obligatory. *State v. Shortridge*, 56 Mo., 126; *State v. Macon Co. Court*, 68 Mo., 29. See *United States v. Clark Co.*, 96 U. S., 211. And as to whether particular securities were issued under such a restriction, see *Murray v. Charleston*, 96 U. S., 432, on its special facts.

Under a constitution providing that county authorities shall never assess taxes the aggregate of which shall exceed a certain rate, except in the payment of indebtedness existing at the adoption of the constitution, a tax above such limit to pay such indebtedness is not to be defeated by the fact that prior taxes had been levied for the same purpose, but misappropriated. *Pope County v. Sloan*, 92 Ill., 177.

CHAPTER IV.

THE PURPOSES FOR WHICH TAXES MAY BE LAID.

The general rule. It is implied in all definitions of taxation that taxes can be levied for public purposes only.¹ Differences of opinion frequently arise concerning the power to impose taxation in particular cases, but all writers who treat the subject theoretically and all jurists agree in the fundamental requirement that the purpose shall be public, and they differ, when they differ at all, upon the question whether the particular purpose proposed is within the requirement. It is also agreed that the determination what is and what is not a public purpose belongs in the first instance to the legislative department. It belongs there because the taxing power is a branch of the legislative, and the legislature cannot lie under the necessity of requiring the opinion or the consent of another department of the government before it will be at liberty to exercise one of its acknowledged powers. The independence of the legislature is an axiom in government; and to be independent, it must act in its own good time, on its own judgment, influenced by its own reasons, restrained only as the people may have seen fit to restrain the grant of legislative power in making it. The legislature must, consequently, determine for itself, in every instance, whether a particular purpose is or is not one which so far concerns the public as to render taxation admissible.²

¹This is as true under one form of government as under another. In Sidney's Treatise "On Government," where he has occasion to refer to the doctrine of courtiers, that the revenue voted to the king is to be spent as he thinks convenient instead of being devoted strictly to public purposes, he very truly remarks, that this "is no less than to cast it into a pit of which no man ever knew the bottom. That which is given one day is squandered away the next; the people is always oppressed with impositions to foment the vices of the court; these daily increasing, they grow insatiable; and the miserable nations are compelled to hard labor in order to satiate those lusts that tend to their own ruin." Ch. 8, § 6.

²Sharpless v. Philadelphia, 21 Pa. St., 147; Booth v. Woodbury, 32 Conn., 118; Brodhead v. Milwaukee, 19 Wis., 624; Williams v. School District, 33 Vt., 271; Thomas v. Leland, 24 Wend., 65; Harris v. Dubluclet, 30 La. An., 662; Bennington v. Park, 50 Vt., 178.

But it is also generally admitted that the legislative determination on this subject is not absolutely conclusive. It may be sufficiently so to put the administrative machinery of the state in motion; but when the exaction is made of an individual, and the power of the state is made use of to compel submission, he has always the right to invoke the protection of the law. And an appeal to the law for protection of individual property must necessarily render the question, which lies at the foundation of the demand, a judicial question, upon which the courts cannot refuse to pass judgment. It has been forcibly, and yet very truly, said, that an unlimited power in the legislature to make any and every thing lawful which it might see fit to call taxation, would, when plainly stated, be an unlimited power to plunder the citizen.¹ In attempting to exercise the right, in any particular case, the legislature merely asserts its jurisdiction to act; but questions of jurisdiction are not usually concluded by a decision in its favor made by the party claiming it; they necessarily remain open, and may be disputed anywhere. This is as true of courts as it is of the legislature; jurisdiction comes from the law, and is not obtained by any tribunal through a simple assertion that it exists. When, therefore, the question of the validity of taxation becomes judicial, if it shall appear that the exaction is made for a purpose not public, the right of the individual to protection is clear. Such an exaction is not within the competency of the legislative power, and the attempt to enforce it, however honestly made, could only be an attempt to take property from its possessor under an authority which the law of the land does not recognize. "The theory of our governments, state and national," it has been truly said, "is opposed to the deposit of unlimited power anywhere. The executive, the legislative and the judicial branches of these governments are all of limited and defined powers. There are limitations on such powers

¹ *Tyson v. School Directors*, 51 Pa. St., 9; *Washington Avenue*, 69 Pa. St., 352; S. C., 8 Am. Rep., 255; *Talbot v. Hudson*, 16 Gray, 417, 421; *Freeland v. Hastings*, 10 Allen, 570, 575; *Hooper v. Emery*, 14 Me., 375, 379; *Allen v. Jny*, 60 Me., 124, 139; S. C., 11 Am. Rep., 185; *People v. Township Board of Salem*, 20 Mich., 452, 459; S. C., 4 Am. Rep., 400; *Morford v. Unger*, 8 Ia., 82, 92; *Hanson v. Vernon*, 27 Ia., 28; *Loan Association v. Topeka*, 20 Wall., 655; *In re Flatbush*, 60 N. Y., 398; *State v. Foley*, 30 Minn., 350; *Cole v. La Grange*, 118 U. S., 1.

which grow out of the essential nature of all free governments; implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. . . . Of all the powers conferred upon government, that of taxation is most liable to abuse. Given a purpose or object for which taxation may lawfully be used, and the extent of its exercise is in its very nature unlimited. It is true that express limitation on the amount of tax to be levied or the things to be taxed may be imposed by constitution or statute, but in most instances for which taxes are levied—as the support of government, the prosecution of war, the national defense—any limitation is unsafe. The entire resources of the people should, in some instances, be at the disposal of the government. The power to tax is, therefore, the strongest, the most pervading of all the powers of government, reaching directly or indirectly to all classes of the people. . . . This power can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised. To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it on favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms.”¹

Presumption in favor of legislation. It is not inconsistent with this doctrine that in every instance the highest consideration should be paid to the determination of the legislature that a tax should be laid. It is not lightly to be assumed that its members have come to the examination of the subject with any other than public motives, or that they have failed to give

¹ *Miller, J.*, in *Loan Association v. Topeka*, 20 Wall., 655, 668. And see *Freeland v. Hastings*, 10 Allen, 570, 575; *Hooper v. Emery*, 14 Me., 375, 379; *Allen v. Jay*, 60 Me., 124; S. C., 11 Am. Rep., 185; *Gove v. Epping*, 41 N. H., 539; *Crowell v. Hopkinton*, 45 N. H., 9; *Curtis v. Whipple*, 24 Wis., 350; *People v. Flagg*, 46 N. Y., 401; *Tyler v. Beacher*, 44 Vt., 648, 651; *Matter of Market St.*, 49 Cal., 546.

it due investigation or reflection. The presumption on the other hand must always be that they have considered it with honesty and fair purpose, and that their action is the result of their deliberate judgment. And with all these presumptions tending to support the legislative action, it would seem but reasonable and proper that the courts should support it when not clearly satisfied that an error has been committed. This is the general rule in constitutional law when the validity of legislation is involved,¹ and it is applicable with peculiar force to the case of a legislative decision upon the purpose for which a tax may be laid.

For, in the first place, there is no such thing as drawing a clear and definite line of distinction between purposes of a public and those of a private nature.² Public and private interests are so commingled in many cases that it is difficult to determine which predominates; and the question whether the public interest is so distinct and clear as to justify taxation is often embarrassing to the legislature, and not less so to the judiciary.

All attempts to lay down general rules whereby the difficulties may be solved have seemed, when new and peculiar

¹Story on Const., § 1483, and notes; Sedg. on Const. and Stat. L., 414; Cooley, Const. Lim., 5th ed., 218, and numerous cases cited in notes.

²*General Purposes of Taxation.* These are enumerated by Adam Smith as follows: 1. The defense of the commonwealth. This includes the expenses of forts, arsenals, ships of war, a standing army and its equipment, the arming and disciplining of the militia, military roads and means of transportation of troops, etc. 2. The administration of justice. 3. The expense of public works and public institutions, of which he enumerates — (a.) Public works and institutions for facilitating the commerce of the society — (b.) Institutions for the education of youth — (c.) Institutions for the instruction of people of all ages. 4. The expense of supporting the dignity of the sovereign.

Doctor Wayland enumerates more perfectly the purposes for which the public funds are most commonly expended as follows: 1. The expenses for the support of civil government, including in these the compensation of judicial, legislative and executive officers. 2. Expenses for the purposes of education, classified by him as common education and scientific education. 3. Expenses for maintaining religious worship, which, however, he considers inadmissible. 4. Expenses for the improvement of coasts and harbors, and whatever is necessary for the security of external commerce, and for roads, canals, etc. 4. Expenses of pauperism. 6. The expenses of war.

cases arose, only to add to the embarrassment instead of furnishing the means of extrication from it. Money for a particular purpose may be raised by tax, it is said in one case, if there be the *least possibility* that it will be promotive in any degree of the public welfare.¹ "A tax law," it is said in another case, "must be considered valid unless it be for a purpose in which the community taxed has no interest; when it is apparent that the burden is imposed for the benefit of others, and where it would be so pronounced at first blush."² And still another presents the same idea in language but little different: "To justify the court in arresting the proceedings and in declaring the tax void, the absence of all possible public interest in the purpose for which the funds are raised must be clear and palpable; so clear and palpable as to be perceptible by every mind at first blush."³ These are very strong and sweeping assertions, but they are supported by many others equally emphatic and comprehensive, which are to be met with in the adjudications of courts.⁴ The very emphasis, however, with which the principle is declared renders it peculiarly liable to mislead, unless it is examined in the light of the adjudicated cases in which it

¹ *Booth v. Woodbury*, 32 Conn., 118, 128, per *Butler*, J. A statement so strong in terms as to be very liable to convey to others a meaning not present in the judicial mind.

² *Sharpless v. Philadelphia*, 21 Pa. St., 147, 174, following *Cheaney v. Hooser*, 9 B. Monr., 330, 345. And see *Guilford v. Supervisors of Chenango*, 13 N. Y., 143, 149; *English v. Oliver*, 28 Ark., 317.

³ *Brodhead v. Milwaukee*, 19 Wis., 624, 652, per *Dixon*, Ch. J. And see *Speer v. School Directors*, 50 Pa. St., 150.

⁴ "The exercise of the taxing power must become wanton and unjust—be so grossly perverted as to lose the character of a legislative function—before the judiciary will feel themselves entitled to interpose on constitutional grounds. To arrest the legislation of a free people, especially in reference to burdens self-imposed for the common good, is to restrain the popular sovereignty, and should have clear warrant in the letter of the fundamental law." *Schenley v. Allegheny City*, 25 Pa. St., 128, 130, per *Woodward*, J.

When county commissioners have legislative power in respect to taxes for local purposes, their discretion in deciding how much of the revenue shall be devoted to one purpose, and how much to others, will not be controlled. *Long v. Com'rs of Richmond*, 76 N. C., 273. And even though the purpose in view in levying the tax was an improper one, yet this will not preclude the collection of the tax, and its appropriation to proper objects. *Ibid.*

has been applied, generally with explanations, and often with necessary qualifications.¹

Grade of the government which taxes. In considering the legality of the purpose of any particular tax, a question of first importance must always concern the grade of the government which assumes to levy it. The "public" that is concerned in a legal sense in any matter of government is the public the particular government has been provided for; and the "public purpose" for which that government may tax is one which concerns its own people, and not some other people having a government of its own, for whose wants taxes are laid. There may, therefore, be a public purpose as regards the federal Union, which would not be such as a basis for state taxation, and there may be a public purpose which would uphold state taxation, but not the taxation which its municipalities would be at liberty to vote and collect. The purpose must in every instance pertain to the sovereignty with which the tax originates; it must be something within its jurisdiction so as to justify its making provision for it. The rule is applicable to all the subordinate municipalities; they are clothed with powers to accomplish certain objects, and for those objects they may tax, but not for others, however interesting or important, which are the proper concern of any other government or jurisdiction. State expenses are not to be provided for by federal taxation, nor federal expenses by state taxation, because in neither case would the taxation be levied by the government upon whose public the burden of the expenses properly rests. To provide for such expenses would consequently not be a purpose in which the

¹This is forcibly put by *Dixon*, Ch. J., in *Whiting v. Sheboygan, etc.*, R. R. Co., 25 Wis., 167, 180. If a tax is laid for a public and also for a private purpose, it is void for excess in legislative authority. In a drainage law provision was made for the ostensible purpose of the act, and also for the storage of debris from mines. The court says: "The storage of debris is, in its nature, a private enterprise, in which the few only are interested. The drainage of a state is a public purpose, in which the public may be interested. To promote a public purpose by a tax levy upon the property in the state is within the power of the legislature; but the legislature has no power to impose taxes for the benefit of individuals connected with a private enterprise, even though the private enterprise might benefit the local public in a remote or collateral way." *People v. Parks*, 58 Cal., 624, 639.

people taxed would in a legal sense be concerned. This is the general rule; some apparent exceptions there unquestionably are, where the nation and the state have common interests and a common duty, such as may require the action of both, and would justify the levy of a tax by either or both to accomplish the one object. An illustration would be the case of a tax for the common defense against the public enemies, which might be levied by each, because the purpose would, in a strict sense, be public as to both.

The grade of the government is also important for another reason. A municipal government is one of delegated and limited powers, whose authority will receive a somewhat strict construction, rendering it necessary that it shall find the purposes for which it may tax clearly and unmistakably confided to its charge by the state. It is not sufficient that a purpose may seem to belong properly to its jurisdiction, or that the court may believe the municipality ought to have had authority over it; but it must be seen that the authority has been conferred in fact. It is otherwise with the state, which has all the power of taxation not withheld from exercise in the making of the state and federal constitutions, and in support of whose action, consequently, the most liberal intendments are to be made. It is otherwise with the federal Union also; for though its powers are not general like those of the state, but are limited and defined by the federal constitution, yet as they concern the most important matters of government, and relate to subjects not of domestic concern merely, but of international intercourse, and to other matters which sometimes call for broad and comprehensive views, and make a policy of liberal expenditures wise and statesmanlike, it would be neither reasonable nor prudent to subject its action in the matter of taxation to critical rules. That which it decides to be an object of public expenditure must generally be so accepted, and error in its action must be corrected by discussion and through public opinion and the elections.

General expenses of government. Every government must provide for its general expenses by taxation; and in these are to be included the cost of making provision for those public needs or conveniences for which, by express law or by general

usage, it devolves upon the particular government to supply. As regards the federal government, a general outline of these is to be found in the federal constitution. That government is charged with the common defense of the Union, and for that defense it may raise and support armies, create and maintain a navy, build forts and arsenals, construct military roads, etc. It has a like power over the general subject of postoffices and post-roads, and over other subjects enumerated in the federal constitution and subjected to its authority. It may contract debts, and it must provide for their payment. For all national purposes it may levy taxes, and its power in so doing to select the subjects of taxation and to determine the rate and the methods is as full and complete as can exist in any sovereignty whatsoever, with the exceptions which are prescribed by the constitution itself.

These exceptions are the following:

1. That duties, imposts and excises must be uniform throughout the United States.¹

2. A capitation or other direct tax must be laid in proportion to the federal census or enumeration, according to which the representation of the states in the popular branch of congress is determined.²

3. No tax or duty can be laid on articles exported from any state.³

To these express restrictions is to be added the following, which is always implied:

4. No tax can be laid on a state, or its agencies of government, nor any which can tend to impair the sovereign powers of the states, or impede the exercise of their essential functions.⁴

Some taxes levied by the federal government are directly calculated and intended to benefit private individuals. For an illustration, it gives bounty land or pensions to those who have

¹ Const. of U. S., art. I, § 8, par. 1; *Veazie Bank v. Fenno*, 8 Wall., 533, 541, per *Chase*, Ch. J.

² Const. of U. S., art. I, § 9, par. 4; *Veazie Bank v. Fenno*, 8 Wall., 533, 541, per *Chase*, Ch. J.

³ Const. of U. S., art. I, § 9, par. 5. A tonnage duty laid on foreign vessels is not a tax on exports, and congress may lay such a duty on foreign vessels. *Aguirre v. Maxwell*, 3 Blatch., 140.

⁴ *Ante*, pp. 82-90, and cases cited.

performed military or naval services for the country, notwithstanding it has made no promise, and is consequently under neither a legal nor a moral obligation to do so. But the primary object in all such bounties is not the private but the public interest. To show gratitude for meritorious public services in the army and navy by liberal provision for those who have performed them is not only proper in itself, but it may reasonably be expected to have a powerful influence in inciting others to self-denying, faithful and courageous services in the future, when the government, which is so ready to be generous as well as just, shall have need of their assistance. The same may be said of a like recognition of valuable public services rendered by other persons: the question in every case is not one of power, but of prudence and public policy.¹

Imposts laid on any other consideration than the production of revenue have been often objected to as being only colorable taxation, and therefore not warranted by the taxing power. But where the impost produces revenue, it is a tax, and it cannot be invalid merely because, if laid in some other way or at some other rate, the revenue would have been greater.² Nor

¹ Taxation for the benefit of firemen who have performed duty until they have earned exemption is lawful, though by the constitution the state is prohibited from giving the money of the state "to or in aid of any association, corporation or private undertaking," it being paid in discharge of a moral obligation resting upon the state. *Trustees of Firemen's Fund v. Roome*, 93 N. Y., 813.

² "No doubt all taxation should be general and as far as practicable, equal. Legislation either to benefit or burden particular classes, under the idea that it is for the good of the state at large, infringes upon the natural and guaranteed right of acquiring, possessing and protecting property, subject to fair and equal contributions to the just and necessary expenses of government in the exercise of its proper and legitimate functions. A government which assumes the office of controlling and directing the lawful industry of the citizens into the channels which it may choose to deem best assumes what does not legitimately belong to it. Some states in modern times, in undertaking to find work for the people, have discovered that it was a sure way to make work for themselves. But we cannot sit in judgment upon the wisdom or expediency of laws. An act of the legislature must clearly transcend the limits of the power confided to that department of government, or, more properly speaking, it must violate some prohibition, either express or necessarily implied, either of the federal or state constitution, before it can be pronounced by the judicial department to be unconstitutional and void." *Sharswood, J.*, in *Durach's Appeal*, 62 Pa. St., 491, 495. As to the general right of odagress to tax, see *United States v. McKinley*, 4 Brewst., 246.

can the motives which have influenced the selection of objects for taxation, or determined the rate, be inquired into for the purpose of invalidating it: proper motives in the legislature are always conclusively presumed.¹ If, therefore, it should be conceded that a tariff of duties discriminating between articles of merchandise in order to protect or encourage particular branches of home industry, was unwise, impolitic, or contrary to the spirit of the federal constitution, it could not for that reason be treated as invalid. Of public policy in matters of federal taxation the congress must judge, and the spirit of the constitution is supposed to address itself to the legislature rather than to the courts. Every tax must discriminate; and only the authority that imposes it can determine how and in what directions. The motives that influence the members of a legislative body raise questions between them and their constituents alone.² Indeed, it is only when a burden is imposed which it is impossible to bear; one which is laid not for the purpose of producing revenue, but in order to accomplish some ulterior object which the general government lacks the power otherwise to accomplish, that a case is presented which really can be said to be fairly debatable on the score of power. Such a burden, it may be said with much force, comes under no definition of the word "tax" which is recognized in public law. It demands no contributions for the service of the state; it adds and is expected to add nothing to the public revenue. It annihilates that upon which it is levied, and it differs from confiscation only in this, that confiscation seizes something of value, and appropriates it to the needs of the government, thus making it useful, while this seizes it for the purpose of destruction only. But even in such cases, it is held that the presumption that correct motives have controlled the legislative action must preclude the judiciary from looking for a purpose in leg-

¹ *Goddin v. Crump*, 8 Leigh, 120, 154; *People v. Draper*, 15 N. Y., 532, 545, 555; *Sunbury & Erie R. R. Co. v. Cooper*, 33 Pa. St., 278; *Wright v. Defrees*, 8 Ind., 298, 302; *Baltimore v. State*, 15 Md., 876; *Newman, Ex parte*, 9 Cal., 502; *Lyon v. Morris*, 15 Ga., 480; *McCardle, Ex parte*, 7 Wall., 506, 514; *Johnson v. Higgins*, 3 Met. (Ky.), 566; *Flint, etc., Plank Road Co. v. Woodhull*, 25 Mich., 99, 103; *State v. Hays*, 49 Mo., 604, 607; *State v. Fagan*, 22 La. An., 545.

² See Story on Const., § 1677; *Veazie Bank v. Fenno*, 8 Wall., 533, 548.

islation beyond what the language imports.¹ A like presumption supports the action of municipal legislative bodies.²

It is sometimes a requirement of law that taxes should be raised for purposes specified in advance, to which alone the moneys can then be devoted; but in the absence of any constitutional or legislative requirement on the subject, the local authorities are not thus restricted.³

Public purposes in general. For the most part the term public purposes is employed in the same sense in the law of taxation and in the law of eminent domain. But both in the legislation of the country and in the judicial decisions some differences have been recognized, and, as we think, with good reason. An appropriation under the right of eminent domain is only a forced sale which one is compelled to make for the public good. As the consideration paid on such sale is pecuniary, and is supposed to be equal to the full value of what is taken, no injustice results to him whose property is appropriated. On the other hand, no pecuniary consideration is paid when money is demanded under the power of taxation; and if the money is taken in order to be appropriated to private purposes, the benefits which the tax payer might be presumed to receive from its being used for the needs of the government, to enable it to protect and defend him and give him the benefits of organized society in common with its other citizens, are not realized. In such a case the supposed consideration to the individual for taking his property wholly fails. A more liberal construction of public purposes is consequently admissible in the law of eminent domain, where an error in the direction of too great liberality could not be seriously detrimental, than in the law of taxation, where a like error would result in injustice which might be seriously harmful.

There are provisions in a number of the state constitutions under which one needing a private way across the land of another may have the way established against the will of the

¹*Vearie Bank v. Fenno*, 8 Wall., 533, 548; *Doyle v. Conn. Ins. Co.*, 94 U. S., 535; *Luehrman v. Taxing District*, 2 Lea, 425; *Sunbury & Erie R. R. Co. v. Cooper*, 33 Pa. St., 278; *People v. Draper*, 15 N. Y., 532; *Baltimore v. State*, 15 Md., 376.

²*Freeport v. Marks*, 59 Pa. St., 259; *Buell v. Ball*, 20 Ia., 282.

³*Long v. Com'rs of Richmond*, 76 N. C., 273.

owner, by making out his necessity to the satisfaction of a proper public officer, or of a jury, and by paying such damages as shall be assessed against him. This is an extension of the law of eminent domain,¹ but it has its foundation in public policy, and the appropriation is supposed to accomplish a public purpose in bringing into use a parcel of real property which otherwise would be or might be practically inaccessible. A proposition to make such a private way at the public expense by means of an exercise of the power of taxation would, by general consent, be pronounced wholly inadmissible, as being a proposition to appropriate the public revenues to a private purpose. The difference in the two cases is felt and appreciated the moment they are stated, and the wisdom of recognizing it in legislation has also been very generally felt. So there are some cases in which, without the aid of constitutional provisions, it has been held that individual property may be appropriated under the law of eminent domain, in order to enable private parties to establish and carry on their business enterprises, notwithstanding it would be incompetent to aid the same enterprises by payments from the public treasury. An illustration is the case of lands appropriated for the purpose of creating a reservoir for water, by means of which a water power may be made available in private hands for manufacturing purposes. The right to make the appropriation has been sustained, on the ground that, within the meaning of the law of eminent domain, land is taken for the public use whenever its taking is for the general public advantage, and that the establishment of power for manufacturing purposes is an object of such great public interest — especially where manufacturing is one of the great industrial pursuits of the commonwealth — as fully to justify the declaring it a public use and to authorize for the purpose the appropriation of private property by individuals or corporations.²

¹ In a few cases it has been held that private roads might be laid out by compulsory proceedings without any such constitutional permission. *Harvey v. Thomas*, 10 Watts, 63; *Case of Pocopson Road*, 16 Pa. St., 15; *Sherman v. Buick*, 32 Cal., 241.

² *Hazen v. Essex Company*, 12 Cush., 475, 477, per *Shaw*, Ch. J.; *Great Falls Manuf. Co. v. Fernald*, 47 N. H., 444, 458, per *Perley*, Ch. J. The following cases are to the same effect: *Fiske v. Framingham Manuf. Co.*, 12 Pick., 67; *Boston & Roxbury Mill Corporation v. Newman*, 12 Pick., 467; *Harding*

On the other hand, the right to exercise the power of taxation in aid of the manufacturing enterprises of private persons or corporations has seldom been asserted, and whenever asserted has been most emphatically denied. It has been well and forcibly said that: "Individuals and corporations embark in manufactures for the purpose of personal and corporate gain. Their purposes and objects are precisely the same as those of the farmer, the mechanic or the day laborer. They engage in the selected branch of manufactures for the purpose and with the hope and expectation not of loss but of profit. . . . The general benefit to the community resulting from every description of well directed labor is of the same character, whatever may be the branch of industry upon which it may be expended. All useful laborers, no matter what the field of labor, serve the state by increasing the aggregate of its products — its wealth. There is nothing of a public nature any more entitling the manufacturer to public gifts, than the sailor, the mechanic, the lumberman or the farmer. Our government is based upon equality of rights. All honest employments are honorable. The state cannot rightfully discriminate among occupations, for a discrimination in favor of one branch of industry is a discrimination adverse to all other branches. The state is equally to protect all, giving no undue advantage or special or exclusive preference to any."¹

v. Goodlett, 3 Yerg., 41. The courts of Wisconsin have sustained such laws, *Newcomb v. Smith*, 1 Chand., 71; *Thein v. Voegtlander*, 3 Wis., 461, 465; *Pratt v. Brown*, 3 Wis., 603. But with some hesitation of late. See *Fisher v. Horicon Co.*, 10 Wis., 351; *Curtis v. Whipple*, 24 Wis., 350; note of Judge *Redfield* to *Allen v. Inhabitants of Jay*, 12 Am. Law Reg., 493; S. C., 60 Me., 124; also 11 Am. Rep., 185. They have also been sustained in other states: *Olmstead v. Camp*, 33 Conn., 532; *Jordan v. Woodward*, 40 Me., 317; *Miller v. Troost*, 14 Minn., 365; *Venard v. Cross*, 8 Kan., 248; *Harding v. Funk*, 8 Kan., 315; *Burgess v. Clark*, 13 Ired., 109; *M'Affee's Heirs v. Kennedy*, 1 Lit., 92; *Smith v. Connelly*, 1 T. B. Monr., 58; *Shackelford v. Coffey*, 4 J. J. Marsh., 40; *Crenshaw v. Slate River Co.*, 6 Rand., 245; *Ash v. Cummings*, 50 N. H., 591; *Hankins v. Lawrence*, 8 Blackf., 266; *Gammel v. Potter*, 6 Ia., 548. And in the federal supreme court. *Head v. Amoskeag Manuf. Co.*, 113 U. S., 9, where all the cases are collected.

Compare *Tyler v. Beacher*, 44 Vt., 648; S. C., 8 Am. Rep., 398; *Ryerson v. Brown*, 35 Mich., 393; S. C., 24 Am. Rep., 564; *Loughbridge v. Harris*, 42 Ga., 500.

¹ Opinions of Justices, 58 Me., 590, 592. This subject is considered a little further on.

Of like import is the opinion of an eminent federal judge, in a case in which a town, under an authority which the legislature had attempted to confer, had voted its bonds in aid of a private manufacture.¹ The same doctrine was afterwards affirmed in the federal supreme court. After consideration of the general nature of the power to tax, the court declare it to be "beyond cavil that there can be no lawful tax which is not laid for a *public purpose*. It may not be easy to draw the line in all cases so as to decide what is a public purpose in this sense, and what is not. It is undoubtedly the duty of the legislature which imposes or authorizes municipalities to impose a tax, to see that it is not to be used for purposes of a private interest instead of a public use; and the courts can only be justified in interposing when a violation of this principle is clear and the reason for interference cogent. And in deciding whether, in a given case, the object for which the taxes are assessed falls upon the one side or the other of this line, they must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether state or municipal. Whatever lawfully pertains to this, and is sanctioned by time and the acquiescence of the people, may well be held to belong to the public use, and proper for the maintenance of good government; though this may not be the only criterion of rightful taxation.

"But in the case before us, in which the towns are authorized to contribute aid, by way of taxation, to any class of manufactures, there is no difficulty in holding that this is not

¹ *Commercial National Bank v. Iola*, 2 Dill., 353. See *National Bank of Cleveland v. Iola*, 9 Kan., 689; *Opinions of Justices*, 58 Me., 590, 596; *Parkersburg v. Brown*, 106 U. S., 487; *English v. People*, 96 Ill., 566; *Weisner v. Douglas*, 64 N. Y., 91; S. C., 21 Am. Rep., 586.

A neck of land between two rivers could most easily be protected from cattle by a fence from river to river. A company was incorporated to build and maintain such a fence and impose fines and penalties and levy a specific tax to insure success. Held, that a land owner who refused to pay an assessment could not be compelled to do so; the undertaking not being one for which taxes could be authorized. *Scuffletown Fence Co. v. McAllister*, 12 Bush, 312.

such a public purpose as we have been considering. If it be said that a benefit results to the local public of a town by establishing manufactures, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds the business men of the city or town.”¹

Further authorities in support of the position that there is a distinction in the meaning of *public use*, as employed in the law of eminent domain and of taxation, would seem unnecessary. Custom must have great influence in determining the proper limit of either power; but it is manifest that the adjudications recognize certain incidental benefits to the public as constituting such a public interest as will justify an exercise of the eminent domain which, in the case of the power of taxation, are not admitted as constituting any basis whatever for its employment. Few cases have undertaken to point out the distinction,² but the courts have acted upon it in many cases.

An enumeration of the purposes which are recognized as justifying taxation is not needful, and is scarcely practicable. The most of them pass unchallenged. To preserve the public order; to provide for the enforcement of civil rights and the punishment of crime; to make compensation to public officers

¹ Per *Miller, J.*, in *Loan Association v. Topeka*, 20 Wall., 655, 664. See also, *Allen v. Jay*, 60 Me., 124; S. C., 11 Am. Rep., 185. Taxation in aid of private enterprises is properly characterized by *Dickenson, J.*, in *Opinions of Justices*, 58 Me., 590-603, as taxation “to load the tables of the few with bounty that the many may partake of the crumbs that fall therefrom.”

It is not competent for a city to levy taxes to loan to persons who have suffered from a fire (*Lowell v. Boston*, 111 Mass., 454; S. C., 15 Am. Rep., 39); or for a town to supply farmers, whose crops have been destroyed, with provisions and seed grain (*State v. Osawkee*, 14 Kan., 418); or to pay a subscription to a private corporation, not for a public purpose (*Weismer v. Douglas*, 64 N. Y., 91; S. C., 21 Am. Rep., 586); or to erect a dam with the privilege afterwards at discretion to devote it to either a public or a private purpose. *Attorney-General v. Eau Claire*, 37 Wis., 400.

² See, however, *Whiting v. Sheboygan, etc.*, R. Co., 25 Wis., 187, 190; *People v. Township Board*, 20 Mich., 452, 477.

and to others who perform services for the public; to protect public property; to erect and keep in repair the necessary public buildings; to pay the expenses of legislation and of administering the laws,—all these are purposes which, in a consideration of the law of taxation, call for no comment, as each and all are absolutely indispensable in orderly government. All these may therefore be passed by while attention is directed to cases not so clear, the determination of which will sufficiently indicate the bounds which usage in representative government has prescribed as the proper limit to a lawful expenditure of the public moneys.

Religious instruction. This to individuals is an object of the very highest moment, and formerly it was thought to be the duty of government to provide for it. The more enlightened opinion of the present day denies the duty, and affirms that any step in that direction is in greater or less degree a species of persecution of those whose views are not favored, and therefore incompetent in any country whose political institutions are based upon the principles of equality before the law.¹ Religious instruction is, therefore, by common consent referred exclusively to the voluntary action of the people. It is expressly forbidden by many of the state constitutions that public moneys shall be appropriated to religious worship. It is true that in selecting the objects of taxation, buildings and

¹ Cooley, Const. Lim., ch. 13, and cases referred to in the notes. Dr. Wayland justly observes that "The only ground on which taxes for the support of religion can be defended is that its existence is necessary for the support of civil government, and that it can be sustained in no other manner than by compulsion. The first assertion we grant to be true; the second we utterly deny. Hence we do not believe that any taxation for this purpose is necessary. All that religious societies have a right to ask of the civil government is, the same privileges for transacting their own affairs which societies of every other sort possess. This they have a right to demand, not because they are religious societies, but because the exercise of religion is an innocent mode of pursuing happiness. If these be not granted, religious men are oppressed, and the country where such oppression prevails, let it call itself what it may, is not free." Wayland, Pol. Econ., b. 4, ch. 3, § 2.

It has been held not incompetent to permit a public school-house to be made use of for religious purposes when it is not wanted for school. *Nichols v. School Directors*, 93 Ill., 61; S. C., 34 Am. Rep., 160; *Davis v. Boget*, 50 Ia., 11. Compare *Dorton v. Hearn*, 67 Mo., 301; *People v. Mo-Adams*, 82 Ill., 356.

other property made use of for that purpose are generally exempted from the lists. This is done without discrimination between sects, and is generally defended upon the ground that public worship is a public benefit which may properly be encouraged in this indirect way. The discrimination is opposed by some persons, but whether or not it is proper or politic, it cannot be declared unwarranted by the general principles of government. As already observed, the question what taxes shall be levied, and upon what classes of persons or property, is always one of public policy which the legislature must solve. But another view is not entirely without plausibility. Whoever contributes to the support of churches also contributes to pay the taxes, if any, which are imposed upon them. But as most persons who pay taxes at all do, in some form, and with some regard to their ability, contribute to the support of churches, it is of little importance to the general public whether taxes are levied on church property or not, as whatever is collected from such property, while it goes to diminish what will be collected from individual property, will at the same time increase to the same extent what the individuals pay for the support of religious instruction, so that the burden in the one case will be substantially the same as in the other. We do not say that this view is strictly correct, but it is perhaps safe to say that the inequality occasioned by the exemption of church property from taxation is not so great as without reflection one would be likely to suppose.

Secular instruction.¹ It may be safely declared that to bring a sound education within reach of all the inhabitants has been a prime object of American government from the

¹For the most part public education in the United States is in charge of corporations created for the purpose, the most of which are invested with power of taxation. But this power is limited strictly to the educational purpose. *People v. Trustees of Schools*, 78 Ill., 136, and cases referred to. Also *Weightman v. Clark*, 103 U. S., 256.

The fact that a state constitution expressly mentions only a state university and common schools as educational institutions to be provided for does not preclude the establishment and support of state normal schools. *Briggs v. Johnson County*, 4 Dill., 148.

Taxation in support of a high school, when duly authorized, will not be held incompetent by reason of the course of study prescribed being differ-

very first. It was declared by colonial legislation, and has been reiterated in constitutional provisions to the present day. It has been regarded as an imperative duty of the government; and when question has been made concerning it, the question has related not to the existence of the duty, but to its extent. But the question of extent is one of public policy, and addresses itself to the legislature and the people, not to the courts.¹ And the tendency on the part of the people has been steadily in the direction of taking upon themselves larger burdens in order to provide more spacious, elegant and con-

ent from that contemplated by law. *Richards v. Raymond*, 92 Ill., 612; S. C., 84 Am. Rep., 151. See *Stuart v. Kalamazoo*, 30 Mich., 69.

In Florida it has been decided that a statutory provision that commissioners *may* levy a tax for school purposes is mandatory. *Jones v. Board of Public Instruction*, 17 Fla., 411.

¹*Commonwealth v. Hartman*, 17 Pa. St., 118; *Powell v. Board of Education*, 97 Ill., 375; *Bellmeyer v. School District*, 44 Ia., 564. See the very interesting case of *Cushing v. Inhabitants of Newburyport*, 10 Met., 506. Also *Bull v. Read*, 13 Grat., 78; *Stuart v. Kalamazoo*, 30 Mich., 69. That a tax for the support of free schools is within a general grant of the power to tax for "municipal purposes," see *Horton v. School Commissioners*, 43 Ala., 596; *Opinions of Justices*, 67 Me., 582. Dr. Wayland, in speaking of the liberality of construction in determining the purposes of taxation, says: "It must not, of course, always be expected that the product created by consumption (in public expenditure) will be a visible, tangible, material substance. Thus we see no physical, tangible product as the result of taxes for the support of civil government. But we receive the benefit in security of person, property and reputation; or in that condition of society which, though it be incapable of being weighed and measured, is absolutely essential both in individual happiness and individual accumulation. The same may be said in substance concerning the taxes paid for general education. Here, whether the tax payer receives his remuneration in instruction given to his own children or not, he yet receives it in the improvement of the intellectual and social character of his neighbors, by which his property is rendered more secure, the labor for which he pays is better performed, and the demand for whatever he produces is more universal and more constant. The same may be said of the public expenditure by which the moral and social character of a community is elevated, the taste of a nation refined, and an impulse given to efforts for the benefit of man. With this view, no one could oppose the expense incurred in bestowing upon public edifices elegance, or even, in some cases, magnificence of structure, in the public celebration of remarkable eras, and in the rewards bestowed upon those who have by their discoveries enlarged the boundaries of human knowledge, or by their inventions signally improved the useful arts." *Pol. Econ.*, pt. 4, ch. 8, § 1.

venient houses of instruction, and to place within the reach of all a more generous and useful education. And this is usually done by the direct action of the public; the state or its municipalities constructing and owning the edifices, and supporting the schools, academies, colleges and universities.¹

But to justify taxation for the purposes of education, the rules under which the people shall be admitted to the privileges given must not be invidious and partial, but must place all parties on a plane of practical equality. The rule is substantially the same here that applies in the apportionment of taxes: equality must be the aim of the law, and it must be assumed the state has no special favors to bestow upon privileged classes. But if the rules are impartial it is not a legal objection to them that they fail to provide for every one. Elementary instruction, for example, is commonly offered by the state to children between certain ages only; and if the offer is impartial to these, no just exception can be taken to it. Neither can one complain that he is required to attend the schools in his own neighborhood. But it would not be competent to single out some one class of the community and exclude them from the benefits of the public schools on arbitrary grounds. This has been frequently held in the case of the freedmen and other colored citizens.²

¹ When public funds are provided for education under definite regulations or restrictions, these must be observed. *People v. Board of Education*, 13 Barb., 400; *People v. Allen*, 43 N. Y., 404; *Halbert v. Sparks*, 9 Bush, 259; *Collins v. Henderson*, 11 Bush, 74; *State v. Graham*, 25 La. An., 440; *State v. Board of Liquidation*, 29 La. An., 77; *Sun Mut. Ins. Co. v. Board of Liquidation*, 81 La. An., 175; *Littlewort v. Davis*, 50 Miss., 403; *Weir v. Day*, 35 Ohio St., 143; *Otken v. Lamkin*, 56 Miss., 758. As to power of the state to control school expenditures, see *Curryer v. Merrill*, 25 Minn., 1; *Bancroft v. Thayer*, 5 Sawy., 502; *People v. Board of Education*, 55 Cal., 331; *Kinney v. Zimpleman*, 36 Tex., 554.

² Whether it is the constitutional right of colored children to attend the same schools with others when the law makes equal provision for them elsewhere is a question discussed in the following cases. *State v. Duffy*, 7 Nev., 342; S. C., 8 Am. Rep., 713; *Cory v. Carter*, 48 Ind., 327; *Ward v. Flood*, 48 Cal., 36; *State v. McCann*, 21 Ohio St., 198; *Bertonneau v. School Directors*, 3 Woods, 177. In several of the states it is expressly prohibited by law that any distinction shall be made. Where the law contemplates separate schools, colored children may nevertheless attend the regular schools if no others are provided for them. *State v. Duffy*, 7 Nev., 342; S. C., 8 Am. Rep., 713. In Kentucky the law provides for devoting school

In some states a practice has prevailed, while making liberal provision for instruction in public schools, to also give assistance to institutions owned and controlled by private corporations or by religious bodies or denominations. The legal right to do this has received but little attention. In one case in Massachusetts, under a constitutional provision which required moneys raised for public schools to be applied to those only which were under the order and superintendence of the public authorities, it was denied that the legislature could lawfully authorize a town to take moneys which had been raised for the public schools and appropriate them in support of a school founded by a charitable bequest, under which the order and superintendence of the school was vested in trustees who, though a majority were to be chosen by the inhabitants of the town, were yet limited to the members of certain religious societies.¹ And in Wisconsin the authority of the legislature to empower a town to tax its citizens in aid of the erection of buildings for an educational institution to be owned and controlled by a private corporation was denied on general principles. "It strikes us," say the court, "at the first blush, that this is not the levy and collection of money for public purposes, as clearly as if the institute were not an incorporated body, but a mere association of private individuals resolved upon the establishment of a like institution. If it were such an institution, or a grammar or classical school, or a seminary built up and established by individual enterprise, as by persons engaged in the profession of teaching, or by others, and owned and controlled by those contributing towards it, and the emoluments belonging to them, we apprehend that no one would contend that the people [of the town] might be taxed for the purpose of donating the moneys to it. The fact that it is an institution incorporated by act of the legislature does not change its character in this respect. It is but a most frivolous pretext for giving to a corporation, where there is no certain and definite personal responsibility, money exacted from the

taxes collected from colored people to the support of schools for colored children. They cannot, therefore, be taxed for exclusively white schools. See *Marshall v. Donovan*, 10 Bush, 681; *Claybrooke v. Owensboro*, 16 Fed. Rep., 297.

¹ *Jenkins v. Andover*, 103 Mass., 94. See *People v. McAdams*, 83 Ill., 856.

tax payers, which a just and honorable man engaged in the same business would hesitate to receive though paid without opposition, and to enforce the payment of which, against the will of the tax payers, he would never think of resorting to coercive measures, provided the same were lawful. It can no more be supported by taxation than if it were unincorporated, or a private school or seminary of the kind above supposed.”¹ This is strong language, and has much reason in its support, though it may be affirmed that it has had little or no influence on the course of legislation in other states.

It has been decided to be competent for the legislature to authorize a town to tax itself in aid of the erection of buildings for a state educational institution to be constructed within it.² In the particular case the purpose, as regards the state at large, was clearly public, but the locality was allowed to assume a special burden on the ground of special and peculiar benefits. A case in New York perhaps goes further, inasmuch as it sustains the authority of the legislature to require a village to render such assistance.³ While it may be entirely proper to regard the incidental benefits to the locality as constituting a just basis for an exceptional tax upon it, no such ruling would be admissible where the building itself was not to be one owned and controlled by the public, and where consequently the sole ground for any taxation would be the incidental benefits to flow from a private undertaking. This has been so clearly shown in a case from which we have already quoted, that we copy from the opinion instead of attempting any statement of the general doctrine in our own language:

“That is not the kind of public benefit and interest which will authorize a resort to the power of taxation. Such benefits accrue to the people of all communities from the exercise in their midst of any useful trade or employment, and the argument, pursued to its logical result, would prove that compul-

¹ *Curtis v. Whipple*, 24 Wis., 350, 353, per *Dixon*, Ch. J.

² *Merrick v. Amherst*, 12 Allen, 500. See, also, *Marks v. Trustees of Purdue University*, 37 Ind., 155; *Burr v. Carbondale*, 76 Ill., 455; *Hensley Township v. People*, 84 Ill., 544; *Livingston County v. Darlington*, 101 U. S., 407.

³ *Gordon v. Cornes*, 47 N. Y., 608. In that case, however, there was to be a grammar school in the state building, free to the children of the village. Compare *State v. Haben*, 22 Wis., 661.

sory payment or taxation might be made use of for the purpose of building up and sustaining every such trade or employment, though carried on by private persons for private ends, or the purposes of mere individual gain and emolument. That there exists in the state no power to tax for such purposes is a proposition too plain to admit of a controversy. Such a power would be obviously incompatible with the genius and institutions of a free people; and the practice of all liberal governments, as well as all judicial authority, is against it. If we turn to the cases where taxation has been sustained as in pursuance of the power, we shall find in every one of them that there was some direct advantage accruing to the public from the outlay, either by its being the owner or part owner of the property or thing to be created or obtained with the money, or the party immediately interested in and benefited by the works to be performed, the same being matters of public concern; or because the proceeds of the tax were to be expended in defraying the legitimate expenses of government, and in promoting the peace, good order and welfare of society. Any direct public benefit or interest of this nature, no matter how slight, as distinguished from those public benefits or interests incidentally arising from the employment or business of private individuals or corporations, will undoubtedly sustain a tax. In thus endeavoring to define how the public must be beneficially interested in order to justify the raising of money by taxation in cases like the present, we of course do not intend to include all purposes for which money may be so raised. Taxes may be levied and collected for charitable purposes, but these constitute a peculiar ground for the exercise of the power which does not exist here.

“So claims founded in equity and justice in the largest sense, and in gratitude, will support a tax; such claims, however, and we think all others where taxation is proper, except claims founded in charity, may be referred to the general principle above spoken of, of public interest in, or benefits received by, the transaction out of which the claims arose.”¹

Public charity. The support of paupers and the giving of assistance to those who, by reason of age, infirmity or disability

¹Curtis v. Whipple, 24 Wis., 350, 354, per Dixon, Ch. J.

are likely to become such, is, by the practice and the common consent of civilized countries, a public purpose. The laws not only exempt from taxation the limited means of such persons, but they go further and provide public funds with which to furnish them retreats where they can be supplied with the necessities, and, to a reasonable extent, with the comforts of life. Hospitals are also provided where dependent classes can receive medical aid and assistance, and asylums where the deaf, the dumb and the blind may be supported and taught, and where the insane may be kept from doing or receiving harm, and can have such careful and scientific treatment, with a view to their restoration, as they would not be likely to receive elsewhere. He would be a bold man who, in these days, should question the public right to make provision for these benevolent objects. And this provision might not only be made by the establishment of institutions for the purpose, but private institutions might undoubtedly be aided with public funds, in consideration of services to be rendered to the public, and expenses to be incurred by them in assisting and relieving the same necessitous and dependent classes.¹ The buildings and property of charitable bodies may also, with the utmost propri-

¹ It has been held not competent to levy taxes to be paid over to individuals or associations simply because they are charitable. In the particular case the legislature had required the agencies of foreign insurance companies to pay over two per centum of their receipts to an association for the relief of disabled firemen. "If the legislature may command such a contribution as this, we are unable to see why they may not command every citizen to contribute, not only to this association, but to every charitable association; and, indeed, to every man who spends his money and means in a charitable way. There are associations for all sorts of charity — why may not the legislature require us to contribute to them all, if they may require this class of people to contribute to this one? We cannot answer this question." *Lowrie*, Ch. J., in *Philadelphia Association, etc., v. Wood*, 39 Pa. St., 73, 82. But in New York it is decided that a constitutional provision that "neither the credit nor the money of the state shall be given or loaned to or in aid of any association, corporation or private undertaking," etc., would not preclude taxation by municipalities in aid of charitable societies and corporations. *Shepherd's Fold v. New York*, 96 N. Y., 137. But they cannot thus tax without being empowered by legislation, either expressly or by necessary implication. *St. Mary's Industrial School v. Brown*, 45 Md., 310. And the question of constitutional power must be one of construction which might depend largely on the peculiar state experience. *Bay City v. State Treasurer*, 23 Mich., 499.

ety and justice, be exempted from taxation, as by implication public buildings for the same purpose are exempted.¹

Private business enterprises. In comparing the right to tax with the right of eminent domain it has been shown that taxation cannot be employed to aid mills and other manufactories in private hands. The rule there stated is general. However important it may be to the community that individual citizens should prosper in their industrial enterprises, it is not the business of government to aid them with its means. Enlightened states, while giving all necessary protection to their citizens, will leave every man to depend for his success and prosperity in business on his own exertions, in the belief that by doing so his own industry will be more certainly enlisted, and his prosperity and happiness more probably secured. It may therefore be safely asserted that taxation for the purpose of raising money from the public to be given or even loaned to private parties, in order that they may use it in their individual business enterprises, is not recognized as an employment of the power for a public use. In contemplation of law it would be taking the common property of the whole community and handing it over to private parties for their private gain, and consequently unlawful. Any incidental benefits to the public that might flow from it could not support it as legitimate taxation.²

¹ In *Directors of the Poor v. School Directors*, 42 Pa. St., 21, 25, in which it was claimed that a public poor-house was taxable for school purposes under general words in the statute, *Lowrie*, Ch. J., uses the following vigorous language: "Tax the poor-house to support the schools? Why, this would be to take the poor *taxes* to support the schools; and the people must be taxed to pay the officers who perform such foolish service. If we require the townships, counties, towns, cities and state, and the road, school and poor authorities to tax each other, we shall furnish fees enough for several hundred officers engaged in transferring from one public body to another the taxes which it has collected for its public purposes. These poor taxes must be collected to support the schools and roads, and *school* taxes to support the poor, and so on all around. Surely it is not too much to say that this is absurd. The public is never subject to tax laws, and no portion of it can be without express statute. No exemption law is needed for any public property held as such."

² *Allen v. Jay*, 60 Me., 124; S. C., 11 Am. Rep., 185. See a valuable note to this case by Judge *Redfield*, 12 Am. Law Reg., N. S., 493. In it reference

Moral obligations. There are some cases in which taxation has been allowed for the benefit of private persons on considerations not of charity so much as of justice. Any exercise of the powers of government is liable to cause injury to particular individuals. When the injury is merely incidental,

is made to the recent case of *Lowell v. Boston*, 111 Mass., 454, as follows:

"The foregoing opinion and the still more recent decision of the supreme judicial court of Massachusetts, in the case of *Lowell v. The City of Boston*, seem to justify the expectation that some limits will hereafter be placed to the power of interested parties through the legislature to carry forward *private enterprises* by means of taxation. The case of *Boston* grew out of an act of the legislature, at a special session called largely for that purpose, by which the city was authorized to issue bonds not exceeding \$20,000,000, at five per cent. interest when payable in gold, or six per cent. if payable in currency; the avails of these bonds to be loaned to the owners of land upon which buildings were destroyed by the great fire of November last. Commissioners were appointed to manage the loan, and were required to take a first mortgage upon the land at not less than three-fourths its value, as security for the money advanced, at seven per cent. interest. Here there was a case where there could be no reasonable danger of loss, and a high probability of some gain to the city by means of the larger rate of interest paid by the borrowers than that paid by the city. There could be no fair question either that such a proceeding would afford great accommodation to the property owners on the burnt district, and that it would greatly conduce to the speedy restoration of that portion of the city, and thus naturally to the increase of the wealth and business prosperity of the city, and, to some extent, to the greater convenience, accommodation and prosperity of the inhabitants of the city generally. And still the court, unanimously, so far as we learn, came to the conclusion that the statute was void, and perpetually enjoined all proceedings under it." A town cannot raise money by tax to distribute among its citizens according to numbers. *Hooper v. Emery*, 14 Me., 375, 379. Towns cannot raise moneys for the purpose of abating a particular class of taxes—*e. g.*, poll taxes upon its male inhabitants—and consequently cannot appropriate public moneys for that purpose. *Cooley v. Granville*, 10 Cush., 56.

That it is not competent to tax for the support of a woolen mill in private hands, and that if the tax is laid and the money collected the officers have no right to pay it over, see *McConnell v. Hamm*, 16 Kan., 228. That taxation in support of a grist mill is void, and the payment of bonds issued for the purpose will be enjoined, see *Central Branch U. P. R. Co. v. Smith*, 23 Kan., 745. Also *Commercial Nat. Bank v. Iola*, 2 Dill., 353; *National Bank v. Iola*, 9 Kan., 689; *Loan Association v. Topeka*, 20 Wall., 655.

In *Burlington v. Beasley*, 94 U. S., 810, taxation in aid of a public grist mill, the tolls of which the legislature would have a right to regulate, was sustained. It is of course conceivable that in a new country such a mill may not only be a public necessity, but impossible of establishment without public aid.

these individuals have no legal claim to indemnification. Nevertheless, it seems eminently proper and just, in some exceptional cases, to recognize a moral obligation resting on the public to share with the persons injured the damage sustained; and this can only be done by means of taxation. All governments are accustomed to recognize and pay equitable claims of this nature under some circumstances; claims, for instance, for the destruction of private property in war, and sometimes for incidental injuries occasioned by the construction of a public work, or for loss in performing a contract to construct it.¹

In these cases the legislature is not confined in making compensation within the strict limits of common law remedies, but it may recognize moral or equitable obligations, such as a just man would be likely to recognize in his own affairs, whether by law required to do so or not. And what the legislature may do for the state, the municipalities, under proper legislation, may do for themselves. Thus where their officers have been subjected to responsibility and loss in an honest attempt to perform public duty, they may very justly as well as legally be indemnified by the municipality for which they were acting.² And it has several times been held that what the municipality might thus voluntarily do, the legislature might require it to do.³ It may, therefore, compel a city to issue bonds for a merely equitable demand,⁴ or to lay a tax for its satisfaction.⁵

Amusements and celebrations. To furnish amusements to its citizens is not one of the functions of government. But to

¹ *New Orleans v. Clark*, 95 U. S., 644; *Lycoming v. Union*, 15 Pa. St., 106; *Friend v. Gilbert*, 108 Mass., 408; *Guilford v. Supervisors of Chenango*, 18 N. Y., 143.

² *Nelson v. Milford*, 7 Pick., 18, 23; *Hadsell v. Hancock*, 8 Gray, 526; *Fuller v. Groton*, 11 Gray, 840; *Baker v. Windham*, 13 Me., 74; *Pike v. Middleton*, 12 N. H., 278; *Briggs v. Whipple*, 6 Vt., 95; *Sherman v. Carr*, 8 R. I., 431; *Bancroft v. Lynnfield*, 18 Pick., 566, 568. Whether this could be done in Michigan, see *Bristol v. Johnson*, 84 Mich., 123.

³ *Guilford v. Supervisors of Chenango*, 18 N. Y., 143; *Brewster v. Syracuse*, 19 N. Y., 116; *New Orleans v. Clark*, 95 U. S., 644; *Board of Education v. McLandsborough*, 36 Ohio St., 227; *Wilkinson v. Cheatham*, 43 Ga., 258; *Beals v. Amador*, 35 Cal., 624; *Blanding v. Burr*, 18 Cal., 343.

⁴ *Blandig v. Burr*, 13 Cal., 343.

⁵ See *Thomas v. Leland*, 24 Wend., 65; *New Orleans v. Clark*, 95 U. S., 644.

provide public parks or other grounds which shall be open to the public use and occupation for healthful recreation and enjoyment is not only proper but highly commendable, and in large towns may almost be said to be absolutely necessary.¹ The great public parks of the world are great public blessings, in which the poor participate with the rich, and from which they, perhaps, derive the larger share of positive benefit. How far a state or a town should go in making these attractive, the legislative wisdom must provide, and it will be likely to err but seldom in the direction of liberality so long as careful provision is made for an honest expenditure of public funds.²

Government sometimes provides for the celebration of important events or eras. Cities or towns have no authority to do this, at least without express legislative permission. Such are the decisions in cases where public money has been voted to celebrate the declaration of independence, or the closing military success in the revolutionary war.³ It is not very clear

¹ See *Matter of Central Park*, 50 N. Y., 493; *Matter of Prospect Park*, 60 N. Y., 398; *State v. Leffingwell*, 54 Mo., 458; *People v. Salomon*, 51 Ill., 87; *People v. Brislin*, 80 Ill., 423; *Dunham v. People*, 96 Ill., 331. In *Attorney-General v. Burrell*, 31 Mich., 25, a town was held to have authority under its general powers to purchase and hold land for town purposes, to buy and hold a public square.

² "It is difficult to name a limit beyond which taxes will not be borne without impatience, when they appear to be called for by necessity and faithfully applied. . . But the sting of taxation is wastefulness." *Hallam's Middle Ages*, ch. 1, pt. 2.

³ *Hodges v. Buffalo*, 2 Denio, 110; *Tash v. Adams*, 10 Cush., 252; *New London v. Brainard*, 22 Conn., 552; *Gerry v. Stoneham*, 1 Allep, 319; *Hood v. Lynn*, 1 Allen, 103, 107; *Dillon's Mun. Corp.*, § 110.

In the case last cited, the following remarks are made by *Bigelow*, Ch. J., regarding the force of usage in the construction of town powers: "It was urged by the counsel for the respondents, that the appropriation in the present case might be justified and sustained on the ground of usage. But the answer to this argument is twofold. In the first place, there is no evidence in the case of the existence of any such usage or custom in the towns or cities of this commonwealth. It is not even alleged in the answer of the respondents. Certainly, the court cannot take judicial cognizance of it. But even if such usage was alleged and proved, it would not alter the case. An unlawful expenditure of the money of a town cannot be rendered valid by usage, however long continued. Abuses of power and violations of rights derive no sanction from time or custom. A casual or occasional exercise of the power by one or a few towns will not constitute a usage. It must not only be general, reasonable and of long continuance, but what is

that the power could be conferred upon them if the legislature were disposed to do so.

Highways and roads. One of the most important functions of government is the making provision for public roads for the use of the people. The variety of these is great, and the modes of construction and operation are different. No question is made of the competency of the legislature to levy taxes for the common highway, the improved turnpike and macadamized road, the planked or paved street, the canal, the tramway or the railway. Any or all of them may be constructed by the state, or under state authority, by the municipal subdivisions of the state within whose limits they may be needed.¹

more important, it must also be a custom necessary to the exercise of some corporate power, or the enjoyment of some corporate right, or which contributes essentially to the necessities and conveniences of the inhabitants. The usage relied on in the present case, if established, would not satisfy either of these last named requisites, which are necessary to give it validity. It is said by this court, in a recent case, that there are many things in the management of town affairs, which are done without objection and pass by general consent, which cannot, when objection is made and they are brought to the test of judicial investigation, be supported as strictly legal. *Sikes v. Hatfield*, 13 Gray, 353. The present case is an illustration of the truth of this remark."

¹ In *Philadelphia v. Field*, 58 Pa. St., 320, it was held competent for the legislature to provide for the construction of a free bridge over the Schuylkill, opposite one of the streets of Philadelphia, and to require the expense to be borne by taxation of the city. The cases of *Thomas v. Leland*, 24 Wend., 65; *Norwich v. County Commissioners*, 13 Pick., 60; *Hingham, etc., Corporation v. Norfolk County*, 6 Allen, 353, and *Board of Wardens v. Philadelphia*, 42 Pa. St., 209, were cited with approval. Some of these will be referred to hereafter. The levy of a tax by the county commissioners to purchase a toll road, and make it free, is a proper public purpose. *Warden v. Commissioners*, 38 Ohio St., 639. It is a tax and not an assessment when the cost of building a bridge is laid upon the property of a city and of a town connected by the bridge. *People v. Whyler*, 41 Cal., 351; *Smith v. Farrelly*, 52 Cal., 77. It has been held that where a city, under competent legislation, improves its own streets, a county tax for roads cannot be laid upon its inhabitants. *Martin v. Aston*, 60 Cal., 63. But it is doubted that this is universally true. For a somewhat peculiar case involving the construction of a statute for taxing to make a county road, see *King v. Aroostook Co.*, 63 Me., 567.

The state may, by general law or otherwise, require a county to share with a town in the cost of an expensive bridge or road, though in general the towns bear the whole cost of such works. *Supervisors of Will Co. v. People*, 110 Ill., 511.

They may be supported and kept in repair by taxation of the state or of proper districts, or private corporations may be invested with the franchise of constructing them, and taking tolls for their use. Upon these points, also, no question arises. The differences of opinion which are met with, regarding taxation for public conveniences of this nature, have principally arisen in those cases in which the legislature has permitted or required the municipal corporations or subdivisions of the state to become stockholders in private corporations organized for the purpose of constructing them, or to make loans or donations to such corporations in order to assist them in their enterprises. On the one hand, it has been insisted that the state cannot subject itself and its property, as a corporator, to the risks of a business conducted and managed in part, perhaps mainly, by individuals for their own benefit; and that if it can do so in one business, because of benefits that may flow to the public in consequence of their being supplied with convenient facilities for travel and transportation, there is no reason in the nature of things why it may not do so in any other case where benefits to the public might reasonably be anticipated in consequence of their being furnished any other valuable conveniences or facilities. The public, it has also been claimed, could not be taxed in aid of such private corporations, because the benefits anticipated from them would be purely incidental, not differing in their nature from those which might flow from the establishment of a mill for the manufacture of breadstuffs, or from any other manufactory of a useful kind, or from any useful and necessary private business; and, consequently, could not, on the principles already stated and universally recognized as sound, constitute any basis for taxation. On the other hand, the argument has been, that corporations for the construction of turnpikes, canals, railroads, etc., have a duplicate nature, and are both public and private; that the taking of property for them is universally recognized as being for a public use; that the ways they construct or propose to construct are *quasi* public highways on which the public at large are entitled to equal and impartial accommodations, and that for all these reasons there is a public interest in their construction which constitutes them public purposes within the meaning of the law of taxation, and renders the question of public assist-

ance to them a question purely of policy and not at all one of power.

The question concerns first, the power of the state, and second, the power of the municipal bodies. So far as the state at large is concerned, a large preponderance of decisions is in support of the authority to aid these corporations by an exercise of the power to tax, and this by taking stock in such corporations, or by making to them loans or donations.¹ As to the municipal bodies, it is conceded that they have no such power unless it is specially conferred by the legislature; the general authority to construct streets, road and bridges not comprehending such a case.² It is also conceded that any special authority must be strictly pursued, or the action of the municipality under it will be invalid.³ But when the legislature has thought proper to confer the power, and care has been observed to keep strictly within it, in the municipal action, the same cases already referred to sustain the action as standing on the same ground, and as being supported by the same rea-

¹ "Improvement of coasts and harbors, and all that is necessary for the security of external commerce, must be done by the public. Internal improvements, such as roads, canals, railroads, etc., may, in general, be safely left to individual enterprise. If they would be a profitable investment of capital, individuals will be willing to undertake them. If they would be an unprofitable investment, both parties had better let them alone. The only case in which a government should assume such works is that in which their magnitude is too great to be intrusted to private corporations. Whenever they are undertaken, the principles on which the expenditure should be made are the same as those which govern the expenditure of individuals." Wayland's Pol. Econ., b. 4, ch. 3, § 2. There are probably not many now who doubt the soundness of this as a rule of public policy, but the rule of policy is not necessarily the rule of constitutional law.

² *Bullock v. Curry*, 2 Met. (Ky.), 171; *Stokes v. Scott County*, 10 Ia., 166, 173; *State v. Wapello County*, 13 Ia., 388; *La Fayette v. Cox*, 5 Ind., 38. A long list of cases might be cited to the same effect, but the principle is disputed by no one.

³ See among other cases to this effect, *Commissioners v. Thayer*, 94 U. S., 641; *People v. Cline*, 63 Ill., 394; *Harding v. Railroad Co.*, 65 Ill., 90; *Chicago, etc., R. Co. v. Coyer*, 79 Ill., 373; *People v. Oldstown*, 88 Ill., 202; *Portland, etc., R. Co. v. Standish*, 65 Me., 63; *Gray v. Mount*, 45 Ia., 591; *Packard v. Jefferson Co.*, 2 Col., 338; *Leavenworth, etc., R. Co. v. Platte Co.*, 42 Mo., 171; *Horton v. Thompson*, 71 N. Y., 513. It is no objection to a vote of railroad aid that the corporation to be aided is to construct and operate both a railroad and a telegraph line. *Snell v. Leonard*, 55 Ia., 553.

sons which would support the like action when taken by the state itself.¹

It has been decided that an assessment for making and opening a road where no road has in fact been laid out, and where, consequently, the land is the subject of private ownership, and no highway would exist when the money was expended, would be illegal and void.² It has also been held that a city has no authority to assess on abutters upon a street the expense of a bridge over a mill-race running through the center of the street, and owned by private parties. The duty of the owners of the race to restore the street which they occupied to a pass-

¹ *Talbot v. Dent*, 9 B. Monr., 526; *McClenachan v. Curwen*, 8 Yeates, 863; *Commonwealth v. McWilliams*, 11 Pa. St., 61; *Goddin v. Crump*, 8 Leigh, 120; *Thomas v. Leland*, 24 Wend., 65, and cases collected in *Cooley's Const. Lim.* (5th ed.), 142, note.

Where aid is voted to a railroad on condition of the road being constructed to a specified point, it is not a compliance with the condition to purchase an existing road to that point. *Lamb v. Anderson*, 54 Ia., 190; *Meeker v. Ashley*, 56 Ia., 188; *Railroad Co. v. Schenck*, 56 Ia., 628. For a discussion of sundry questions arising under the Iowa railroad and tax law, see *Merrill v. Welsher*, 50 Ia., 61. A railroad aid tax will not be enjoined because a narrow gauge is adopted; the subscription not specifying the gauge. *Meador v. Lowry*, 45 Ia., 684. But no part of the tax voted is collectible until it is earned. *Casady v. Lowry*, 49 Ia., 523. The validity of a tax is not affected by the fact that the route of the road is changed after the vote, if the route was not a condition of the vote. *Shontz v. Evans*, 40 Ia., 139. A condition to an aid vote that a depot shall be located within the town is competent. *Bittinger v. Bell*, 65 Ind., 445. See *Blanchard v. Detroit, etc., R. Co.*, 31 Mich., 43.

Where railroad aid has been voted the vote is not defeated by subsequent legislation which directs that the certificates of stock issued therefor shall be issued to individual tax payers. *Commissioners v. Lucas*, 93 U. S., 108.

There is no doubt of the right of the legislature to enact laws for the levy of taxes for the construction of gravel roads. *Ricketts v. Spraker*, 77 Ind., 371.

² *Philbrook v. Kennebeck*, 17 Me., 196. And see *People v. Supervisors of Saginaw*, 26 Mich., 22. The same reasons would render void all subscriptions to internal improvements which are made without any precautions to secure the construction of the works, and which contemplate the payment of the money or the delivery of the securities subscribed in reliance only on the good faith and business prudence of the corporators. In some cases, large sums thus subscribed and paid have been wholly misappropriated.

If a bridge rests in part on private property an assessment for building it is void. *Pacific Bridge Co. v. Kirkham*, 54 Cal., 558.

able condition could not thus be transferred to the public, or to any portion of the public.¹

Municipal water and gas works. The propriety and necessity of provision by taxation for a supply of water for the extinguishment of fires, and for the general use of the inhabitants of large towns, is not disputed. Costly expenditures are sometimes made in the construction of public works for these purposes, and large sums are in some instances paid to corporations or individuals who furnish or contribute to furnish the public supply.² Cities may also be authorized to construct gas

¹ *People v. Rochester*, 54 N. Y., 507.

² *Mayor of New York v. Bailey*, 2 Denio, 433; *West v. Bancroft*, 32 Vt., 367; *Rome v. Cabot*, 28 Ga., 50; *Wells v. Atlanta*, 43 Ga., 67; *Dillon's Mun. Corp.*, §§ 97, 371, note, 438, note. In *Van Sicklen v. Burlington*, 27 Vt., 70, 75, in which it was held competent for a town in its corporate capacity to vote money for procuring apparatus for the extinguishment of fires, and to aid fire companies formed for the purpose, the following remarks are made by *Isham, J.*: "There is no doubt that towns or municipal corporations, as well as private corporations, are limited to the exercise of such powers as are expressly given them; that is, the inhabitants of a town cannot by a vote impose a tax, or appropriate their funds, for objects entirely foreign to their political or municipal duties — such as to build a county jail (10 Vt., 506); to repel the public enemies of the country (13 Mass., 272); or to build a county road. 11 Pick., 396. But when the object is within their duty and jurisdiction as a municipal corporation, they may exercise such powers as will enable them fully to discharge the duties devolving upon them. Our statute on this subject is nearly a transcript of that of Massachusetts. In that state it is provided by statute, that 'towns may vote money as they shall judge necessary for the support of the ministry, schools, the poor and other necessary charges arising within the same town.' On the question whether this latter and general clause is limited to the objects previously specified, *Ch. J. Shaw*, in the case of *Willard v. Newburyport*, 12 Pick., 230, observed, 'that it seems very clear that this statement was not intended to be an enumeration of objects and purposes for which towns may raise money, but the expression of a few prominent objects by way of instance, and a general reference to others, under the term of other necessary charges.' On the same construction, the general words in our act, that money may be voted 'for the prosecution and defense of their common rights and interests, and for all other necessary and incidental charges,' must not be limited to the objects specially mentioned in that act, but will be extended to other matters that fall within their rights and duties. It has always been found difficult to define the limits within which towns may act, or give any definite rules by which we may ascertain when their votes will be deemed illegal. *Ch. J. Shaw* observed, 'that perhaps no better approximation to an exact

works in order to furnish their citizens with light, as well as to supply the corporate needs,¹ or they may be empowered to contract for the corporate wants with private corporations or persons.² The more common objects for which towns and cities customarily levy taxes we pass over as not requiring enumeration.³

description can be made, than to say that it embraces that large class of miscellaneous subjects affecting the *accommodation and convenience* of the inhabitants, which have been placed under the municipal jurisdiction of towns by statute or usage.”

That it is competent by legislation to provide a special water precinct in a city for water works, and levy a tax within the same, see *Brown v. Concord*, 56 N. H., 375.

¹See *Western Saving Fund Society v. Philadelphia*, 31 Pa. St., 175; *Same v. Same*, 31 Pa. St., 185.

²See *Nelson v. La Porte*, 33 Ind., 258.

³A tax to repair a meeting house, and to pay the sexton for ringing the bell, is *prima facie* not a town purpose, but it may be shown by the vote to levy it to be such by showing that it is to be done as compensation for the use of the meeting house for town purposes. *Woodbury v. Hamilton*, 6 Pick., 101. A town may appropriate money for the repair of a fire engine used by the town but owned by individuals. *Allen v. Taunton*, 19 Pick., 435. And for the repair and regulation of clocks used for the benefit of the citizens of the town generally. *Willard v. Newburyport*, 12 Pick., 227.

To what extent municipal corporations may be legally justified by their general grant of power in levying taxes to defray the expense of procuring legislation for their benefit, has in some cases been made a question. The bounds of such authority must, it is conceived, be very much restricted. Probably no case which comes within the principle of the early Rhode Island tax to raise for Mr. Roger Williams £100, to remunerate him for obtaining the colonial charter (*Arnold's Rhode Island*, vol. 1, p. 205), would be questioned. Some attention to the interests of a local community at the state capital is frequently essential, and no reason is apparent why the expense may not be considered a proper municipal charge. See *Bachelor v. Epping*, 8 Fost., 354. Compare *Frankfort v. Winterport*, 54 Me., 250. But lobby services are services a municipality has no right to employ and no power to pay. The practice is immoral and corrupting, and will not be tolerated in the law. The subject is fully and satisfactorily considered and discussed by *Chapman, J.*, in *Frost v. Belmont*, 6 Allen, 152, who, in denying the right of a town to pay for lobby services in procuring its charter, cites with approval the cases of *Pingrey v. Washburn*, 1 Aiken, 264; *Gulick v. Ward*, 10 N. J., 87; *Wood v. McCann*, 6 Dana, 366; *Clippinger v. Hepbaugh*, 5 W. & S., 315; *Harris v. Roof*, 10 Barb., 489; *Sedgwick v. Stanton*, 14 N. Y., 289; *Fuller v. Dame*, 18 Pick., 472. And see *Hatzfield v. Golden*, 7 Watts, 152.

Military and other bounties. The general government having authority to declare war and conduct warlike operations, no question can exist of its right to levy taxes in order to pay bounties for military services performed or promised. The several states may with as little question do the same. But it is no part of the duty of a township, city or county, as such, to raise men or money for warlike operations; and under the general grant of municipal powers, they are without authority to impose upon their people any burden by way of taxation for any such purpose.¹ No reason is perceived, however, which should preclude them, under the proper legislative sanction, from devoting their funds to this purpose to any extent that may be necessary to enable them to secure a voluntary performance of any duty which may rest upon their inhabitants to contribute their proportion to the public defense. And so are the authorities. The several municipal divisions of the state, under proper enabling legislation, may promise and pay bounties to those who will volunteer to fill any call made upon their people for their proportionate contribution to the public armies in time of actual or threatened hostilities.² They may

¹ *Stetson v. Kempton*, 13 Mass., 272; *Gove v. Epping*, 41 N. H., 539, 545; *Crowell v. Hopkinton*, 45 N. H., 9; *Baldwin v. North Brandford*, 32 Conn., 47; *Webster v. Harwinton*, 32 Conn., 181; *Cover v. Baytown*, 12 Minn., 124; *Petersburg v. Noss*, 52 Pa. St., 448; *Meek v. Bayard*, 53 Pa. St., 217; *Fiske v. Hazard*, 7 R. I., 438; *People v. Supervisors of Columbia*, 43 N. Y., 130; *Alley v. Edgecombe*, 53 Me., 446; *Wahlschlager v. Liberty*, 23 Wis., 362; *Wilson v. Buckman*, 13 Minn., 441; *Dillon on Mun. Corp.*, 103. Furnishing a uniform for a voluntary military company is not within the compass of "town charges." *Claffin v. Hopkinton*, 4 Gray, 502.

² *Speer v. School Directors*, 50 Pa. St., 150, 159; *Waldo v. Portland*, 33 Conn., 363; *Bartholomew v. Harwinton*, 33 Conn., 408; *Fowler v. Danvers*, 8 Allen, 80; *Lowell v. Oliver*, 8 Allen, 247; *Cass v. Dillon*, 16 Ohio St., 38; *Opinions of Justices*, 52 Me., 590, 595; *Washington County v. Berwick*, 56 Pa. St., 466. Where the municipality has taken action for the payment of such bounties in advance of legislative authority, it may be conferred retrospectively. *Booth v. Woodbury*, 32 Conn., 118; *Crowell v. Hopkinton*, 45 N. H., 9; *Shackford v. Newington*, 46 N. H., 415; *Ahl v. Gleim*, 52 Pa. St., 432; *Weister v. Hade*, 53 Pa. St., 474; *Grim v. School District*, 57 Pa. St., 433; *Coffman v. Keightly*, 24 Ind., 509; *Board of Commissioners v. Beares*, 25 Ind., 110; *Comer v. Folsom*, 13 Minn., 219; *State v. Demorest*, 32 N. J., 528; *Taylor v. Thompson*, 42 Ill., 9; *Barbour v. Camden*, 51 Me., 608; *Hart v. Holden*, 55 Me., 572; *Burnham v. Chelsea*, 43 Vt., 69; *Butler v. Putney*, 43 Vt., 481; *Lowell v. Oliver*, 8 Allen, 247.

also pay bounties to those who have voluntarily entered the public service from or as representing their locality in advance of any such promise.¹ And they may raise moneys by tax in order to refund to individuals any sums advanced by them to relieve the municipality from a draft, or to fill its assigned quota of a call, on an understanding, based upon informal corporate action, that the sums should be refunded when legislation could be had permitting it,² and perhaps, also, where the advancements were made without any such informal action.³ But they cannot be empowered to refund to individuals sums which such individuals may have paid in order to procure substitutes in military service, for themselves as individuals, in an impending draft. Such payments being made by the parties in their own interest, the repayment of them by the public could be nothing else than an appropriation of public moneys to a private purpose.⁴

The public health. It is not doubted that the preservation of the public health is a public purpose of prime importance.⁵ Sanitary regulations are indispensable in large towns, but they may be made for every locality. The right to provide for draining low lands for the purpose is well settled,⁶ and the

¹*Brodhead v. Milwaukee*, 19 Wis., 624, 652. See, also, *Freeland v. Hastings*, 10 Allen, 570; *Cass v. Dillon*, 16 Ohio St., 88; *State v. Richland*, 20 Ohio St., 362; *Veazie v. China*, 50 Me., 518; *Kunkle v. Franklin*, 13 Minn., 127.

²*Weister v. Hade*, 52 Pa. St., 474. See *People v. Sullivan*, 43 Ill., 412, 418; *Johnson v. Campbell*, 49 Ill., 316; *Susquehanna Depot v. Barry*, 61 Pa. St., 317. Compare *Gregg v. Jamison*, 55 Pa. St., 468.

³*Kelley v. Marshall*, 69 Pa. St., 319; *Freeland v. Hastings*, 10 Allen, 570, 585. See *Hilbish v. Catherman*, 64 Pa. St., 154; *Micheltree v. Sweezey*, 70 Pa. St., 278; *Cass v. Dillon*, 16 Ohio St., 88; *State v. Harris*, 17 Ohio St., 608; *Perkins v. Milford*, 59 Me., 315. Compare *People v. Supervisors*, 16 Mich., 254.

⁴*Freeland v. Hastings*, 10 Allen, 570; *Tyson v. School Directors*, 51 Pa. St., 9. See, also, *Crowell v. Hopkinton*, 45 N. H., 9; *Miller v. Grandy*, 18 Mich., 540; *Pease v. Chicago*, 21 Ill., 500, 508; *Ferguson v. Landram*, 5 Bush, 230; *Estey v. Westminster*, 97 Mass., 324; *Usher v. Colchester*, 33 Conn., 567; *Kelley v. Marshall*, 69 Pa. St., 319; *Perkins v. Milford*, 59 Me., 315; *Thompson v. Pittston*, 59 Me., 545; *Cover v. Baytown*, 12 Minn., 124.

⁵Taxes may be levied for the care of small-pox patients, and to prevent the spread of the disease. *Solomon v. Tarver*, 52 Ga., 405.

⁶*Woodruff v. Fisher*, 17 Barb., 224; *Hartwell v. Armstrong*, 19 Barb., 166; *Anderson v. Kerns Draining Co.*, 14 Ind., 199, 202; *Draining Company Case*, 11 La. An., 388; *Sessions v. Crunkilton*, 20 Ohio, N. S., 347, 349.

right to protect low lands from overflow may also be justified on the same reasons.

Protection against calamities. Under the head of calamities against which the government should or might make provision for protection, may be mentioned fires, the overflow of the country by great freshets, the washing away of the shores of the sea, or the banks of rivers in populous districts, destruction of persons or property by wild beasts, and the like. If the danger is sufficiently great and extensive to make the threatened calamity a matter of general concern, the purpose is public; if not, it will not justify taxation.

Payment of the public debt. For whatever purposes taxes may be laid, government may contract debts. The converse of this is equally true, that for whatever purposes debts may be contracted, taxes may be laid. It follows that the payment of the public debt is always a public purpose, not only because of the importance of meeting the public engagements, but also because the debts themselves were contracted for public purposes. But an unlawful debt is no debt at all. If it has been contracted in violation of law or of the constitution, and for any other than a public purpose, it cannot be a public purpose to make provision for its payment. The purpose must be determined by the consideration for the debt, and not by the fact that public officials have unwarrantably assumed to contract it.¹

General remarks. A very large proportion of all the public expenditure is for purposes which could not well be partic-

¹ See *Nougues v. Douglass*, 7 Cal., 65, 75.

Under a statute which required officers to levy a tax "for all the expenses and disbursements which by a careful estimate shall be required for that year," and to pay all claims against the county authorized by law, it is competent to embrace in the levy a sum for contingent expenses which experience had shown to be reasonable. *Webster v. Baltimore Co. Com'rs*, 51 Md., 395. A power to levy taxes for general and contingent expenses, and any other expenses not otherwise provided for, will authorize a levy to pay a debt. *Spring v. Collector of Olney*, 78 Ill., 101. Where a city has power "to levy annually an additional tax to pay the whole interest of the public debt due from said city," the levy may include back interest as well as that which is due for the year. *Aurora v. Lamar*, 59 Ind., 400.

ularized here, but which need no specification. They are purposes which always pertain to government, and for which, in an especial sense, government is founded. Such are the general preservation of public order through the enforcement of police laws, the general administration of justice, and the like. These are matters the burden of which is usually apportioned by the state among its municipalities, but, to secure vigilance and a feeling of responsibility, these bodies are sometimes required to give protection against exceptional disorders, at the risk of exceptional taxation of themselves if they neglect it. The case of laws imposing responsibility for riots and mobs will furnish an illustration.¹

Exclusiveness of public interest. The purposes to be accomplished by taxation need not be exclusively public in order to warrant an exercise of the power. There are sometimes cases in which the public have equally with private parties an interest, and in which, therefore, an apportionment of the burden between the public and such individuals might be appropriate. In such cases the public interest may properly invoke legislative action for the levy of a tax; and the legislative determination as to the just proportion to be borne by the public must be conclusive, so far at least as the public are concerned.² Cases in illustration might be suggested of a building for the common use of the public authorities and of private parties, and of a way for the use of the public, but in which individuals have such a peculiar and special interest that the public authorities may decline to do more than to share with such parties the expense of the way. Taxation in these cases has relation to the public interest only, and the fact of private interest in the same object is an incidental circumstance of no legal importance.³

¹ See ch. XXI.

² See *Eddy v. Wilson*, 48 Vt., 362. Compare *Greenbanks v. Boutwell*, 48 Vt., 207.

³ Compare and distinguish *People v. Parks*, 58 Cal., 624.

CHAPTER V.

THE PURPOSE MUST PERTAIN TO THE DISTRICT TAXED.

The general rule. In the preceding chapter we have endeavored to show that in order to give validity to any demand made by the state upon its people under the name of a tax, it is essential that the purpose to be accomplished thereby shall be public in its nature. But it is equally essential, as there intimated, that the purpose shall be one which in an especial and peculiar manner pertains to the district within which it is proposed that the contribution called for shall be collected, and which concerns the people of that district more particularly than it does others. The federal constitution recognizes this principle in the provisions it makes to prevent the federal government from indirectly imposing its support upon one or more of the states to the relief of others.¹ But the power of a state over its municipalities is so great, and its control of taxation for their purposes as well as for its own is so extensive, that some further consideration of the restraints which rest upon state power in this regard will not be out of place or unimportant.

Taxes are collected as *proportionate* contributions to public purposes. But to make them such in any true sense, they must not only be such as between the persons called upon to pay them, but also as between those who *ought* to pay them. It is therefore of prime necessity in taxation that it should first be determined what public—whether state or local—should bear the burden, and that it should then be imposed ratably as between those who constitute that public. If a single township were to be required to levy upon its inhabitants and collect and pay over to the state whatever moneys were necessary to pay the salaries of the several state officers, it would be apparent, “at first blush,” that the enactment was not one which, either in its purpose or tendency, was calculated to make the tax payers of that township contribute only their several proportions to the public purpose for which the tax

¹ See art. 1, § 8, cl. 1; § 9, cl. 4, 5.

was to be levied. If, on the other hand, for the purpose of purchasing and ornamenting a city park or any other improvement of mere local convenience, a tax should be imposed upon the whole state, it would be equally manifest that equality and justice were not the purpose of the imposition, but that, if carried into effect, the people of the state not residing in the city would be compelled to contribute to a purpose in which, in a legal sense, they had no interest whatever. As has been well said: "If the legislature should arbitrarily designate a certain class of persons on whom to impose a tax, either for general purposes or for a local object of a public nature, without any reference to any rule of proportion whatever, having no regard to the share of public charges which each ought to pay relatively to that borne by all others, or to any supposed peculiar benefit or profit which would accrue to those made subject to the tax which would not inure to others, so that in effect the burden would fall on those who had been selected only for the reason that they might be made subject to the tax, we cannot doubt that the imposition of it would be an unlawful exercise of power, not warranted by the constitution, against the exercise of which a person aggrieved might sue for protection."¹ And it is no more incompetent to select classes of persons for exceptional burdens than it is to select districts of the state for that purpose.²

The cases suggested are extreme cases, but the principle that controls them is universal, and a disregard of it is fatal to the tax: and whether the unjust consequences are slight or serious is unimportant. Where the principles of taxation are disregarded, every one is entitled to claim strict legal right; for in no other way can the power be restrained from perversion and oppression. It can therefore be stated with emphasis that the burden of a tax must be made to rest upon the state at large, or upon any particular district of the state, according as the purpose for which it is levied is of general concern to the whole state, or, on the other hand, pertains only to the particular district. A state purpose must be accomplished by state taxation, a county purpose by county taxation, or a public purpose for any inferior district by taxation of such district.

¹ *Bigelow*, Ch. J., in *Dorgan v. Boston*, 12 Allen, 223, 237.

² See *Sharswood*, J., in *Hammett v. Philadelphia*, 65 Pa. St., 146, 151.

This is not only just but it is essential. To any extent that one man is compelled to pay in order to relieve others of a public burden properly resting upon them, his property is taken for private purposes, as plainly and as palpably as it would be if appropriated to the payment of the debts or the discharge of obligations which the person thus relieved by his payments might owe to private parties.¹ "By taxation," it is said in a leading case, "is meant a certain mode of raising revenue for a public purpose in which the community that pays it has an interest. An act of the legislature authorizing contributions to be levied for a mere private purpose, or for a purpose which, though it be public, is one in which the people from whom they are exacted have no interest, would not be a law, but a sentence commanding the periodical payment of certain sums by one portion or class of people to another."² This principle has met with universal acceptance and approval because it is as sound in morals as it is in law.

State control of municipalities. The application of the principle is much complicated by that control which the state possesses in respect to its municipalities, and which for most purposes may almost be said to be absolute; and also by the fact that the states very generally make the municipalities districts for the purposes of state taxation, and also use them as conveniences for state purposes in collection. The state not only confers upon its counties, towns, cities and villages such

¹ *Lexington v. McQuillan's Heirs*, 9 Dana, 513; *Howell v. Bristol*, 8 Bush, 493, 497; *Wells v. Weston*, 22 Mo., 384; *Gilman v. Sheboygan*, 2 Black, 510; *State v. Haben*, 22 Wis., 661; *Madison County v. People*, 58 Ill., 456; *Bright v. McCullough*, 27 Ind., 223; *Knowlton v. Rock County*, 9 Wis., 410; *Hale v. Kenosha*, 29 Wis., 599; *Sleight v. People*, 74 Ill., 47; *People v. Township Board*, 20 Mich., 452; *St. Charles v. Nolle*, 51 Mo., 122.

² *Sharpless v. Philadelphia*, 21 Pa. St., 147, 174. See *Washington Avenue*, 69 Pa. St., 352; *Weber v. Reinhard*, 73 Pa. St., 370; *Lexington v. McQuillan's Heirs*, 9 Dana, 513; *Ryerson v. Utley*, 16 Mich., 269; *Sanborn v. Rice*, 9 Minn., 258. That the legislature has no power to authorize a local board or corporation to levy taxes within its district for general purposes, see *People v. Parks*, 58 Cal., 624; *State v. Leffingwell*, 54 Mo., 458; *Bromley v. Reynolds*, 2 Utah, 525. A tax on one community for the benefit not alone of that community, but for the common benefit of that and a larger community not taxed, is void, though it might be otherwise of a burden laid under the police power. *Ex parte Marshall*, 64 Ala., 266.

powers to tax as they possess, but it may to a large extent take to itself the control and disposition of funds collected, though in doing so it should keep in view the general purposes for which the funds have been called for from the people, as a guide in the expenditure provided for.¹ And if municipal powers are taken away, the municipal property, including its tax moneys, collected and uncollected, passes to the state, to be treated as a trust, and managed and disposed of for the benefit of the local community.² But the legislative power over municipalities is not so extensive that they may be required, or even permitted, to tax themselves for a purpose foreign to the objects for which they are called into being; as, for example, a school corporation cannot be allowed to contract debts or levy taxes in aid of a railroad.³

When the state makes the municipalities agents in collection, it may hold them responsible for the collection of the whole state levy within their limits, respectively, and leave them to make good any deficiencies. This is not unfrequently done,⁴ and when done it is not competent for the municipalities to burden the state tax with the cost of collection or with other deductions, except as the law may permit.⁵

Violations of the rule of apportionment. The general rule of restricting the levy of a tax to the very district concerned, but making it embrace the whole district, is so plain and reasonable that it is not likely to be overlooked or disre-

¹See *Trustees of Schools v. Tatman*, 13 Ill., 27; *Richland Co. v. Lawrence Co.*, 12 Ill., 1; *Harrison v. Bridgeton*, 16 Mass., 16; *Weymouth, etc., Dist. v. County Com'rs*, 108 Mass., 142; *Rawson v. Spencer*, 113 Mass., 40; *State v. St. Louis Co. Ct.*, 34 Mo., 546; *Palmer v. Fitts*, 51 Ala., 489; *North Yarmouth v. Skillings*, 45 Me., 133; *Payne v. Treadwell*, 16 Cal., 221; *San Francisco v. Canavan*, 42 Cal., 541.

²*Merriwether v. Garrett*, 102 U. S., 472. See *Morgan v. Beloit*, 7 Wall., 613; *Mount Pleasant v. Beckwith*, 100 U. S., 514. Though the state controls the moneys, it is not to be deemed the money of the state, but of the municipality. *Shepherd's Fold v. New York*, 96 N. Y., 187, citing *People v. Ingersoll*, 58 N. Y., 1; *People v. Fields*, 58 N. Y., 491. See *State v. St. Louis Co. Ct.*, 34 Mo., 546.

³*Trustees v. Railway Co.*, 63 Ill., 299; *People v. Dupuyt*, 71 Ill., 651; *People v. Trustees of Schools*, 78 Ill., 136; *Weightman v. Clark*, 103 U. S., 256.

⁴This is the case in New York. *New York v. Davenport*, 92 N. Y., 604.

⁵*Multnomah Co. v. State*, 1 Or., 859.

garded, except in cases in which the facts are such as to raise doubts as to its application. There are some cases in which the character of a proposed public expenditure is such that there may be differences of opinion as to the propriety or justice of its being provided for by a small district or a larger one. Cases of highways afford an illustration. In many of the states the cost of these is usually borne by the towns, and it is not surprising to find a general impression prevailing in some quarters, that the towns must always and ought always to bear it. But there is probably no state that does not provide for highways of more general importance than the ordinary town ways; highways that are very properly called and treated as state or county roads, and which are made and kept in repair by an expenditure of state or county moneys. In such a case the state or the county is the proper taxing district, and the town will not be taxed for the purposes of the road, except as a part of the larger district to which it belongs.¹ The state or the county might possibly be the proper taxing district, even though the work were wholly within the town; the importance and cost of the work, and not its locality, being in many cases the controlling consideration.² In all such cases legislation must determine what the district shall be.

In cases where the character of the work, as local or general, is plain, the rule of right is clear. If a single locality were to assume to tax itself, or the state were to undertake to tax it, for the construction of a state work or the erection of a state building, no one could hesitate for a moment in saying there was no such right, and that there could be none so long as taxation by the fundamental law is required to be laid by fixed rules, and is not subject to the arbitrary caprice of legislative bodies.³ A county has therefore no constitutional authority to lay a tax for a county building on a part of its towns only; neither has it authority, when it has contracted a debt for a county purpose, to levy a tax for the satisfaction of the debt on such part of the towns only as its governing board may

¹ See *People v. Supervisors of Dutchess*, 1 Hill, 50; *Parsons v. Goshen*, 11 Pick., 396; *post*, ch. XXI.

² See *Supervisors of Will Co. v. People*, 110 Ill., 511.

³ See *Ryerson v. Utley*, 16 Mich., 269; *State v. Haben*, 23 Wis., 661; *Livingston Co. v. Weider*, 64 Ill., 427; *Sleight v. People*, 74 Ill., 47.

think ought in equity to pay it.¹ The rule would be the same if a tax were levied for proper local purposes and the corporation were then to undertake, or the state were to require, its application to purposes not properly local; as where a city, which embraced parts of two counties, voted city funds towards the court-house of one;² and where the legislature undertook, after a school tax had been levied, to authorize the expenditure of a part of it for purposes outside the district.³ Taxes when authorized to be raised by any public body invested with the power of local taxation must be for public uses under the care of that body; and a county has therefore no constitutional right to lay a tax as for a county purpose, in order that it may be paid over to a part of its towns, or even to the whole of them, to be expended by them.⁴ Such cases would seem to be plain.

More difficult cases arise where the principle of assessments by benefits is resorted to for improvements which commonly are constructed by an expenditure of the ordinary taxes. In no part of the law of taxation has the practice of our state governments left the discretion of the legislature more entirely unfettered than in laying and apportioning such assessments, and the case must be most extraordinary and clearly exceptional to warrant any court in declaring that the discretion has been abused, and the legislative authority exceeded. In Pennsylvania, it has been decided that a case of clear abuse existed in an act imposing a special assessment upon the premises fronting on a country road, and others lying within a certain distance therefrom, for the purpose of constructing the

¹ *People v. Supervisors of Ulster*, 94 N. Y., 263, affirming 80 Hun, 148. But where a village has been annexed to a city, and by the terms of annexation it is to pay its own debts, it is competent to assess that portion of the city exclusively for the payment of such debts. *Cleveland v. Heisley*, 41 Ohio St., 670.

² *Bergen v. Clarkson*, 6 N. J., 352.

³ *Bromley v. Reynolds*, 2 Utah, 525.

⁴ *Attorney-General v. Supervisors*, 34 Mich., 46. See *Stockle v. Silsbee*, 41 Mich., 615. But where a statute provided that a state tax on telegraph companies should be distributed to the towns in proportion to the number of shares held in them respectively, it was held that whether such distribution was warranted or not, the fact that it was provided for was no defense to the tax; if unwarranted, the remedy was to be sought after payment. *State v. Western Union, etc., Co.*, 73 Me., 518.

road on a very costly plan; not, as the court found, for the local, but for the general public benefit. The act, consequently, was adjudged void.¹ It must be conceded that this legislative application of the law of special assessment was of very questionable propriety, and the conclusion of the court was doubtless just, notwithstanding it leaves us in great doubt touching the exact bounds of the legislative discretionary authority in this regard.²

Taxing districts in general. The cases which have been instanced show that the nature of the purpose to be accomplished will, in many cases, determine the district within which the tax must be levied and collected. But, in other cases, there may be questions of fact to be examined and considerations of equity to be weighed before the proper bounds of a taxing district can be fixed upon. When a local improvement is to be made or a local work constructed for the general public good, the general theory of taxation would seem to require that the cost should be collected from the state at large, or, in other words, from the whole public for whose benefit it is to be made. But, as has already been remarked of the common roads, it is not the custom of the country to provide for these improvements by general taxation. Instead of apportioning the cost of each through the state at large, it has been found more satisfactory and more consistent with the general system of local government, that the works themselves should be apportioned for construction among the divisions of the state in which they respectively are to be made, and that each division

In re Washington Avenue, 69 Pa. St., 352; S. C., 8 Am. Rep., 255. The case of *People v. Springwells*, 25 Mich., 153, in its main facts bears some resemblance to the foregoing. The legislature proposed to assess upon a township the expense of a costly road, which was to be constructed by state agents under state authority, and taken out of the control of local officers. The act was adjudged invalid on the ground that by the constitution the state was forbidden to engage in internal improvements, and the towns were given control of these local works, and of the expenditure of their moneys therefor. See *Baltimore v. Hughes*, 1 Gill & J., 480; *Preston v. Roberts*, 12 Bush, 570; *Jones v. Water Commissioners*, 84 Mich., 273.

² *People v. Flagg*, 46 N. Y., 401, may usefully be compared with the case of *Washington Avenue*. It was a case of compulsory town taxation for a like expensive road. See, also, *People v. Supervisors of Richmond*, 20 N. Y., 252; *Shaw v. Dennis*, 10 Ill., 405.

should be left to bear the cost of that which falls within it. The advantages of this system are obvious. Presumptively the cost of these works is apportioned through the state as equally and justly in this mode as by spreading the cost of all among the whole people. Moreover, when each community is thus taxed for those works only which are constructed in the immediate vicinity, and the importance of which its members may be supposed to feel and appreciate, it is reasonable to expect that they will bear the cost more willingly and cheerfully than they would their proportion of a work at a distance, of the necessity of which they could know nothing except by report, and the demand for construction of which they might attribute to local or personal considerations. These are not the only reasons for leaving highways and other public works of a similar nature to be constructed by the local divisions of the state only. Such a course has been found conducive to economy in expenditure, because the community upon whom the whole cost falls have the opportunity, and will be certain to have the disposition, to watch with reasonable jealousy in order to see that nothing is wasted and nothing plundered. At the same time, as all local improvements tend to confer special and peculiar benefits upon the local community beyond what are received by the state at large, the people thus immediately and specially benefited may generally be relied upon to make liberal appropriations for the public works which are to add to the comforts, conveniences and, perhaps, the adornment of their neighborhood, because the very moneys they thus vote appear to return to them in the increased value which the expenditure confers upon their estates. It is therefore found to be a wise apportionment of the cost of public highways which leaves each separate division of the state, either town or county, to bear the cost which is made within its own limits. And what is said of these will apply equally to school buildings and to the conveniences required for local courts and the general administration of justice in the several municipalities.

There is a class of public works, however, which by general consent are not regarded as being general in their nature, though the use thereof may be open to the general public. As an illustration may be taken the case of the pavement of a city street. The street itself is a public highway, but the necessity

for a heavy expenditure in paving arises from causes that are purely local, and that, too, in a very restricted sense. Moreover, in large cities, the pavement becomes absolutely essential, and must be made by the owners of adjoining property, if not provided for by the public. The ability to make profitable use of their property depends upon it, and they might, perhaps, be safely left to provide for it at their own expense, if all property was improved and occupied; and if, when individual action was relied upon, there was any method of insuring uniformity of action in the time, manner and expense of improving the streets. The necessity, however, for public supervision and direction is made imperative by the likelihood of such diversity of individual views as would prevent voluntary co-operation among property owners; and the necessity for making the improvement a local burden is almost equally imperative, since it is not to be supposed that the state at large would understand and appreciate the absolute need of an improvement which was specially important to comparatively few persons.

Considered as a city work, the expense of paving a street may be levied upon the whole city, or a system of apportionment may be resorted to analogous to that which is adopted in the construction and working of highways in general; that is to say, the cost of any such work may be assessed upon that part of the city which receives peculiar benefits from it. The latter method would require either a division of the city into taxing districts for the several local improvements within it, or the creation of a special taxing district for each improvement, setting apart for the purpose that portion of the city which was believed to receive the special benefits. These special taxing districts are most common, and they are either fixed after an examination of the circumstances of each particular case with a view to ascertaining how far the special benefits extend, and what property shares in them, or they are determined by some general rule which, though it may not be strictly just in any particular case, will, in the main, it is supposed, apportion all such expenses with reasonable equality and fairness. Whether one course or the other shall be adopted must be determined by competent legislation.¹

¹See ch. XX.

Establishment of districts. When the nature of the case does not conclusively fix it, the power to determine what shall be the taxing district for any particular burden is purely a legislative power, and not to be interfered with or controlled, except as it may be limited or restrained by constitutional provisions. Reference to the cases cited in the margin will show that this is a principle which the courts assert with great unanimity and clearness.¹ "The judicial tribunals," it has justly been said, "cannot interfere with the legislative discretion, however onerous it may be."² And when it was objected that a certain construction of a statute would throw upon one locality the expense of constructing a road for state purposes, "the conclusive answer" was declared to be, "that the state may impose such a burden where, in the wisdom of the legis-

¹*People v. Brooklyn*, 4 N. Y., 419, 425; *Shaw v. Dennis*, 10 Ill., 405, 416, per *Caton, J.*; *Philadelphia v. Field*, 58 Pa. St., 320; *Langhorne v. Robinson*, 20 Grat., 661; *Conwell v. Connersville*, 8 Ind., 353; *Malchus v. Highlands*, 4 Bush, 547; *Challiss v. Parker*, 11 Kan., 394; *Hingham, etc., Turnpike v. Norfolk County*, 6 Allen, 353, and cases cited. In *Howell v. Buffalo*, 37 N. Y., 267, 273, *Parker, J.*, speaking of the legislative power over special assessments, says: "The legislature was not bound to apportion the tax among the taxable persons within the city, but might, according to its own view of justice and right, apportion the whole tax among a part of such persons. It saw fit to apportion the tax upon the owners of the lands which had been benefited by the improvement, in proportion to the amount of such benefit. As it is impossible, under the doctrine adverted to, to say that it had not the constitutional power so to do, so it can scarcely be contended that, in so doing, it violated any principle of justice or right."

²*Ranney, J.*, *Scovill v. Cleveland*, 1 Ohio St., 126, 138. The same judge, in *Hill v. Higdon*, 5 Ohio St., 243, 245, after speaking of former decisions in the same state, says: "It was there shown . . . that the right to tax for such a purpose necessarily included the power to determine the extent, and upon what property the tax should be levied; and that its imposition upon the property particularly and specially benefited by the improvement was but a lawful exercise of the discretion with which the legislative body was invested in apportioning the tax." "We see," he says further on, "no reason to doubt the correctness of these conclusions." See, also, what is said by *Rapallo, J.*, in *Gordon v. Cornes*, 47 N. Y., 608, 611. Also *Allen v. Drew*, 44 Vt., 174, 187; *Alcorn v. Hamer*, 38 Miss., 652, 761.

The fact that an improvement for which an assessment is made is partly in one town and partly in another will not vitiate the assessment unless it affirmatively appears that the money raised thereby in one town was to be expended in the other. *Halsey v. People*, 84 Ill., 89; *Wright v. People*, 87 Ill., 532.

lature, it is considered that it ought to rest."¹ The right to do this where the constitution has interposed no obstacles is declared to be not now open to controversy, if indeed it ever was.² The legislature judges finally and conclusively upon all questions of policy, as it may also upon all questions of fact which are involved in the determination of a taxing district.³

¹ *Johnson*, Ch. J., in *People v. Supervisors of Richmond*, 20 N. Y., 252, 255. This statement of the principle is true in a general sense only; if literally true the state would have despotic powers. It is countenanced by *Shaw v. Dennis*, 10 Ill., 405, in which the legislature had required the levy of a special tax upon the taxable property of a single precinct for the purpose of repairing and maintaining a bridge over the Rock river at that place. The court declared the act valid, and that it was always in the power of the legislature to determine the district in which a tax shall be levied. See, also, *Philadelphia v. Field*, 58 Pa. St., 326; *Waterville v. Kennebec Co.*, 59 Me., 80.

² See *People v. Lawrence*, 41 N. Y., 137; *McFerron v. Alloway*, 14 Bush, 580; *Litchfield v. Vernon*, 41 N. Y., 123. Also, ch. XX, where many cases are collected.

³ *Litchfield v. Vernon*, 41 N. Y., 123, 133. This was a very peculiar case of a special taxing district for a local improvement. *Grover*, J., states it thus: "An examination of the case shows that, at the time of the passage of the act, the Long Island Railroad Company had the right of way in a tunnel constructed in Atlantic street, Brooklyn, for a railroad operated by steam, and were operating their road thereon; that the legislature deemed it expedient to close the tunnel, grade the street, lay a track upon the surface to be operated by horse power, etc., and to authorize the making of a contract with the railroad company for doing the work and effecting the changes for a sum not exceeding \$125,000. To carry into effect this design, the act in question was passed, authorizing the commissioners, whose appointment was provided for in the act, to make the contract, and to make an assessment for the payment of the contract price, together with the incidental expenses, upon the lands and premises situate in the district specified in the act. This local assessment for those purposes, it is apparent, was based upon the ground that the territory subjected thereto would be benefited by the work and change in question. Whether so benefited or not, and whether the assessment of the expense should for this, or any other reason, be made upon the district, the legislature was the exclusive judge." See, also, *Hoyt v. East Saginaw*, 19 Mich., 39, 43. In Kansas it is held that where several streets are to be improved, it is competent to make one district of them all, and apportion the expense by frontage along them all. *Parker v. Challiss*, 9 Kan., 155; *Challiss v. Parker*, 11 Kan., 394. And see *Arnold v. Cambridge*, 106 Mass., 352; *Cumming v. Grand Rapids*, 46 Mich., 150.

A district in Kentucky for the purposes of railroad aid taxation included an island nearer the Indiana than the Kentucky shore, and which could receive no direct benefit from the projected railroad. Held, nevertheless,

And having the authority to determine what shall be the taxing districts, the legislature must also be left to its own methods of reaching the conclusion. Most cases will be settled by general law; but taxes for extraordinary purposes may require special legislation, or at least may justify it. In such cases it may be proper to enter upon such inquiries into the facts as cannot well be made directly by the legislative body of the state, whose duties are too multitudinous to admit of special investigations on a hearing of evidence or on personal examination by its members. Under such circumstances it may be proper and convenient to refer the whole subject to the local authorities; and this in the case of local works or special improvements is the course usually adopted. The state does not determine whether a city street shall be improved and a tax levied therefor, but, by provision in the city charter, or by special legislation, it refers the whole subject to the city common council, under such directions, regulations and instructions as it may be thought proper or prudent to give or impose. The state does not divide the several counties and towns into school districts, and order the construction of district school-houses; but by general law submits the subject to the people specially concerned. This is the general course, and it has been found to be the satisfactory, and therefore the wise course. And if an apportionment is to be made on the basis of benefits to property, the local authorities may be and usually are empowered to refer the assessment of benefits to officers or commissioners chosen for the purpose, whose report, when under the provisions of the law it shall become final, will settle the limits of the special taxing district. These, if not the only methods of giving effect to the legislative authority over this subject, are certainly admissible and proper methods.¹

Diversity of districts. Taxing districts may be as numerous as the purposes for which taxes are levied. The district that the courts could not relieve the island from the taxation, which was imposed in the discretion of the legislature. *McFerron v. Alloway*, 14 Bush, 580.

¹*People v. Brooklyn*, 4 N. Y., 419, 430; *Lexington v. McQuillan's Heirs*, 9 Dana, 413; *Williams v. Detroit*, 2 Mich., 560; *Dorgan v. Boston*, 12 Allen, 223; *Brewster v. Syracuse*, 19 N. Y., 116; *Hingham, etc., Turnpike Co. v. Norfolk County*, 6 Allen, 353; *Salem Turnpike, etc., Co. v. Essex County*, 100 Mass., 282; *Appeal of Powers*, 29 Mich., 504.

for a single highway may not be the same as that for the school-house located upon it. It is not essential that the political districts of the state shall be the same as the taxing districts,¹ but special districts may be established for special purposes, wholly ignoring the political divisions. A school district may be created of territory taken from two or more townships or counties, and the benefits of a highway, a levee or a drain may be so peculiar that justice would require the cost to be levied either upon part of a township or county, or upon parts of several such subdivisions of the state.² In some states there may be township government within a city, or a city within the bounds of a township, and the fact will create a necessity for special taxing districts, since otherwise taxation for some local purposes could not possibly be properly apportioned.³ And railroads which extend through several of the ordinary taxing districts may seem to require districts specially created, and having regard to no other property. It is compulsory that the political divisions of the state shall be regarded in taxation only where the tax itself is for a purpose specially pertaining to one of them in its political capacity, so that, as already stated, the nature of the tax will determine the district.

¹ *People v. Central R. R. Co.*, 43 Cal., 398, in which it was decided to be competent to divide a county into revenue districts: *Malchus v. Highlands*, 4 Bush, 547; *S. C.*, 2 *Withrow's Corp. Cas.*, 361, in which an act was sustained which created a special district near Newport, with authority to grade and pave, or macadamize with rock or gravel, any public road passing through or into the same, on a favorable vote of two-thirds the owners of real estate by or through which any such road may pass. See, also, *County Judge v. Shelby R. R. Co.*, 5 Bush, 225; *Shaw v. Dennis*, 10 Ill., 405; *People v. Haws*, 84 Barb., 69. A strong illustration of legislative power in establishing districts is afforded when several streets are put into one district for the purposes of improvement, and the cost of improving all is assessed throughout the district; as in *Challiss v. Parker*, 11 Kan., 394.

² *County Judge v. Shelby R. R. Co.*, 5 Bush, 225. See, also, *People v. Draper*, 15 N. Y., 532; *Buffalo, etc., R. R. Co. v. Supervisors of Erie*, 48 N. Y., 98; *Litchfield v. McComber*, 42 Barb., 288, 299; *Sangamon, etc., R. R. Co. v. Jacksonville*, 14 Ill., 163; *Bakewell v. Police Jury*, 20 La. An., 334; *Malchus v. Highlands*, 4 Bush, 547; *Norwich v. County Commissioners*, 13 Pick., 60; *Brighton v. Wilkinson*, 2 Allen, 27; *Attorney-Gen'l v. Cambridge*, 16 Gray, 247; *Salem Turnpike, etc., Co. v. Essex County*, 100 Mass., 282.

³ In Iowa if a city is within the limits of a township, this does not authorize township highway officers to levy road taxes within the city. *Marks v. Woodbury Co.*, 47 Ia., 452. But in Illinois in such a case the highway commissioner taxes alike all property in the city and outside, but all funds

Overlying districts. Even when the purpose for which a tax is demanded pertains to the state at large, or to one of its divisions, so that a general levy throughout the state or such division is essential, there may be peculiar reasons why a part of the general public who are concerned in the purpose should bear a proportion of the burden greater than that which should be borne by the others. A pertinent illustration might perhaps be the case of a tax for the construction of a state capitol. It would be clear, we should say, that such a tax should be spread over the state at large, because the purpose is a state purpose, and every individual in the state is directly interested in its accomplishment. But it is also apparent that the people and the property at the place where the structure is proposed to be constructed would receive special and probably very great benefits in consequence of the construction, beyond what they would receive in common with all others. The fact is often recognized in the voluntary contributions which are made by the people to secure the location and construction of state buildings at the place where they reside or own property; and the question then arises whether these peculiar benefits may not constitute a basis for special taxation. To make them such it would be necessary there should be two taxing districts; the one embracing the whole state, and the other embracing only the district which, in the opinion of the legislature, was so peculiarly benefited as to justify an exceptional burden upon its people and property. In such a case the people within the minor district, which is also embraced within the larger district, would contribute twice to the same burden; but this, though apparently a violation of the principles of taxation, is not so in fact, if the establishment of the minor district has only equality and justice in view, and if each tax payer, though twice called upon, is by the two assessments only required to pay what, as between himself and the rest of the state, has been found to be his just proportion of a burden which, though general in its nature, distributes its benefits unequally.

This doctrine has been applied in Pennsylvania to the case

raised in the city by such taxation are to be expended within it. *Baird v. People*, 83 Ill., 387; *People v. Wilson*, 8 Ill. App., 368; *Britten v. Clinton*, 8 Ill. App., 164. See *Suppiger v. People*, 9 Ill. App., 290. As to meaning of taxes "for road purposes," see *People v. Wilson*, 8 Ill. App., 368.

of a county town, which, in addition to its proportion of the county levy, was specially assessed for the expense of constructing a court-house and jail. "The advantages of a county town," it was said, "are too well appreciated, not to make every village use all its exertions to have a court-house provided for its benefit and convenience; and as its inhabitants profited by, not only the disbursement of the tax among them, but a permanent increase of their business and an appreciation of their property, they were morally bound to contribute in proportion."¹ In the state of New York it has also been applied to a state work of public improvement—a canal—which conferred or was likely to confer local benefits on a locality specially taxed.² It has also been applied to the case of a building erected for the accommodation of a state educational institution. In one case where a local tax was constructed to meet a portion of the cost of erecting at that place a building for the state agricultural college, the principles which underlie such cases were so clearly stated that a quotation from the opinion will be more satisfactory than any synopsis that might be attempted, or any restatement in our own language.

"It may at first sight seem," it was said, "as if the establishment of a college and its endowment and support by the commonwealth for the education of all persons within the state who might wish to receive instruction in certain branches of science or art, would stand on the same footing as the public schools, and that money raised for such an object ought to be apportioned and distributed in such manner as to bear on all persons and property equally, without resort to local taxation, which would operate partially, and in a certain sense disproportionately. We are not prepared to say that this proposition is in all respects incorrect. We doubt very much whether it would be competent for the legislature to impose the whole burden of supporting such an institution upon any particular municipality, section or district of the state. But we are clear in the opinion that there may exist a state of facts which would render it just and expedient, and strictly

¹ *Gibson*, Ch. J., in *Kirby v. Shaw*, 19 Pa. St., 258, 261.

² *Thomas v. Leland*, 24 Wend., 65. See, also, *Harbor Commissioners v. State*, 45 Ala., 399.

within the exercise of constitutional authority, for the legislature to enact that a portion of such a public burden should be borne by persons and estates situated within certain limits, and to authorize a special assessment on them for that purpose. If the establishment of a public institution of general utility or necessity in a particular locality would be productive of direct and appreciable benefit to persons or estates in the vicinity, either by increasing the value of property there situated, or by the opportunities which it would afford to those residing in the neighborhood to enjoy certain common advantages and privileges with greater facility and at less cost than others having an equal right to participate in them, but who reside or own estates more remotely situated, or in distant parts of the state, we can see no reason why these special advantages or benefits should not be taken into consideration in determining the mode in which the public burden of defraying the cost of the institution should be apportioned and distributed. While perfect equality in the raising of money for public charges is inattainable, it would certainly approximate more nearly to an equitable apportionment of them, to provide that such portion of the expenditure for a public object as will inure directly to the benefit or profit of a certain town or district, should be borne by the estates situated and persons resident therein, leaving only that sum to be treated as a public charge, and to constitute a general assessment on all persons and property in the commonwealth, which may reasonably be supposed to be expended for the equal and common benefit of all. Such distribution of a public burden would be reasonable, because it would tend to equality; and it would be proportional, because it would be borne in proportion to the benefits which each would receive.”¹

¹ *Bigelow*, Ch. J., in *Merrick v. Amherst*, 12 Allen, 500, 504. See to the same effect, *Marks v. Pardue University*, 37 Ind., 155; *Gordon v. Cornes*, 47 N. Y., 608, 614; *Burr v. Carbondale*, 76 Ill., 455; *Hensley Township v. People*, 84 Ill., 544; *Livingston County v. Darlington*, 101 U. S., 407; *Briggs v. Johnson Co.*, 4 Dill., 148.

Every such special assessment must of course have express legislative authority. It could not be made under the general power conferred upon a municipality to levy taxes for corporate purposes. On this general subject see *post*, ch. XX.

A like principle is sometimes applied to the construction and improvement of the streets. These, as has been said, constitute highways for the accommodation of the general public, but are calculated, by their improvement, to increase largely the value of all property fronting on or lying in the immediate vicinity of them. Should the legislature determine that the cost of a street improvement should be borne in part by the whole city, and in part by an assessment made on the basis of benefits within a district to which the improvement was exceptionally valuable, we know of no valid legal objection that could be interposed. Whether the city shall bear the whole expense, or the adjacent property the whole, or, as a third resort, the expense be apportioned between two districts, one of which shall include the whole city, and the other the adjacent property only, must be determined by the legislature on a consideration of all the equities bearing on the case.¹ Other local city improvements may undoubtedly be provided for in the same way.

The legislature has sometimes applied the same doctrine to the case of general city taxation; constituting two districts, the one, consisting of the whole city, to be assessed equally, and the other consisting of the more compact portions of the city, which, because receiving a larger share of the benefits of city government, in the protection afforded by the police and fire departments, and the like, was required to pay a greater proportionate share of the expense of such government. It is not perceived that such a case differs in principle from the other cases of overlying districts which have been mentioned. Nevertheless, in some cases the power of the legislature to discriminate in city taxation between what may be designated the *out* property, and that in the parts compactly built, has been denied, on the ground that the city constituted the taxing district for city purposes, and such a discrimination would give distinct rules of taxation within the same district, to the number of which there could be no limit except the legislative discretion; a doctrine wholly inconsistent, it was said, with the

¹ See *Municipality v. White*, 9 La. An., 446; *Municipality v. Dunn*, 10 La. An., 57; *Chicago v. Larned*, 34 Ill., 203; *Ottawa v. Spencer*, 40 Ill., 211; *Patton v. Springfield*, 99 Mass., 627; S. C., 2 Withrow's Corp. Cas., 494.

constitutional idea of taxation.¹ This conclusion seems to impose restraints on the constitutional power of the legislature to establish taxing districts, which can hardly be justified in reason, or by the decisions in analogous cases. Legislation, such as was thus condemned, has not been uncommon in other states, and in some cases has passed the test of judicial scrutiny,² being sustained on the ground that it is only an equitable apportionment of the burdens of municipal government between those who receive a part of its benefits only, and those who participate in them all.³

A different case has been presented in some other states. City boundaries having been extended so as to embrace the lands of parties who insisted that their premises were agricultural lands merely, and would receive no benefit from the city government, such parties sought the protection of the courts, and prayed for injunction to restrain the imposition upon them of any tax in excess of what they would have been chargeable with had the boundaries not been extended to embrace them. It is to be observed of such cases that the legislature, which alone had authority to determine and fix the proper bounds of the municipal divisions of the state, and also to establish the taxing districts, had proceeded to do so, and in fixing the city boundaries without any provision for a discrimination in the taxation of property within them, had in effect determined that no such discrimination should or ought to be made. The whole subject was one committed by the constitution exclusively to the judgment and discretion of the

¹ *Knowlton v. Supervisors of Rock Co.*, 9 Wis., 410; *New Orleans v. Caze-lar*, 27 La. An., 156. Perhaps the Wisconsin case should now be regarded as overruled. See Wis. Cent. R. Co. v. *Taylor Co.*, 52 Wis., 37, 69. The Louisiana case seems to rely for the doctrine laid down upon a passage from a text book, where cases were cited, but without approval.

² *Serrill v. Philadelphia*, 38 Pa. St., 355, 358; *Henderson v. Lambert*, 8 Bush, 607; *Benoist v. St. Louis*, 19 Mo., 179; *Lee v. Thomas*, 49 Mo., 112. And see *Zanesville v. Richards*, 5 Ohio St., 590; *Gillette v. Hartford*, 31 Conn., 351; *Norris v. Waco*, 57 Tex., 635.

³ In *Gillette v. Hartford*, 31 Conn., 351, 357, *Butler, J.*, delivering the opinion of the court, assumes as probable that the persons within the city limits whose lands have been brought in by an extension of city lines had been so brought in on the application of the old corporation and against their own desire, and that the discrimination in taxation in their favor was only a just protection against inequality and unfairness.

legislature, whose members, as in other cases of legislation, would make inquiry into the facts in their own way, and act upon their own reasons. No question could be made of the complete legislative jurisdiction over the case, and if the action was unfair, and led to unequal and unjust consequences, it seems difficult to suggest any ground upon which it could be successfully assailed in the courts that would not warrant a judicial review of legislative action in every case in which parties complain of injustice and inequality. Nevertheless in some cases the courts have considered themselves warranted in inquiring into the facts, in order to determine whether in their judgment the extension of municipal boundaries was fairly warranted; and having reached the conclusion that it was not, and that the extension was made for the purpose of subjecting to taxation adjacent property that would not receive the benefits of municipal government, and was not in fact urban property, they have undertaken to protect the owners of property thus unfairly brought in, against the unequal taxation to which the legislation would expose them. In doing this they have not assumed to nullify the legislative action in extending the municipal limits, but they have undertaken to modify and relieve against its consequences, and to do this upon the express ground that the motive which has influenced the legislation was not legitimate.¹ As the point is stated in one case, it is the palpable perversion of the power to tax which justifies the judicial interference.²

Some of these decisions are made by very able judges, whose opinions are always entitled to the highest respect; but it seems difficult to harmonize them with the conceded principles governing the law of taxation. For, 1. They do not question legislation as being in excess of legislative authority, as might be done where taxes are voted for a purpose not public; but they leave the legislation to stand, and only interfere to qualify

¹ *Cheaney v. Hooser*, 9 B. Monr., 330; *Covington v. Southgate*, 15 B. Monr., 491; *Sharp's Executor v. Dunavan*, 17 B. Monr., 223; *Arbegust v. Louisville*, 2 Bush, 271; *Courtney v. Louisville*, 12 Bush, 419; *Swift v. Newport*, 7 Bush, 37; *Morford v. Unger*, 8 Ia., 82; *Langworthy v. Dubuque*, 13 Ia., 86; *Fulton v. Davenport*, 17 Ia., 404; *Buell v. Ball*, 20 Ia., 232; *Deeds v. Sanborn*, 26 Ia., 419; *Davis v. Dubuque*, 20 Ia., 458; *Deiman v. Fort Madison*, 30 Ia., 542; *Durant v. Kauffman*, 34 Ia., 194.

² *Swift v. Newport*, 7 Bush, 37, 40.

its effect, on the ground that it has been adopted on improper grounds and will operate unequally. 2. This is done on an inquiry into the facts, and a substitution of the judicial conclusion for the legislative on a subject not at all judicial; a subject, too — the proper limits of city extension — upon which persons are certain to differ widely, and where an inquiry into the facts after the judicial method of an examination of witnesses is usually much less satisfactory than that personal knowledge and investigation which legislators are supposed to possess or to make. This is certainly laying down a rule which cannot be applied generally; it being admitted that the judiciary has no general authority to correct the injustice of legislative action in matters of taxation;¹ and the weight of authority clearly is that, as regards these cases, the determination of the legislature is conclusive.² But the legislature has no authority to bring into a municipality territory not contiguous to it, and the attempt to do so for the purpose of increasing the local revenues may be treated as void.³

Extraterritorial taxation. Those cases in which it has been held incompetent for a state or municipality to levy taxes on persons or property not within its limits have generally indicated the want of jurisdiction over the subject of the tax as the ground of invalidity. But such a burden would be inadmissible, also, for the further reason that, as to any property or person outside the district in which the tax was levied, the want of legal interest in the tax would preclude its being subjected to the burden. A state can no more subject to its power a single person or a single article of property whose residence or legal *situs* is in another state, than it can subject all the citizens or all the property of such other state to its

¹ See *Kirby v. Shaw*, 19 Pa. St., 258, 261; *Logansport v. Seybold*, 59 Ind., 225; *Waco v. Texas*, 57 Tex., 635.

² *Stilz v. Indianapolis*, 55 Ind., 515; *Logansport v. Seybold*, 59 Ind., 225; *Martin v. Dix*, 52 Miss., 53; *Giboney v. Cape Girardeau*, 58 Mo., 141; *Linton v. Athens*, 53 Ga., 588; *New Orleans v. Cazelar*, 27 La. An., 156; *Stoner v. Flournoy*, 28 La. An., 850; *Kelly v. Pittsburg*, 85 Pa. St., 170; Same Case in error, 104 U. S., 78; *Hewitt's Appeal*, 88 Pa. St., 55; *Cary v. Pekin*, 88 Ill., 154; *Oliver v. Omaha*, 8 Dill., 368; *Washburn v. Oshkosh*, 60 Wis., 458.

³ *Smith v. Sherry*, 50 Wis., 210.

power. The accidental circumstance that it may happen to have the means of reaching one and not the rest can make no difference; there must be an interest in the subject-matter of the tax; there must be between the state and the tax payer a reciprocity of duty and obligation; and these in contemplation of law would be wholly wanting in the case supposed.¹ A territory, therefore,—or indeed a state—has no authority to exercise the power to tax within the limits reserved to an Indian tribe.² And it has been held in Missouri to be incompetent for the legislature to empower a city to tax for city purposes the land outside the city but adjacent to it, and therefore receiving, possibly, some of the benefits of the city government and expenditure.³ The benefits, it is obvious, would be altogether indirect and incidental, since the city could have no authority to make expenditures outside of its limits for the benefit of people there residing.⁴ But in Indiana a statutory provision authorizing a town to tax all property within two hundred yards of the corporate limits was sustained, though not argued by either counsel or court;⁵ and in Virginia, a railroad aid law was held constitutional which extended the power of a city to tax lands for half a mile outside. These, however, may well be deemed doubtful cases.⁶ It is

¹ *State Tax on Foreign Held Bonds*, 15 Wall., 300. See, also, *Murray v. Charleston*, 96 U. S., 432. Where a town had for more than twenty years exercised jurisdiction over part of another with its acquiescence, a tax levied within this part by such first mentioned town was nevertheless held void. *Ham v. Sawyer*, 38 Me., 37, 39. And see *Hughey's Lessee v. Horrel*, 2 Ohio, 231. Whether, when it is doubtful in which of two counties a district lies, it is not competent to provide for its taxation in either, see *People v. Wilkerson*, 1 Idaho, N. S., 619.

² *Moore v. Sweetwater*, 2 Wy. Ter., 8.

³ *Wells v. Weston*, 22 Mo., 384, approved in *St. Charles v. Nolle*, 51 Mo., 122.

⁴ See *Wilkey v. Pekin*, 19 Ill., 159.

⁵ *Conwell v. Connersville*, 8 Ind., 353.

⁶ In *In re Flatbush*, 60 N. Y., 398, an assessment in Flatbush for a part of the cost of extending Prospect Park, which had previously been incurred by the city of Brooklyn, was held void for want of legislative power. Compare *Brooks v. Baltimore*, 48 Md., 265. In that case the mayor and council of Baltimore had been authorized to open streets and provide for ascertaining the damage or benefit thereby accruing to the owners of ground *within or adjacent* to the city, for which such owners ought to be compensated or to pay compensation, and to provide for assessing and levying either gener-

certainly difficult to understand how the taxation of a district can be defended whose people have no voice in voting it, in selecting the purposes, or in expending it. Where a license fee is levied for police purposes, there may be excellent reason for allowing a town specially interested in it to require its payment of any persons in or near the town itself; and as the purpose is one of general interest, the state would have a larger discretion in providing for it than it could possibly possess in the case of ordinary taxation.¹

It is provided by general law in some states that where a farm or plantation lies partly in two taxing districts, it may all be taxed in the one in which the mansion house is situate. Such a general rule varies the district to meet the particular case, and it has generally been sustained.²

ally upon the city or specially upon the persons benefited, the damages, etc. The court, dwelling upon the distinctions between a general tax and a special assessment upon the persons benefited, held that it made no difference whether the property lay upon one side or the other of the city line, if the reason for the exercise of the power was applicable; and further, that under the power to assess and levy, the council could sell the property for failure to pay an assessment.

¹See *Falmouth v. Watson*, 5 Bush, 661, in which license fees imposed by a town on those selling intoxicating drinks outside its limits, but near it, were sustained as being imposed, partly at least, for police purposes. A town cannot give its ordinance such extraterritorial effect without express authority by statute. *Strauss v. Pontiac*, 40 Ill., 301.

²*Saunders v. Springsteen*, 4 Wend., 429; *Hairston v. Stinson*, 13 Ired., 479; *Ellis v. Hall*, 19 Pa. St., 292; *Bausman v. Lancaster*, 50 Pa. St., 208; *State v. Metz*, 29 N. J., 122; *State v. Hoffman*, 30 N. J., 346; *State v. Hay*, 31 N. J., 275; *State v. Britton*, 42 N. J., 103; *State v. Abbott*, 42 N. J., 111; *Judkins v. Reed*, 48 Me., 386. If a farm lying in two townships is assessed in the one in which the owner does not reside, the assessment is without jurisdiction and the assessors are liable for making it. *Dorn v. Backer*, 61 N. Y., 261, reversing 61 Barb., 597. It is held in Pennsylvania that this mode of assessment cannot be claimed as a right by the owner. And assessment of the separate parts in the counties, etc., in which they lie, is not bad as to either for want of jurisdiction. *Patton v. Long*, 68 Pa. St., 260. In New Jersey, if land owned by a corporation is situated in two towns, it may be taxed in the town where the office is. *State v. Warford*, 37 N. J., 397. In New Hampshire it is said that real estate must be taxed in the town where it lies. Where on a division of a town it was provided that each tract through which the divisional line passed should be taxed where the owner lived, this was held not competent as a permanent provision, and long acquiescence did not estop from questioning it. *Weeks v. Gilmanton*, 60 N. H., 501. Towns cannot even by agreement establish the rule that

Where one municipality is set off from another, or where the bounds of an existing municipality are simply changed, so as to set off from it or bring within it persons and property, the case will commonly be one requiring legislation for an adjustment of rights in view of the changed condition of affairs. So long as the corporation retains its legal identity, it will be entitled to retain its property and be liable for its debts;¹ but unless some provision were made for compensations, there might be injustice which in some cases would be serious. It is customary, therefore, for the legislature to make provision for an apportionment of property and debts in such cases, so as to do justice, as nearly as possible, to the people of all the territory affected by the changes.² Should convenience seem to render it desirable, the existing debts might doubtless be provided for through a continued taxation for the purpose within the limits which were before liable.³

To give locality to a purpose in respect to which a public expenditure is to be made, it is obviously not essential that the expenditure should be within the district, nor that a public

each may tax lands of its residents lying in the other; there being no statute permitting it. *Dillingham v. Snow*, 5 Mass., 547.

¹ See *North Hempstead v. Hempstead*, 2 Wend., 109, 135; *Hartford Bridge Co. v. East Hartford*, 16 Conn., 149, 171; *Windham v. Portland*, 4 Mass., 384-390; *Hampshire v. Franklin*, 16 Mass., 76, 85; *Medford v. Pratt*, 4 Pick., 222; *Montpelier v. East Montpelier*, 29 Vt., 12, 20; *Milwaukee v. Milwaukee*, 12 Wis., 93; *Olney v. Harvey*, 50 Ill., 453; *Wade v. Richmond*, 18 Grat., 583; *Milner v. Pensacola*, 2 Woods, 632.

² *Harrison v. Bridgeton*, 16 Mass., 16; *Hampshire v. Franklin*, 16 Mass., 76; *Salem Turnpike v. Essex Co.*, 100 Mass., 282; *Whitney v. Stow*, 111 Mass., 868; *Stone v. Charlestown*, 114 Mass., 214; *Sedgwick v. Bunker*, 16 Kan., 498; *Bristol v. New Chester*, 3 N. H., 524; *Portwood v. Montgomery*, 53 Miss., 523; *Milwaukee Town v. Milwaukee*, 12 Wis., 93; *Marshall Co. Court v. Calloway Co. Court*, 2 Bush, 93; *Layton v. New Orleans*, 12 La. An., 515; *School District v. Board of Education*, 73 Mo., 627. That when territory is brought within the limits of an existing municipality it becomes liable to be taxed for the previous debts of the municipality, see *Olney v. Harvey*, 50 Ill., 453; *Watson v. Commissioners of Pamlico*, 82 N. C., 17; *Stilz v. Indianapolis*, 81 Ind., 532. As to the effect of detaching territory from a municipality previously indebted, see *Galesburg v. Hawkinson*, 75 Ill., 152.

³ See *Galesburg v. Hawkinson*, 75 Ill., 152; *Rader v. Road District*, 36 N. J., 273; *Alvis v. Whitney*, 43 Ind., 83. Where an act sets off one town from another, it may provide that taxes to pay existing liabilities shall be assessed and collected in both by the existing officers as if the act had not been passed. *Winslow v. Morrill*, 47 Me., 411.

work created by means thereof should have its *situs* within the district. The district *interest* must be the true test whether an object is or is not a proper object of district taxation; and if the benefits are had by the district, the interest is manifest. The case of city water-works located outside its limits is an illustration.¹

¹*Goddin v. Crump*, 8 Leigh, 120, 155, per *Tucker*, President; *Denton v. Jackson*, 2 Johns. Ch., 317, 336. But in general, specific authority would be required to enable a municipality to expend money outside its territorial limits for a purpose which presumptively is not local. Thus, a town under its general authority to vote taxes for township purposes cannot raise money to build or repair a bridge outside. *Concord v. Boscawen*, 17 N. H., 465. Compare *North Hempstead v. Hempstead*, Hopk. Ch., 288; *Riley v. Rochester*, 9 N. Y., 64. But with proper legislative authority it may do this, on the ground of special local benefit. *Talbot County Commissioners v. Co. Com'rs of Queen Anne*, 50 Md., 245. See *Halsey v. Rumsey*, 84 Ill., 89; *Wright v. People*, 87 Ill., 582; *Concord v. Boscawen*, 17 N. H., 465.

A city may be authorized to purchase and improve a public park outside its limits. *M'Callie v. Chattanooga*, 8 Head, 317; *Halsey v. People*, 84 Ill., 89.

CHAPTER VI.

EQUALITY AND UNIFORMITY IN TAXATION.

Requirement of equality. There is no imperative requirement that taxation shall be equal. If there were, the operations of government must come to a stop, from the absolute impossibility of fulfilling it. The most casual attention to the nature and operation of taxes will put this beyond question. No single tax can be apportioned so as to be exactly just, and any combination of taxes is likely in individual cases to increase instead of diminishing the inequality. Theoretically, tax laws should be framed with a view to apportioning the burdens of government so that each person enjoying government protection shall be required to contribute so much as is his reasonable proportion, and no more. The tax law that comes nearest to accomplishing this is, in theory, the most perfect. But to accomplish this it may not be requisite to require the tax-gatherer to call upon every individual, and collect from him in person this reasonable proportion. It may possibly be found that the most equal and just tax can be collected from the fewest persons.¹ A tax on an article of prime necessity, which few produce, but all use, may be collected of the producers alone without their feeling the burden beyond what others would feel it, because the tax, in the natural course of business, would be added to the price of the commodity, and would be collected by the producers from the whole community of consumers. Such a tax would be generally distributed, and would be wanting in equality only because of the fact that articles of prime necessity are not consumed by different members of the community in proportion to their means or income, and therefore the poorer classes would pay more than their just proportion. To collect all the revenues of government by a tax on breadstuffs exclusively would consequently be to compel unequal contributions to the support of the gov-

¹ Smith, *Wealth of Nations*, b. 5, ch. 2, pt. 2, art. 4. State taxes on property by valuation are collected from very few persons—five to eight per cent. of the whole population. The indirect taxes levied by the federal government reach all or nearly all.

ernment, by means of the necessities of the poor. A tax on an article which is purely one of luxury would probably be more equal, and certainly less unjust, and would be diffused with some proportion to income; every man would tax himself, and would abstain or indulge as he felt the disposition and ability to pay. To collect the whole revenue of the state from an article of luxury like spirituous liquors, might, if it were practicable, be as little liable to objection as any other method; but to attempt the collection of all from one article would require a tax so heavy that it would be difficult of enforcement, and the purpose of the law would be defeated by diminishing the consumption as the price increased. We have already seen that other kinds of taxes are open to serious objections on the score of equality and justice. A tax on property by valuation, which seems perhaps most fair of all, is subject, as has been shown, to difficulties which preclude its being laid, apportioned or collected with absolute justice. A statement of these difficulties need not be repeated here.

It being thus manifest that there are serious and often insurmountable difficulties in the way of equal and perfectly just taxation, it remains to be seen what is the rule of law where in the particular case the inequality can be pointed out and demonstrated. On this subject certain points have already been covered. The legislature must decide when and how and for what public purposes a tax shall be levied, and must select the subjects of taxation. All this is legislative, and the legislative conclusion in the premises must be accepted as proper and final. It follows that a tax cannot be attacked on averment and proof that some other tax for the same purpose would have been more just and more equal. An excise tax on one kind of business only is not illegal for the discrimination; it is always to be conclusively presumed that the legislature found good and controlling reasons impelling the action it has taken, and that, in view of all the circumstances which were known to its members, the tax which has been provided for is reasonable.¹

¹See *De Camp v. Eveland*, 19 Barb., 81; *Nor. Ind. R. R. Co. v. Connelly*, 10 Ohio St., 159, 165; *People v. Brooklyn*, 4 N. Y., 419; *Lusher v. Scites*, 4 W. Va., 11.

In *Williams v. Cammack*, 27 Miss., 209, 224, *Handy, J.*, speaking of a

Very strong language has been used by the courts in some cases, and a restatement of some of them in this place may illustrate some of the difficulties which are necessarily encountered in all attempts at equal taxation.

In the state of Pennsylvania a single borough was allowed to be specially taxed for the cost of a court-house to be erected within it for the county. This was a departure from the general rule, and the tax was resisted as an unequal burden as between the people of the borough and of the county. But the court had no difficulty in showing that no tax system which had ever existed in the state had resulted in equality. Some property was taxed twice; some escaped any taxation; the exigencies of the state required changes to reach new sources of revenue; but no one imagined that the inequalities had made the previous taxation unconstitutional. Equality of contribution had not been required by the bill of rights, and probably because it was known to be impracticable. And the court proceeds:

"If equality were practicable, in what branch of the government would power to enforce it reside? Not in the judiciary, unless it were competent to set aside a law free from collision with the constitution, because it seemed unjust. It could interpose only by overstepping the limits of its sphere, by arrogat-

special levee assessment, says: "Nor is it any objection to the constitutionality of the act that it operates injuriously upon the appellant. Every revenue bill, and every work of public improvement, must, more or less, have such an effect. But they must be submitted to as the necessary action of the machinery of government, and as individual sacrifices to the general good, in order that the advantages of the social compact may be enjoyed. This principle rests on the very foundations of society, and is illustrated in every day's experience; the citizen yielding his natural rights, even of life, liberty or property, to the public good. But he can only claim immunity when it is secured to him by the principles of the constitution."

In *People v. Whyler*, 41 Cal., 851, 855, a levee tax was objected to as not equal, because not apportioned according to benefits. The court held that it was required to be apportioned by value, and *Rhodes*, Ch. J., says: "A tax is equal and uniform which reaches and bears with the like burden upon all the property within the given district, county, etc. It bears the like burden when the valuation of each parcel is ascertained in the same mode — the mode prescribed by law — and when it is subject to the same rate of taxation as other property within the district, county, etc. Absolute equality is unattainable, and the benefits derived or to be derived from the expenditure of the tax cannot be taken into account."

ing to itself a power beyond its province; by producing intestine discord, and by setting an example which other organs of government might not be slow to follow. It is its peculiar duty to keep the first lines of the constitution clear, and not to stretch its power in order to correct legislative or executive abuses. Every branch of the government, the judiciary included, does injustice for which there is no remedy, because everything human is imperfect. The sum of the matter is, that the taxing power must be left to that part of the government which is to exercise it.

"But what if this power were so managed as to lay the public burthens on particular classes in ease of the rest? It is illogical to argue from an extreme case; or from the abuse of a power to a negation of it. Every authority, however indispensable, may be abused; and if it might not, it would be powerless for good."¹

"Perfect equality in the assessment of taxes," it is said in another case, "is unattainable. Approximation to it is all that can be had. Under any system of taxation, however wisely and carefully framed, a disproportionate share of the public burdens will be thrown on certain kinds of property, because they are visible and tangible, while others are of a nature to elude vigilance. It is only where statutes are passed which impose taxes on false and unjust principles, or operate to produce gross inequality, so that they cannot be deemed in any just sense proportional in their effect on those who are to bear the public charges, that courts can interpose and

¹ *Gibson*, Ch. J., in *Kirby v. Shaw*, 19 Pa. St., 258, 260. "Equality of taxation, as a maxim of taxation, means equality of sacrifice. It means apportioning the contributions of each person towards the expenses of government, so that he shall feel neither more nor less inconvenience from his share of the payment than every other person experiences from his. This standard, like other standards of perfection, cannot be completely realized." *Mill*, Pol. Econ., b. 5, ch. 2, § 2. There is a very elaborate examination of this general subject in *Williams' Case*, 8 Bland. Ch., 186, 220.

A gas and lamp tax, required by law to be assessed "in equal proportions on all lots," is not so assessed when the same sum is assessed on each lot without discrimination throughout the municipality. *State v. Reimenschneider*, 89 N. J., 625. A statute requiring the taxation of any of a certain kind of property brought within the state after a certain specified date is void for want of uniformity. *Graham v. Chatauqua Co.*, 81 Kan., 473.

arrest the course of legislation by declaring such enactments void.”¹

“Perfectly equal taxation,” it has again been said, “will remain an unattainable good as long as laws and government and man are imperfect.”² “There is no provision in the constitution that taxation shall be equal. Sound policy requires that it should be, so far as possible. But perfect equality is not possible. Indeed, if this was necessary there could be no taxation except such as would include every person and every

¹ *Bigelow*, Ch. J., in *Commonwealth v. Savings Bank*, 5 Allen, 428, 436. See *Lowell v. Oliver*, 8 Allen, 247; *Ould v. Richmond*, 23 Grat., 464, 473; *Howell v. Bristol*, 8 Bush, 493. “Equality can never be but approximation.” *Redfield*, J., in *Allen v. Drew*, 44 Vt., 174, 186. See, also, as to the exclusiveness of legislative power in matters of taxation, *Athens v. Long*, 54 Ga., 330; *Tallman v. Treasurer*, 12 Ia., 581; *Dubuque v. Railway Co.*, 47 Ia., 196; *Beals v. Amador Co.*, 35 Cal., 624.

² *Sharswood*, J., in *Grim v. School District*, 57 Pa. St., 433, 437. Compare *Durach's Appeal*, 62 Pa. St., 491; *People v. Worthington*, 21 Ill., 171; *Commonwealth v. N. E. Slate & Tile Co.*, 13 Allen, 891; *Youngblood v. Sexton*, 32 Mich., 406. In *Coburn v. Richardson*, 16 Mass., 213, 215, a tax on the lands of a non-resident for parish purposes was objected to. *Parker*, Ch. J.: “Numerous are the inconveniences and great is the injustice which may flow from this statute. But it is for the legislature alone to determine whether these are or are not counterbalanced by any great public good which may be expected to be produced by it.” In *Comer v. Folsom*, 13 Minn., 219, 222, in which a town bounty tax was contested, on the ground that it benefited in part another town, as in fact it did, *Wilson*, Ch. J., holds this language: “It is generally true that a city, town or county, in expending money for the advancement of its own local interests, either directly or indirectly benefits some other subdivision of the state. If it builds a road or bridge, or aids in building a railroad, or in making any other public improvement, from which benefit to itself is expected to accrue, frequently some other subdivision of the state is directly and equally benefited; but it has not been considered that this would be a legal objection to an appropriation or tax for such improvement. If our constitution required absolute or perfect equality in taxation, such objection would perhaps have to be admitted. But perfect equality is not required, nor is it possible. All taxes ‘should be as nearly equal as may be,’ in the language of the constitution. If the taxes imposed are distributed on just principles applicable alike to all for whose benefit the appropriation is made or intended, substantial equality is attained, and no constitutional right invaded.” Compare *People v. Whyler*, 41 Cal., 351, 354.

It is competent to impose a tax on a particular business — liquor selling — to provide and maintain an asylum for inebriates. *State v. Cassiday*, 22 Minn., 312; *State v. Klein*, 22 Minn., 328.

thing; which would be manifestly impracticable and unjust."¹ These are strong expressions, but they do not go beyond the demands of strict accuracy.

But are there not cases which on their face are manifestly so unequal and unjust as to furnish conclusive evidence that equality has not been sought for, but avoided; that oppression, not justice, was desired, and confiscation, not taxation, intended? Such cases it surely is possible to conceive, and if such has never been the intent of legislation, it is certain that it has sometimes been the result.

It has already been stated that inequality does not necessarily follow the restricting of a tax to a few subjects only, or even to a single subject. Such a restricted tax might, on the other hand, under some circumstances, be as equal and just as any that could be laid. A tax laid exclusively on merchants' goods might not be burdensome to those who, in the first instance, paid it, since the effect would only be to increase the price to the consumer, and thus to diffuse the burden through the whole community. A license tax might not be unjust though laid upon a single occupation, provided that it was so laid that none who followed that occupation escaped it. Let it reach all of a class, either of persons or things, it matters not whether those included in it be one or many, or whether they reside in any particular locality or are scattered all over the state. But when, for any reason, it becomes discriminative between individuals of the class taxed, and selects some for an exceptional burden, the tax is deprived of the necessary element of legal equality, and becomes inadmissible. It is immaterial on what ground the selection is made: whether it be because of residence in a particular portion of the taxing district,² or because the persons selected have been remiss in

¹*Sharswood, J.*, in *Weber v. Reinhardt*, 78 Pa. St., 870, 873. See *Loan Association v. Topeka*, 20 Wall., 655, per *Miller, J.*; *State Railroad Tax Cases*, 92 U. S., 575; *National Bank v. Kimball*, 108 U. S., 732; *Opinions of Justices*, 58 Me., 590; *Savings Bank v. New London*, 20 Conn., 117; *Carrington v. Farmington*, 21 Conn., 65; *Coite v. Society for Savings*, 32 Conn., 173; *State v. Township Committee*, 36 N. J., 66; *Am. Union Exp. Co. v. St. Joseph*, 66 Mo., 675; *Apperson v. Memphis*, 2 Flip., 363.

²*St. Louis v. Spiegel*, 75 Mo., 145.

meeting a former tax for the same purpose,¹ or because of any other reason, plausible or otherwise; for if the principle of selection be once admitted, limits cannot be set to it, and it may be made use of for the purposes of oppression, or even of punishment. It might also be made use of to give special privileges in the nature of monopolies; as if loans of money were in general taxed, but those made by named persons, or by residents of a named locality, were exempted; in which case the injustice would be so manifest that none could defend it.² Even within the class taxed, however, there may be rules

¹ *State v. Township Committee*, 36 N. J., 66. The parties in this case, who were specially taxed \$1,000, had failed to pay \$200 before assessed against them for the same purpose. Had the \$200 been reassessed against them, the reassessment could not have been complained of. It was decided in *Nashville v. Althorp*, 5 Cold., 554, that where a merchant's privilege is taxed discriminations cannot be made; e. g., between those living within and those without a city. Compare *Robinson v. Charleston*, 2 Rich., 317; *Fields v. Commissioners*, 36 Ohio St., 476.

² See *Lin Sing v. Washburn*, 20 Cal., 53, a case of exceptional taxation of persons of one race. For the general rule, see *Durach's Appeal*, 62 Pa. St., 491; *Fletcher v. Oliver*, 25 Ark., 289; *State v. Parker*, 32 N. J., 426; *Youngblood v. Sexton*, 32 Mich., 406; *Ex parte Marshall*, 64 Ala., 266; *New Orleans v. Dubarry*, 33 La. An., 431. In some cases the selection of subjects for taxation has been treated as inadmissible on the principle stated in the text; as in *Franklin Ins. Co. v. State*, 5 W. Va., 349, in which a tax of three per cent. on the premiums of insurance companies was held void, the constitution requiring taxation to be equal and uniform, and this tax law applying to no other class of subjects or corporations, or to individuals. The tax seems to have been regarded as a tax on *property*. Surely the requirement of uniformity cannot make it essential that all persons or subjects shall be taxed, nor that all corporations shall be taxed alike. Does it mean any more than that any particular tax shall be laid equally and uniformly upon the persons or subjects within the class taxed? Would not a tax of one per cent. on the net earnings of all railroad companies be equal and uniform? And if this is inadmissible, how can there be any equalization of taxation, as between, for instance, the insurance company and the saloon keeper, unless everything is brought to the standard of a property tax, in which case those who ought to pay most would sometimes pay least? See *Slaughter v. Commonwealth*, 18 Grat., 767; *Carter v. Dow*, 16 Wis., 298. In *State v. Charleston*, 12 Rich., 702, 732, *Dunkin*, Chancellor, says: "Essential characteristics of any system of taxation, properly so called, are certainty, equality, universality. All the persons or property within a state, district, city or other fraction of territory having a local sovereignty for the purpose of taxation, should, as a general rule, constitute the basis for taxation." Like language is made use of by *Tuck, J.*, in *O'Neal v. Bridge Co.*,

of distinction; and these are perfectly admissible, provided they are general rules and are observed. If a state, for example, were to decide to levy an occupation tax upon one of the learned professions, it might decide to lay the same tax upon each member, or it might discriminate so that the tax should be proportioned to the professional income. Either course would be admissible, provided the rule were made general,¹ though the latter may be the more equitable. But questions of mere equity in taxation are for the legislature, not for the courts.²

Exemptions. Every statute for the levy of taxes is in a sense a statute making exemptions; that is to say, it leaves many things untaxed which it would be entirely competent to tax if the legislature had deemed it wise or politic. One state will lay the burden on property only, another on property and corporations, another on property and the different kinds of business, and so on. In each case there is such selection of subjects as the legislative wisdom has determined upon, and the determination is conclusive. All subjects for which taxation is not provided are exempted, and the subjects selected are alone, for the time, taxable.³

When, however, the selections have been made, and the general rule determined upon, it has been customary for the legislature to make certain exemptions of either persons or property coming within the general rule, but which, for reasons of general policy, it is deemed wise not to tax. Some of these, such as the exemptions of household furniture, tools of trade, etc., and the limited personal property which very poor persons

18 Md., 1, 23, and it is quite true and just where taxation by values is what the law provides for; but it has but limited application to the taxation of business in any form.

¹Ould v. Richmond, 23 Grat., 464; St. Louis v. Steinberg, 69 Mo., 289.

²A remarkable case of invidious exemption occurs in the legislation of Arkansas for 1871. A statute purporting to be passed in the interest of immigration and manufactures exempted every species of manufacture and mining, but excluded from its benefits all whose monthly production did not reach a sum named, thus discriminating against small capitalists.

³See City Council v. St. Phillip's Church, 1 McM. Eq., 139, 144; Martin v. Charleston, 13 Rich. Eq., 50, 52; Levy v. Smith, 4 Fla., 154; Brewer Co. v. Brewer, 62 Me., 62; Butler's Appeal, 73 Pa. St., 448; State v. County Court, 19 Ark., 360.

may be possessed of, are to be looked upon rather as in the nature of limitations of the general rule, than as exceptions from it; the taxation being only of all that is possessed over and beyond what has been left out as absolutely needful to the owner's support. Property made use of for educational purposes though in the hands of private individuals, the property of charitable associations, of cemetery companies, and the like, are excluded from tax rolls for similar reasons; these being supported by contributions collected alike from rich and poor, and having strong claims to public encouragement.

Implied exemptions. Before noticing the exemptions expressly made by law, it will be convenient to speak of some which rest upon implication. Some things are always presumptively exempted from the operation of general tax laws, because it is reasonable to suppose they were not within the intent of the legislature in adopting them. Such is the case with property belonging to the state and its municipalities, and which is held by them for governmental purposes. All such property is taxable, if the state shall see fit to tax it;¹ but to levy a tax upon it would render necessary new taxes to meet the demand of this tax, and thus the public would be taxing itself in order to raise money to pay over to itself, and no one would be benefited but the officers employed, whose compensation would go to increase the useless levy. It cannot be supposed that the legislature would ever purposely lay such a burden upon public property, and it is therefore a reasonable conclusion that, however general may be the enumeration of property for taxation, the property held by the state and by all its municipalities for governmental purposes was intended to be excluded, and the law will be administered as excluding it in fact.² The grant, therefore, in general terms to a city of

¹ *Louisville v. Commonwealth*, 1 Duv., 295; *Wayland v. Commissioners*, 4 Gray, 500; *Durkee v. Commissioners*, 29 Kan., 697; *Trustees of Schools v. Trenton*, 30 N. J. Eq., 667.

² *Louisville v. Commonwealth*, 1 Duv., 295; *People v. Salomon*, 51 Ill., 37; *Directors of the Poor v. School Directors*, 42 Pa. St., 21, 25 (case of poor-house); *State v. Gaffney*, 34 N. J., 133; *West Hartford v. Water Commissioners*, 44 Conn., 360; *Rochester v. Rush*, 80 N. Y., 302 (cases of city water-works and land acquired therefor); *Industrial University v. Champaign County*, 76 Ill., 283 (case of property held in trust for a state educational in-

the power to tax will not be held to confer power to tax state or county property,¹ and the rule applies to the property of public educational and charitable institutions which perform public functions under state control,² and to any other corporation of which the state is substantially the corporator, and which exists for governmental purposes.³

But a municipal corporation may hold property not for governmental purposes, but for the mere convenience of its people, or to supply some need which is commonly supplied by a private corporation; such as water or gas works; and the presumption of an intention to exclude such property from taxation would be very slight, and perhaps could not arise at all on the language of the law. Such property is deemed to be held by the corporation, as is expressed in one case, in its social or commercial capacity as a private corporation, and for its own profit;⁴ and therefore it was held that vacant lots owned by a city, market houses, fire engines, etc., were not presumptively

stitution). And see *King v. Commissioners, etc.*, 4 T. R., 730; *King v. Inhab. of Liverpool*, 7 B. & C., 61; *King v. Terrott*, 8 East, 506; *Queen v. Shee*, 4 Q. B., 2; *Queen v. Exminster*, 12 A. & E., 2; *People v. Doe*, 36 Cal., 220; *People v. Austin*, 47 Cal., 358; *Worcester Co. v. Worcester*, 116 Mass., 193; *Inhab. of Wayland v. Commissioners*, 4 Gray, 500; *Gibson v. Howe*, 37 Ia., 168; *Moore v. Morledge*, 42 Ia., 26; *State v. Gaffney*, 34 N. J., 133; *Directors of Poor v. School Directors*, 42 Pa. St., 21.

¹ *Piper v. Singer*, 4 S. & R., 354; *Nashville v. Bank of Tennessee*, 1 Swan, 269; *People v. McCreery*, 34 Cal., 432, 456; *People v. Doe*, 36 Cal., 220; *People v. Austin*, 47 Cal., 358; *Reid v. State*, 74 Ind., 252; *Townsen v. Wilson*, 9 Pa. St., 270.

² *Trustees of University v. Champaign Co.*, 76 Ill., 184; *Board of Regents v. Hamilton*, 28 Kan., 376.

³ *Nashville v. Bank of Tennessee*, 1 Swan, 269. But the mere fact that a city controls the rates of a water company or other company created to supply a public need will not create an implied exemption in its favor, the stock being held by individuals. *Appeal of Des Moines, etc., Co.*, 48 Ia., 324. A municipal corporation cannot hold private property — *e. g.*, a park — in trust for the owners of lots fronting on it so as to exempt it from taxes and assessments under general laws. *McChesney v. People*, 99 Ill., 216.

⁴ *Louisville v. Commonwealth*, 1 Duv., 295. See *West Hartford v. Water Com'rs*, 44 Conn., 360. This private side to a public corporation has often been recognized in other than tax cases. *Bailey v. New York*, 3 Hill, 531; 2 Denio, 433; *Lloyd v. New York*, 5 N. Y., 369; *Storrs v. Utica*, 17 N. Y., 104; *Western Fund Savings Society v. Philadelphia*, 31 Pa. St., 175; *Commissioners v. Duckett*, 20 Md., 468; *Detroit v. Corey*, 9 Mich., 165; *post*, ch. XXI.

excluded from taxation;¹ but this, unless restricted to the case of special assessments, would seem to be limiting the implied exemption unreasonably, and certainly more than other cases limit it.²

Allowance for debts. Revenue laws sometimes permit tax payers to deduct from the property to be taxed the debts owing by them. Sometimes the deduction is from credits only; sometimes from mortgages; sometimes from the aggregate of personal estate. Reference is made in the note to decisions as to these allowances.³ The allowance is not in any proper sense an exemption, but is made by way of reaching the just amount of taxable property.

¹ *Louisville v. Commonwealth*, 1 Duv., 295. Compare *Appeal of Des Moines, etc., Co.*, 48 Ia., 324. County property, it seems, may be subject to a water tax in Illinois, unless expressly exempted. *Cook County v. Chicago*, 103 Ill., 646.

² The following public property held not taxable: A city hall, *Louisville v. Commonwealth*, 1 Duv., 295. A city slip, *Low v. Lewis*, 46 Cal., 550. Court-house and jail, *Worcester Co. v. Worcester*, 116 Mass., 193. Water-works, reservoirs, etc., *West Hartford v. Water Com'rs*, 44 Conn., 860; *State v. Gaffney*, 34 N. J., 131; *Rochester v. Rush*, 80 N. Y., 302. Cemetery, *People v. Doe*, 36 Cal., 220; *Louisville v. Nevin*, 10 Bush, 549. Poor-house, *Directors of Poor v. School Directors*, 42 Pa. St., 21. Park or common, *St. Louis v. Gorman*, 29 Mo., 593. School fund property is not taxable in Illinois (*Chicago v. People*, 80 Ill., 384). and probably not in any state.

³ A note given by a tax payer and outstanding is to be allowed as a debt, though it is payable on demand, given for United States securities, and may have been given as a device to escape taxation. *People v. Ryan*, 88 N. Y., 142; citing *Stilwell v. Corwin*, 55 Ind., 433; *Smale v. Burr*, L. R., 8 C. P., 64. The amounts an insurance company would be required to return on surrender of policies are not to be deducted as debts. *People v. Davenport*, 91 N. Y., 574. Neither is the reinsurance item in the report of the company to be deemed a debt. *Insurance Co. v. Cappellar*, 38 Ohio St., 560. As to what is "indebtedness within the state" under an Oregon statute allowing such indebtedness to be deducted, see *Ankenny v. Multnomah Co.*, 4 Or., 271. It is held in the same state that a debt contracted for the mere purpose of evading taxation is not to be regarded. *Poppleton v. Yamhill Co.*, 8 Or., 337. See *Waller v. Yaeger*, 39 Ia., 228. As to deduction of indebtedness in Indiana, see *Matter v. Campbell*, 71 Ind., 512. Money on hand or on deposit is not a solvent credit within the meaning of a statute allowing indebtedness to be deducted from the amount of solvent credits. *Richmond, etc., R. Co. v. Commissioners*, 84 N. C., 504. Corporate stocks are not solvent credits. *Raleigh, etc., R. Co. v. Commissioners*, 87 N. C., 414. The allowance of credits and deductions, if the law operates alike on all persons and property like situated, does not establish a want of uniformity. *Edwards*

Constitutional restrictions. Before considering the express exemptions from general taxation which it has been customary to make in state revenue laws, it will be convenient to examine briefly the constitutional provisions which have been adopted in the several states with the purpose of securing uniformity in taxation, and to make the rule of uniformity compulsory upon the legislature. The differences in these provisions are very considerable, but enough of them have been the subject of judicial consideration to make the decisions upon them a sufficient guide to the meaning of all.

Alabama. The constitution provided that "No man or set of men are entitled to exclusive, separate public emoluments or privileges, but in consideration of public services." The legislature granted a charter to an insurance company, and provided therein that "as a full commutation for all taxes, impositions or assessments on the capital stock of said company or on any of its property or effects," the company should annually pay into the state treasury a specified sum of money; and the charter was declared unalterable, except with the consent of its trustees, for the term of twenty years. The commutation being contested, it was held that it must be deemed to have been granted in consideration of advantages to be derived by the public from the establishment of the corporation and the performance of its corporate functions and duties, and that the commutation was not therefore violative of the constitutional provision.¹

v. People, 88 Ill., 340. As to what are solvent debts in case of an insurance company, see *Alabama, etc., Ins. Co. v. Lott*, 54 Ala., 499.

For a case of allowance to a shareholder in a corporation of his proportion of the tax paid by the corporation on its property, see *Railroad Co. v. Commissioners*, 87 N. C., 414. Under a statute providing for exempting from taxation "so much of the debts due or to become due to any person as shall equal the amount of *bona fide* and unconditional debts by him owing," *held*, a shareholder in a national bank was entitled to the set-off against the amount of his shares. *Ruggles v. Fond du Lac*, 53 Wis., 436, citing *People v. Weaver*, 100 U. S., 539; *Pelton v. Nat. Bank*, 101 U. S., 143; *Cummings v. Nat. Bank*, 101 U. S., 153; *Evansville Nat. Bank v. Britton*, 8 Fed. Rep., 867.

¹ *Daughdrill v. Insurance Co.*, 31 Ala., 91. See *Ill. Cent. R. Co. v. McLean Co.*, 17 Ill., 291; *Idle v. Finneran*, 29 Kan., 654; *Louisiana Lottery Co. v. New Orleans*, 24 La. An., 86. Compare *Louisiana Cotton Manuf. Co. v. New Orleans*, 31 La. An., 440, and cases cited. *Contra*, *Home Ins. Co. v. Sweigert*, 104 Ill., 653.

Equality of taxation being a constitutional requirement, it is not competent to discriminate against a foreign insurance company to make the tax upon it correspond to the tax imposed upon home corporations in the state where such foreign corporation has its *situs*.¹

The constitution as revised afterwards contains a provision that "the property of corporations now existing, or hereafter created, shall forever be subject to taxation the same as property of individuals," etc. Under this provision it is not competent to provide by law that the taxation of the property of corporations, or of any class thereof, shall not exceed a certain percentage which is below the limit to which the taxation of other property is restricted.²

Another provision is that "all taxes levied on property in this state shall be assessed in exact proportion to the value of such property." It is not competent for the legislature under this provision to prescribe or declare an arbitrary or artificial value to the property of individuals or corporations, and assess taxes on such valuation, and statutes to that effect are void.³ But a license tax on attorneys and physicians does not violate the constitutional requirement of taxation by value.⁴

Arkansas. The constitution provided that "all property shall be taxed according to its value; the manner of ascertaining which to be as the general assembly shall direct, making the same equal and uniform throughout the state." Where the legislature, by a city charter, undertook to exempt the property of the inhabitants from taxation for the construction

¹ *Clark v. Mobile*, 67 Ala., 217. Tax laws are to be construed so as to avoid double taxation where practicable. *Board of Revenue v. Gas Light Co.*, 64 Ala., 269.

² *Mobile v. Stonewall Ins. Co.*, 53 Ala., 570; *Perry Co. v. Railroad Co.*, 65 Ala., 391; *State Auditor v. Jackson Co.*, 65 Ala., 142.

³ The statute in question provided for the assessment of railroad property like other property, but added that "in no case, where the data of such an estimate shall be in the possession of the board, shall such property be estimated at a sum less than that which, at an interest of eight per cent., would yield the sum shown by such data to constitute the net earnings of such property; such net earnings to consist of the whole earnings, deducting the running expenses of such road; but in no case nor to any extent is any allowance or deduction to be made on any other account." Held void. *Board of Assessment v. Alabama Cent. R. R. Co.*, 59 Ala., 551.

⁴ *McCaskell v. State*, 53 Ala., 510.

of roads in the county of which the city formed a part, this was held invalid as a violation of the rule of uniformity which the constitution had established.¹ The provision, however, does not apply to local taxes, and will not prevent taxes on occupations,² or taxes on land by area for levee purposes.³

California. The constitution requires that "taxation shall be equal and uniform," and that "all property in the state shall be taxed in proportion to its value." Under this the following rulings have been made: 1. That "all property in the state" was to be understood as intending all *private* property only, and that it did not include the public property belonging to the United States or the state and its municipalities.⁴ 2. That exemptions of private property would be inconsistent with the requirement of equality and uniformity, and consequently were forbidden.⁵ 3. That special assessments for local improvements need not be levied by value,⁶ but that whatever basis was adopted, exemptions of property falling within the class assessed were forbidden.⁷ 4. That a levy to be expended in protecting a district from inundation was to be considered a tax rather than a special assessment, and must therefore be made on property by valuation.⁸ 5. That the requirement of uniformity in the taxation of property was not violated by a tax on business graduated by sales;⁹ but it would be violated by a city ordinance imposing a higher fee upon a merchant selling goods by sample, but not bringing his stock within the corporate limits, than upon one who kept his stock there.¹⁰ 6. That solvent

¹ *Fletcher v. Oliver*, 25 Ark., 289.

² *Washington v. State*, 13 Ark., 753.

³ *McGehee v. Mathis*, 21 Ark., 40.

⁴ *People v. McCreery*, 84 Cal., 432.

⁵ *People v. McCreery*, 84 Cal., 432; *People v. Whartenby*, 88 Cal., 461; *People v. Eddy*, 43 Cal., 331; *Lick v. Austin*, 43 Cal., 590. Authority to a board of supervisors to remit a tax or a part of a tax in a specified district would be inconsistent with the requirement of uniformity, and consequently invalid. *Wilson v. Supervisors of Sutter*, 47 Cal., 91.

⁶ *Burnett v. Sacramento*, 12 Cal., 76; *Blanding v. Burr*, 18 Cal., 343; *Emory v. San Francisco Gas Co.*, 28 Cal., 345; *Walsh v. Mathews*, 29 Cal., 123; *Crosby v. Lyon*, 87 Cal., 242.

⁷ *People v. San Francisco, etc., R. Co.*, 35 Cal., 606.

⁸ *People v. Whyler*, 41 Cal., 351.

⁹ *Sacramento v. Crocker*, 16 Cal., 119.

¹⁰ *Ex parte Frank*, 52 Cal., 608.

credits are property, and must be taxed as such to the party owning them.¹ 7. That a state revenue law is not void for want of uniformity, because of the regulations of different counties as regards enforcing collection of delinquent taxes being different,² though it might be if it provided different rules for reaching the valuation of property owned by different classes, whereby substantial inequality was produced.³ 8. That an act has uniform operation in the constitutional sense if it operates uniformly throughout the municipality which alone is taxable under it.⁴ 9. That it is not incompetent, in providing for the relevy of a void tax, to provide for allowing sums paid thereon previously.⁵ 10. And that the requirement of taxation by value is satisfied by the ascertainment of the value as directed by law, even though it be done before the passage of the law for levying the tax.⁶

¹ *People v. McCreery*, 34 Cal., 432; *People v. Gerke*, 35 Cal., 677; *People v. Black Diamond Co.*, 37 Cal., 54; *People v. Whartenby*, 38 Cal., 461; *People v. Hibernia Bank*, 51 Cal., 243; *Bank of Mendocino v. Chalfant*, 51 Cal., 369.

The fact that the debt is secured by mortgage on land which is also taxable can make no difference. *People v. Eddy*, 43 Cal., 331. See *McCoppin v. McCartney*, 60 Cal., 367; *Kirtland v. Hotchkiss*, 100 U. S., 491. Compare *Lick v. Austin*, 43 Cal., 590; *Savings Society v. Austin*, 46 Cal., 415.

² *People v. Cent. Pac. R. Co.*, 43 Cal., 398.

³ *San Mateo Co. v. Railroad Co.*, 8 Sawy., 238; S. C., 13 Fed. Rep., 722.

⁴ *San Francisco v. Spring, etc., Works*, 54 Cal., 571.

⁵ *People v. Latham*, 52 Cal., 598.

⁶ *People v. Latham*, 52 Cal., 598. Further as to what is equal and uniform taxation, see *Beals v. Amador Co.*, 35 Cal., 624; *Chambers v. Satterlee*, 40 Cal., 497; *People v. Placerville, etc., R. Co.*, 34 Cal., 656; *Barton v. Kalloch*, 53 Cal., 95; *People v. Townsend*, 56 Cal., 633.

A constitutional provision allowing the taxation of railroad corporations without deducting from the value of their property the amount of any mortgage or lien thereon, although it practically permits the taxing of such corporations at a higher rate upon their property than is assessed upon the property of others, is not in conflict with the fourteenth amendment to the federal constitution. The provision therein, that a state shall not "deny to any person the equal protection of the laws," does not apply to corporations. *Central, etc., R. R. Co. v. Board of Equalization*, 60 Cal., 35; citing *Ins. Co. v. New Orleans*, 1 Woods, 85.

If a mortgage is not taxable when taken, the mortgagee has no vested right in the exemption, and it may be made taxable afterwards. *McCoppin v. McCartney*, 60 Cal., 367.

For a singular provision for the taxation of migratory herds of cattle, which was held void on grounds of inequality, see *People v. Townsend*, 56 Cal., 633.

Colorado. The constitution provides that "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax," etc. It forbids exemptions with the exception of certain which are specified. Under these provisions, a statute which relieves real estate in cities and villages from taxation for road purposes, and makes no provision for its taxation for street purposes, is unconstitutional.¹

Georgia. A provision that taxation of property shall be *ad valorem* only will preclude the taxation of animals by the head.² Income is not property within the meaning of this provision,³ nor is business; and occupations as such may be taxed.⁴ A provision that "all taxation shall be uniform on the same class of subjects to be taxed, within the territorial limits of the authority levying the tax," is not violated by taxing one kind of business or one occupation and not another; but the same tax must be levied on all members of the class taxed.⁵ Persons engaged in the same occupation, if not taxed alike, should be classified by some clear distinction in business, other than the amount or value of the business; or if the tax be scaled according to the amount or value, it should, to correspond with the sense and spirit of the constitution, be *ad valorem*.⁶ A city tax on common carriers who drive wagons, drays, etc., is lawfully apportioned according to the number of vehicles used by them respectively, and such apportionment is in accord with the uniformity rule of the constitution.⁷ *It seems* that the con-

¹ *Gunnison Co. v. Owen*, 7 Col., 487.

² *Livingston v. Albany*, 41 Ga., 21. Compare *Goodwin v. Savannah*, 53 Ga., 410.

³ *Waring v. Savannah*, 60 Ga., 93.

⁴ *Burch v. Savannah*, 42 Ga., 596; *Bohler v. Schneider*, 49 Ga., 195; *Home Ins. Co. v. Augusta*, 50 Ga., 580; *Rome v. McWilliams*, 52 Ga., 251; *Decker v. McGowan*, 59 Ga., 805.

⁵ *Cutliff v. Albany*, 60 Ga., 597.

⁶ *Johnston v. Macon*, 62 Ga., 645. The butcher and the milk seller do not fall within the same class, and the wagon of the former may be taxed while that of the other is not. *Davis v. Macon*, 64 Ga., 128. The farmer who sells his own meat from his wagon does not belong to the same class with the dealer who engages in the business of retailing meat. *Davis v. Macon*, *supra*. See *Burr v. Atlanta*, 64 Ga., 225; *Cutliff v. Albany*, 60 Ga., 597.

⁷ *Goodwin v. Savannah*, 53 Ga., 410. See *State v. Endom*, 23 La. An., 663.

stitutional requirement of *ad valorem taxation* means only that property of each species shall be taxed uniformly, and does not preclude the taxation of real and personal property at different rates.¹ A city may commute highway labor on the streets for a money payment.²

Illinois. The constitution prescribed that the "general assembly shall provide for levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his or her property." Also that "the corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes, such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same." As to these provisions it has been decided that they "were manifestly inserted in the fundamental law for the purpose of insuring equality in the levy and collection of the taxes to support the government, whether levied for state, county or municipal purposes. The design was to impose an equal proportion of these burthens upon all persons within the limits of the district or body imposing them. Under these provisions the legislature has no power to exempt or release a person or community of persons from their proportionate share of these burthens. Not having such power themselves, they are unable to delegate such power to these inferior bodies."³ These provisions preclude discrimination in favor of or against any classes of property or persons whatsoever, and therefore personalty or improvements in realty cannot be favored in taxation⁴ or the property of railroad companies disfavored.⁵ The provisions recited require the taxation

¹ *Waring v. Savannah*, 60 Ga., 93.

² *Johnston v. Macon*, 62 Ga., 645.

³ *Hunsaker v. Wright*, 30 Ill., 146, 148. See *Trustees v. McConnell*, 12 Ill., 138; *O'Kane v. Treat*, 25 Ill., 458; *Madison Co. v. People*, 58 Ill., 456; *Dunham v. Chicago*, 55 Ill., 357. Another provision authorized an exemption of property for schools, etc., as to which see *University v. People*, 99 U. S., 309; *People v. Soldiers' Home*, 95 Ill., 561.

⁴ *Primm v. Belleville*, 59 Ill., 142.

⁵ *Bureau Co. v. Railroad Co.*, 44 Ill., 229; *Chicago, etc., R. Co. v. Boone Co.*, 44 Ill., 240. See *Law v. People*, 87 Ill., 385. Uniformity would be destroyed if a municipal board without authority were to reduce a part of the assessments. *Sherlock v. Winnetka*, 68 Ill., 530.

of loans or any other credits, these being property as much as lands or chattels in possession;¹ they do not admit of residents in one part of a road district being exempted from taxes for the roads in another part;² nor of one class of counties being taxed a higher rate for state purposes than another class which happens to be more largely indebted for local purposes;³ nor of residents in a city being exempted from county taxes for roads and bridges because of their liability to street taxes.⁴ The constitution is not violated by license taxes if laid uniformly;⁵ and these taxes are only required to be uniform upon all who fall within the same class.⁶ Foreign and domestic insurance companies may be put in different classes and taxed differently,⁷ and the companies of a state which in its taxation discriminates as between its own and foreign companies may be made a class by themselves for corresponding taxation.⁸ Persons dealing in intoxicating drinks may be classified according to the kinds of drinks they sell;⁹ and gas-light companies may be classified separately from other manufacturing corporations.¹⁰ Railroad companies are also by the constitution allowed to be put in a class by themselves for taxation as the legislature shall deem best.¹¹ The constitution does not pre-

¹ *Trustees v. McConnell*, 12 Ill., 138; *People v. Worthington*, 21 Ill., 173.

² *O'Kane v. Treat*, 25 Ill., 458. The exemption was of residents within a municipal corporation from being taxed for roads beyond its limits but within the same road district. Compare *Pleasant v. Kost*, 29 Ill., 490, 494; *Madison County v. People*, 58 Ill., 456. And see *Allhands v. People*, 82 Ill., 234.

³ *Ramsey v. Hoeger*, 76 Ill., 476.

⁴ *Cooper v. Ash*, 76 Ill., 11. Compare *People v. Supervisors of Ulster*, 94 N. Y., 263.

⁵ See *Walker v. Springfield*, 94 Ill., 364; *Wiggins Ferry Co. v. East St. Louis*, 102 Ill., 562; *Braun v. Chicago*, 110 Ill., 186.

⁶ *Braun v. Chicago*, 110 Ill., 186.

⁷ *Hughes v. Cairo*, 92 Ill., 339. See *Ducat v. Chicago*, 48 Ill., 172; *Walker v. Springfield*, 94 Ill., 364; *Insurance Co. v. New Orleans*, 1 Woods, 85.

⁸ *Home Ins. Co. v. Swigert*, 104 Ill., 653. *Contra*, *Clark v. Mobile*, 67 Ala., 217.

⁹ *Timm v. Harrison*, 109 Ill., 593.

¹⁰ *Williams v. Rees*, 9 Biss., 405.

¹¹ See *Ramsey v. Hoeger*, 76 Ill., 432; *Porter v. Railroad Co.*, 76 Ill., 561; *Ottawa, etc., Co. v. McCalder*, 81 Ill., 556; *Pacific, etc., Co. v. Lieb*, 83 Ill., 602; *Chicago, etc., R. Co. v. Siders*, 88 Ill., 320; *State Railroad Tax Cases*, 92 U. S., 575.

clude the levy of poll taxes,¹ nor are its provisions violated by allowing parties to commute.²

License fees imposed under the police power do not come under the constitutional provisions referred to, and they may be graduated on other reasons than those of general uniformity.³ But equality among the class taxed is nevertheless to be kept in view.⁴

Indiana. The constitution provides that "the general assembly shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only for municipal, educational, literary, scientific, religious or charitable purposes as may be specially exempted by law." It also provides that "the general assembly shall not pass local or special laws" "for the assessment and collection of taxes for state, county, township or road purposes." Of these provisions it has been said, they "do not prohibit local taxation for objects in themselves local. They require a general, uniform levy for state purposes, but they do not forbid local taxation under general laws. Nor do we think they prohibit indirect taxation by way of licenses upon particular pursuits, etc. Such indirect taxation may be made effectual as a police regulation. The taxing, which is a part of the legislative power of the state, is supreme, except where limitations are imposed. Indirect taxation, by way of tariffs, etc., has ever been regarded a legitimate exercise of the taxing power, and we do not think a provision in the constitution requiring the general levy of direct taxes for state purposes to be upon a uniform assessment implies a prohibition of all other taxation. Such, at all events, is not the conventional force of its language."⁵

¹ *Sawyer v. Alton*, 4 Ill., 127.

² Ill. Cent. R. Co. v. McLean Co., 17 Ill., 291. See *State Bank v. People*, 5 Ill., 308; *Hunsaker v. Wright*, 30 Ill., 146; *Daughdrill v. Insurance Co.*, 31 Ala., 91; *Ide v. Finneran*, 29 Kan., 569.

³ See *East St. Louis v. Wehrung*, 46 Ill., 392; *Lovington v. Trustees*, 99 Ill., 564; *Timm v. Harrison*, 109 Ill., 593.

⁴ See *Braun v. Chicago*, 110 Ill., 186; *East St. Louis v. Wehrung*, 46 Ill., 392.

⁵ *Perkins, J.*, in *Anderson v. Kerns Draining Co.*, 14 Ind., 199, citing *La Fayette v. Jenners*, 10 Ind., 70, 75; *The Bank v. New Albany*, 11 Ind., 139;

Nor do these provisions require the rate of assessment to be equal for all purposes throughout the state, but only to be equal and uniform throughout the district for which the tax is levied.¹ In prescribing regulations "to secure a just valuation of all property," the legislature must exercise a discretion, and unless the method adopted be clearly inadequate to secure the result, the courts cannot interfere. A statute for the taxation of railroad property, which authorizes the assessors in estimating the value of the road to take into consideration its location for business, the competition of other roads, its earnings, etc., cannot therefore be held unconstitutional.² The legislature is not precluded by the constitution from making exemptions,³ but the exemptions must be by uniform rule; they cannot be made to apply to one class of cities and not to others,⁴ nor to one class of persons and not to others.⁵ A tax for a general purpose cannot be levied on one species of taxable property only, and therefore a levy of a specific tax on land by the acre for highway purposes without taxing personalty is void.⁶

Iowa. The constitution provides that "the property of all corporations for pecuniary profit, now existing or hereafter created, shall be subject to taxation the same as that of individuals." This provision would preclude exemptions of corpo-

Aurora v. West, 9 Ind., 74. To the same effect is *Bright v. McCullough*, 27 Ind., 223, in which the authorities are reviewed by *Elliott*, J. See *Loftin v. National Bank*, 85 Ind., 341.

¹ *Adamson v. Auditor of Warren County*, 9 Ind., 174; *Conwell v. O'Brien*, 11 Ind., 419; *Covington Drawbridge Co. v. Auditor of Warren County*, 14 Ind., 331; *Bright v. McCullough*, 27 Ind., 223; *Richmond v. Scott*, 48 Ind., 568; *Loftin v. National Bank*, 85 Ind., 341.

² *Louisville, etc., R. Co. v. State*, 25 Ind., 177.

³ *Bank of the State v. New Albany*, 11 Ind., 139. See *Connersville v. State Bank*, 16 Ind., 105; *King v. Madison*, 17 Ind., 48.

⁴ *McDougal v. Brazil*, 88 Ind., 211.

⁵ Exemptions made only to "a widow, unmarried female, or female minor whose father is deceased," held void. *State v. Indianapolis*, 69 Ind., 875; *Warner v. Curran*, 75 Ind., 809.

⁶ *Bright v. McCullough*, 27 Ind., 223. A statute providing that persons residing outside of a town, but sending their children to the town school, shall, with their property, be liable to a school tax as if they resided in the town, on all property owned by them in the township in which the school is located, is not in conflict with the constitutional requirement of uniform and equal taxation. *Kent v. Kentland*, 62 Ind., 291.

rate property from taxation, and consequently would require the court, in any doubtful case, to construe a revenue law as not intending such an exemption.¹ And where there is no power to make an exemption there is none to release a levy of taxes after it has been made.² In the case of railroad, express, telegraph and other similar property, it is not incompetent to provide for its assessment and valuation by a state board, and for the apportionment of the valuation among the municipalities for the purposes of local taxation; the law for the purpose making no distinction between such property as may be owned by individuals and that owned by corporations.³ The constitution does not require uniformity of methods of reaching property for taxation, nor does it render absolute equality imperative, and if it did it would be impossible of enforcement.⁴ It is not violated by taxing a corporation on its capital, and also taxing the shareholders on their shares.⁵

Kansas. The constitutional provision that "the legislature shall provide for a uniform and equal rate of assessment and taxation" is not violated by state assessment of railroads which extend into unorganized territory, even though other property in such territory, by reason of the want of county government and machinery, escapes taxation altogether.⁶ This provision aims at a certain end and not at the manner or mode of reaching that end; and the legislature may choose different methods for different kinds of property, but keeping in view

¹ *Iowa Homestead Co. v. Webster County*, 21 Ia., 221; *Dubuque, etc., R. Co. v. Webster Co.*, 21 Ia., 235.

² *Dubuque v. Illinois, etc., R. Co.*, 39 Ia., 56. The statute of Iowa exempts a homestead from taxation provided it is listed for taxation separate from other property. *Salter v. Burlington*, 42 Ia., 531.

³ *Dunlieth, etc., Bridge Co. v. Dubuque*, 32 Ia., 427; *Dubuque v. Chicago, etc., R. Co.*, 47 Ia., 196; *Express Co. v. Ellyson*, 28 Ia., 370.

⁴ *Dubuque v. Chicago, etc., R. Co.*, 47 Ia., 196; *Macklot v. Davenport*, 17 Ia., 379; *Warren v. Henly*, 31 Ia., 40.

It is competent to tax a railroad bridge separately from the railroad and on a different basis. *Union Pac. R. Co. v. Pottowatamie Co.*, 4 Dill., 497. See *Chicago, etc., R. Co. v. Sabrela*, 19 Fed. Rep., 177.

⁵ *Cook v. Burlington*, 59 Ia., 251.

⁶ *Francis v. Railroad Co.*, 19 Kan., 303. As to the right of a company so situated to such rebates as are allowed to tax payers generally, see *Atchison, etc., R. Co. v. Francis*, 23 Kan., 495.

the uniformity and equality of rate which the constitution requires.¹ Nor does the provision deprive the legislature of power to allow the levy of license taxes by its municipalities on insurance companies doing business therein.² Nor prevent the passage of a "compromise tax law" for the clearing up of arrearages, where delinquent taxes have accumulated beyond the ability of owners to pay or of the state to enforce.³ Nor deprive the legislature of power, when the boundary lines of towns are changed or new towns created, to make an adjustment as to pre-existing debts, and provide taxation for their payment.⁴

Kentucky. While taxes for general purposes should be assessed generally upon the subjects of taxation, yet when the benefits of a particular tax are restricted to one class of persons, a member of that class cannot be heard to object that those who are excluded from its benefits are not taxed also. Therefore, white persons taxed for schools which are open to white persons only, cannot object to the tax as unconstitutional, because of its not being laid upon colored persons also.⁵

¹ *Gulf Railroad Co. v. Morris*, 7 Kan., 210; *Ottawa Co. v. Nelson*, 19 Kan., 234.

² *Leavenworth v. Booth*, 15 Kan., 627.

³ *Ide v. Finneran*, 29 Kan., 569; *Daughdrill v. Insurance Co.*, 31 Ala., 91; *Ill. Cent. R. Co. v. McLean Co.*, 17 Ill., 291; *New Orleans v. Insurance Co.*, 31 La. An., 440.

⁴ *Ottawa Co. v. Nelson*, 19 Kan., 234. There is a general discussion in this case of the constitutional provision recited.

⁵ *Marshall v. Donovan*, 10 Bush, 681. The court, per *Lindsay, J.*, says: "As a general proposition, taxation to be constitutional must be as nearly as practicable equal and uniform. To that general rule, however, there are well recognized exceptions. When all are alike benefited by the taxation, the burden should be a common one; but when the benefits are special and peculiar, the contributions may be so laid as to exempt from taxation those persons who are by the law itself excluded from all participation in the advantages which are expected to arise from the system, institution or improvement to the establishment, construction or maintenance of which the money raised is to be appropriated."

The statute for this separate taxation was held void as opposed to the fourteenth amendment of the federal constitution, in *Claybrooke v. Owensboro*, 16 Fed. Rep., 297.

Louisiana. A provision that "taxation shall be equal and uniform throughout the state" applies only to state taxes.¹ It does not require that all property shall be taxed, but only that such as is fixed upon for the purposes of revenue shall be taxed with equality and uniformity; and, therefore, a revenue law is not invalid because of its excluding from its scope a moderate amount of household furniture or of income.² It will not preclude the legislature authorizing the taxation of callings, trades and professions, or from classifying these for the purposes of taxation, provided that all who fall within the same class are taxed alike.³ The legislature has a broad discretion in the matter of classification,⁴ and may make junk dealers a class by themselves,⁵ and also make foreign insurance companies a separate class for heavier taxation than is imposed on home companies.⁶ The legislature may also graduate license fees for entertainments by the population of towns within which they are given.⁷ But a city cannot impose a license tax for revenue under the police power on those bringing garden products of their own raising within it for sale.⁸ And the legislature cannot authorize a specific tax on property not of

¹ *Municipality v. Duncan*, 2 La. An., 182; *Louisiana v. Pillsbury*, 105 U. S., 278; *New Orleans v. Klein*, 26 La. An., 498.

² *New Orleans v. Fourchy*, 30 La. An., 910; *New Orleans v. Davidson*, 30 La. An., 554.

³ *Municipality v. Dubois*, 10 La. An., 56; *New Orleans v. The Bank*, 10 La. An., 735; *New Orleans v. Staiger*, 11 La. An., 68; *New Orleans v. South Bank*, 11 La. An., 41; *New Orleans v. Turpin*, 18 La. An., 56; *Merriman v. New Orleans*, 14 La. An., 318; *State v. Volkman*, 20 La. An., 585; *Hodgson v. New Orleans*, 21 La. An., 301; *New Orleans v. Home Ins. Co.*, 23 La. An., 449; *Boye v. Girardey*, 28 La. An., 717; *Walters v. Duke*, 31 La. An., 668; *Parish of Orleans v. Cochran*, 20 La. An., 373.

⁴ See *State v. Lathrop*, 10 La. An., 398; *Insurance Co. v. New Orleans*, 1 Woods, 85; *Sims v. Jackson*, 22 La. An., 440; *Wirtz v. Girardey*, 31 La. An., 381.

⁵ *New Orleans v. Kaufman*, 29 La. An., 283.

⁶ *Insurance Co. v. New Orleans*, 1 Woods, 85. See *Hughes v. Cairo*, 92 Ill., 339; *Home Ins. Co. v. Sweigert*, 104 Ill., 653.

⁷ *State v. O'Hara*, 36 La. An., 98. Whether they can tax dealers in proportion to extent of dealings, see *East Feliciana v. Gurth*, 26 La. An., 140. And compare *Gatlin v. Tarboro*, 78 N. C., 119; *Boye v. Girardey*, 28 La. An., 220.

⁸ *State v. Blaser*, 36 La. An., 363.

uniform value, as of cotton by the pound,¹ nor, it seems, on drays, wagons, etc., proportioned to the number of animals drawing them.²

Under constitutional provisions that "all property shall be taxed in proportion to its value, to be ascertained as directed by law," and that "the general assembly shall have power to exempt from taxation property actually used for church, school and charitable purposes," it is not within the power of the legislature to provide that upon the payment of \$100 per annum to the state, and a like sum to the city or municipality, every cotton or woollen mill then running or put in operation within a specified time should be exempt from further taxation. An act to that effect would either be an act for specific taxation irrespective of valuation, or an act for exemption, and in either case would be invalid.³

¹*Sims v. Jackson*, 22 La. An., 440. See *Livingston v. Albany*, 41 Ga., 21.

²*State v. Endom*, 23 La. An., 663. See *Goodwin v. Savannah*, 53 Ga., 410.

³*Louisiana Cotton Manuf. Co. v. New Orleans*, 81 La. An., 440. Such an act cannot be sustained as an act for the commutation of taxes. The power to commute is forbidden in denying the power to exempt. *New Orleans v. Insurance Co.*, 28 La. An., 756; *New Orleans v. St. Charles, etc., Co.*, 28 La. An., 498; *New Orleans v. Sugar Shed Co.*, 35 La. An., 548. But it seems to be competent to provide that the payment of a specified sum annually shall be in lieu of any license tax. *Louisiana Lottery Co. v. New Orleans*, 24 La. An., 86. Where an unauthorized exemption is made to a water supply company the company is entitled to relief in respect to the consideration that was to be made for it. *New Orleans v. Water Works Co.*, 86 La. An., 432. An exemption of traders in goods of domestic manufacture from municipal license taxes was sustained in *New Orleans v. Dunbar*, 28 La. An., 722.

A partial exemption from taxation by a corporate charter before the constitution was adopted is not affected by it. *Citizens' Bank v. Bouny*, 82 La. An., 239; *New Orleans v. Canal & Nav. Co.*, 86 La. An., 396.

As to the construction of an exemption of property of an orphan asylum, see *New Orleans v. Orphan Asylum*, 83 La. An., 850. Of an exemption of property employed in manufacture of articles of wood, *New Orleans v. Le Blanc*, 84 La. An., 596; *Jones v. Raines*, 85 La. An., 996. And as to exemptions in general under the constitution, see *New Orleans v. Canal Bank*, 32 La. An., 104; *New Orleans v. National Bank*, 34 La. An., 892; *Morrison v. Larkin*, 26 La. An., 699; *New Orleans v. Insurance Co.*, 27 La. An., 519; *New Orleans v. Savings Co.*, 31 La. An., 826; *State v. Savings Co.*, 32 La. An., 1136.

The constitution does not forbid special assessments by benefits.¹

Maine. The constitutional provision that "all taxes upon real and personal estate assessed by authority of this state shall be apportioned and assessed equally, according to the just value thereof," will not preclude the legislature empowering the city of Portland to exempt a water company from taxation for a term of years in consideration of its supplying the city with water free of cost.² But with this provision in force, it is not competent for the legislature to empower the municipal corporations of the state to exempt the property of manufacturing companies from taxation,³ or to authorize the levy of a tax for a general purpose upon a part only of the property within the municipality which levies it.⁴ A tax on a telegraph company of a percentage on the value of its line within the state, including poles, wires, instruments, etc., is not in violation of this provision; it being a tax not upon property, but on its use or on business of the company.⁵

Maryland. The constitution ordains that "the county commissioners shall exercise such powers and duties only as the legislature may from time to time prescribe; but such powers and duties and the tenure of office shall be uniform throughout the state." Where the legislature made provision by law for the levy of a tax, by the county commissioners of a single county, for the support of public schools therein, the objection to this legislation, that it gave powers to and imposed duties on the commissioners of that county which were peculiar and exceptional, was held not to be well taken. It was not the purpose of the constitution that all local regulations should be the same in all parts of the state, or that every locality should levy taxes for the same objects, and no others, or that the county com-

¹ *Yeatman v. Crandall*, 11 La. An., 220.

² *Portland v. Water Company*, 67 Me., 135.

³ *Brewer Brick Co. v. Brewer*, 62 Me., 62. See *Farnsworth Co. v. Lisbon*, 62 Me., 451.

⁴ *Dyar v. Farmington*, 70 Me., 515. The tax was in aid of a railroad, and was to be levied on the property of a village constituting part of a town.

⁵ *State v. Western Union, etc., Co.*, 78 Me., 518.

missioners should exercise their uniform powers on precisely the same subjects. And this legislation was not to be regarded as giving exceptional authority, but as requiring a special exercise, in one county, of the uniform power to tax which the commissioners possessed in all the counties.¹

The bill of rights declares that "Every person in the state or person holding property therein ought to contribute his proportion of public taxes for the support of the government according to his actual worth in real or personal property." It is not competent for the legislature, with this declaration in force, to levy on coal mining companies a specific tax of so much per ton on all coal transported by them for sale, and make this in lieu of all other taxation.² But railroad companies may be taxed upon their gross receipts; such a tax being upon the franchise, and not upon property.³ Corporate franchises, however, are protected by the constitution as property from unequal or excessive taxation.⁴

Massachusetts. The constitutional provision that the legislature shall only impose proportional and reasonable taxes is not violated by permitting a town, in which a state agricultural college is located, to levy a tax to pay an exceptional portion of the cost of erecting buildings for such college.⁵ Neither is it violated by laying an excise tax on life insurance companies doing business in the commonwealth, proportioned to the aggregate net value of policies in force.⁶ But the provision is violated if taxes are imposed upon one class of persons or property at a different rate from that which is applied to other classes, whether the discrimination is effected directly in the assessment, or indirectly through arbitrary and unequal methods of valuation. It is therefore incompetent to provide for the assessment of the reservoirs and dams of a water company

¹ *Commissioners of Schools v. Allegany Cc.*, 20 Md., 449.

² *State v. Cumberland, etc.*, R. Co., 40 Md., 22, three judges dissenting.

³ *State v. Philadelphia, etc.*, R. Co., 45 Md., 361; *State v. Northern Cent. R. Co.*, 44 Md., 131.

⁴ *State v. Balt. & O. R. Co.*, 48 Md., 49.

⁵ *Merrick v. Amherst*, 12 Allen, 498.

⁶ *Conn. Mut. Life Ins. Co. v. Commonwealth*, 133 Mass., 161.

on a basis which would only take its land into account, irrespective of the improvements upon it.¹

Michigan. The provision that "the legislature shall provide a uniform rule of taxation, except on property paying specific taxes, and taxes shall be levied on such property as shall be prescribed by law," is inoperative until some new rule in conformity with the requirement is provided by the legislature.² And neither that nor the provision that "all assessments hereafter authorized shall be on property at its cash value," precludes a taxation of business as such, although the property employed in the business is also taxed,³ nor preclude as a police regulation the taxation of dogs.⁴ Water rates are not taxes, but a levy for laying water pipes in a street is a tax, and must be apportioned as such.⁵

Minnesota. The constitution provides that "all property on which taxes are to be levied shall have a cash valuation, and be equalized and uniform throughout the state." It is not competent where equality and uniformity are required to impose a tax exclusively upon one subdivision of the state to pay a claim or indebtedness which is not peculiarly the debt of such subdivision, or to raise money for any purpose not peculiarly beneficial to such subdivision.⁶ The provision that "all

¹ *Cheshire v. County Commissioners*, 118 Mass., 386, citing *Portland Bank v. Apthorp*, 12 Mass., 252; *Commonwealth v. Savings Bank*, 5 Allen, 428; *Commonwealth v. Hamilton Manuf. Co.*, 12 Allen, 298; *Fall River v. County Commissioners*, 125 Mass., 507.

² *Williams v. Detroit*, 2 Mich., 560. So a constitutional provision that "the legislature may by law authorize the corporate authorities of cities, towns and villages for corporate purposes to assess and collect taxes; but such taxes shall be uniform with respect to persons and property within the jurisdiction of the authority imposing the same," must be understood to be prospective in operation, and it will not of its own force repeal a law in existence at its adoption. *Douglass v. Harrisville*, 9 W. Va., 162. See *Lehigh Iron Co. v. Lower Macungie*, 81 Pa. St., 482.

³ *Walcott v. People*, 17 Mich., 68; *Kitson v. Ann Arbor*, 26 Mich., 335.

⁴ *Van Horn v. People*, 46 Mich., 346.

⁵ *Jones v. Water Commissioners*, 34 Mich., 273.

⁶ *Sanborn v. Rice*, 9 Minn., 258. That the provision would preclude penalties for failure to list property for taxation, see *McCormick v. Fitch*, 14 Minn., 252.

taxes raised in this state shall be as nearly equal as may be" will not preclude the customary poll taxes and exemptions in respect to them.¹

Mississippi. The constitutional provision that "the property of all corporations for pecuniary profits shall be subject to taxation the same as that of individuals," while it does not require all such property to be actually taxed, requires that it shall be kept taxable, and contracts of exemption are not admissible.² The provision that "taxation shall be equal and uniform throughout the state. All property shall be taxed in proportion to its value, to be ascertained as directed by law," does not make it obligatory to tax everything, or deprive the legislature of the power to make exemptions.³ A docket fee imposed in a single judicial district only is void for want of equality and uniformity.⁴

The constitution does not preclude local assessments for local works, such as the construction of levees⁵ or the improvement of streets.⁶

Missouri. A constitutional requirement that taxation shall be uniform, and shall be levied on property in proportion to its value, is not violated by the taxation of income and salaries. The purpose of it is to make the burdens of government rest on all property alike; to forbid favoritism and prevent inequality. Outside of this constitutional restriction the legislature must be the sole judge of the propriety of taxation, and define the sources of revenue as the exigencies of the occasion may require.⁷ And the customary license fees may be imposed if it is done ratably.⁸ A municipal corporation can only tax

¹ *Faribault v. Misener*, 20 Minn., 396. As to equality in taxation, see further, *Comer v. Folsom*, 13 Minn., 219.

² *Mississippi Mills v. Cook*, 56 Miss., 40.

³ *Mississippi Mills v. Cook*, 56 Miss., 40.

⁴ *Murray v. Lehman*, 61 Miss., 283.

⁵ *Williams v. Cammack*, 27 Miss., 209.

⁶ *Smith v. Aberdeen*, 25 Miss., 453.

⁷ *Glasgow v. Rouse*, 43 Mo., 479.

⁸ See *Glasgow v. Rouse*, 43 Mo., 479; *St. Louis v. Green*, 7 Mo. Ap., 463.

within its own limits,¹ and its taxation must be uniform as respects the subjects of taxation within it.²

Nebraska. A constitutional provision that "The legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property, the value to be ascertained in such manner as the legislature shall direct, and it shall have power to tax peddlers, auctioneers, brokers, hawkers, commission merchants, showmen, jugglers, inn-keepers, liquor dealers, toll bridges, ferries, insurance, telegraph and express interests or business, and venders of patents, in such manner as it shall direct by general law uniform as to the class upon which it operates," will not preclude the taxation of other subjects than those specified; and a tax upon parties in respect of the commencement of a suit is not unconstitutional.³ It is not incompetent to exempt the capital stock of a corporation from taxation when it is all invested in real estate,⁴ and a statute authorizing a road tax not exceeding \$4 to the acre, to be paid in labor at option, is not void on grounds of inequality because of not providing for the tax being assessed against city lots and other property.⁵

The requirement of equality in respect to local taxes is complied with if duly observed as to each jurisdiction for whose use the particular taxes are laid.⁶

New Hampshire. By the constitution the legislature is given power "to impose and levy proportional and reasonable assessments, rates and taxes upon all the inhabitants and residents within the said state, and upon the estates within the same, to

¹ *Wells v. Weston*, 22 Mo., 384.

² *Adams v. Lindell*, 5 Mo. Ap., 197. See *Am. Un. Exp. Co. v. St. Joseph*, 66 Mo., 675. And as to equality of taxation in general, see *State v. Hannibal*, etc., R. Co., 75 Mo., 208.

³ *State v. County Com'rs*, 4 Neb., 537.

⁴ *Mortensen v. West Point Manuf. Co.*, 12 Neb., 197.

⁵ *Burlington, etc., Co. v. Lancaster Co.*, 4 Neb., 293. Compare *Gunnison v. Owen*, 7 Col., 467.

⁶ *Pleuler v. State*, 11 Neb., 547. See, further, *Miller v. Hurford*, 11 Neb., 377; *Same v. Same*, 13 Neb., 13.

be issued and disposed of," etc. Under this provision equality and justice are the basis of all constitutional taxation, and a statute founded on any other principle cannot be upheld. Therefore a tax of two per cent. on the gross receipts of express companies doing business upon railroads, or in lieu thereof of \$5 per mile for the number of miles of railroad over which the business is done—thus impliedly excepting from its scope the business not done upon railroads—is not valid, because not founded in equality and justice.¹

New Jersey. A law for the taxation of property generally and equally, but which provides that a mortgage or debt secured thereby shall not be taxed in any case unless a deduction therefor is claimed by the owner of the land and allowed by the assessor, and that when taxed it shall be in the township or city where the mortgaged premises are situated, is not in violation of the constitutional provision that "property shall be assessed for taxes under general laws and by uniform rules, according to its true value."² The same provision "does not require all property to be taxed. It leaves the legislative power of selecting the subjects of taxation as untrammelled as ever it was." And it is not infringed by the taxation of bank shares when shares in other corporations are exempted, nor by the fact that the shares are rated differently in different townships, unless the different rating comes from some system of valuation designed to produce it.³ But the provision is fatal to a conflicting provision in a special tax law for one of its municipalities.⁴

Nevada. A constitutional provision for the taxation of property by value does not exclude privilege taxes.⁵

North Carolina. The constitution requires township officers to assess all taxable property within their townships respect-

¹State v. U. S. and Canada Express Co., 60 N. H., 219.

²State v. Bunyon, 41 N. J., 98.

³Stratton v. Collins, 43 N. J., 562. See Trustees of Schools v. Trenton, 30 N. J. Eq., 667.

⁴State v. Newark, 40 N. J., 558. The case is summarily disposed of without discussion or citation of authorities.

⁵Robinson, *Ex parte*, 12 Nev., 263.

ively. Under this provision they may tax the land of a railroad company, even though the state authorities, in taxing the franchise of the company, have taken the land into account.¹ The provision that "all taxes levied by any county, town or township shall be uniform and *ad valorem* upon all property in the same, except property exempted by this constitution," overrules a conflicting provision in a city charter, and taxes must be levied on real as well as personal property.²

The omission of the stock in trade of merchants from taxation, when real estate is taxed, cannot be defended by showing that, in another way, merchants are taxed to make up the deficiency. It is not for the city authorities to substitute their judgment for the obligatory requirement.³ Solvent credits and stocks may be taxed under this provision, but must be taxed *ad valorem*.⁴ A tax on traders may be proportioned to the sales during the preceding quarter of the year, and it may be different on wholesale to what it is on retail dealers, or on persons in different kinds of business; it being required only that the taxation shall be uniform as to all subjects in the same class.⁵ But it is not competent to tax some railroad companies upon gross receipts and others upon capital stock, since this cannot be uniform.⁶ It is not competent to levy retroactive taxes.⁷

The constitution by another provision declares that taxes levied by county commissioners shall never exceed twice the

¹ *Wilmington, etc., R. R. Co. v. Brunswick County*, 72 N. C., 10. See *Bridge Co. v. New Hanover County*, 72 N. C., 15; *Richmond, etc., R. Co. v. Orange County*, 74 N. C., 506; *Same v. Brogden*, 74 N. C., 707. That the assessment cannot be made by city authorities, see *Carolina Cent. R. Co. v. Wilmington*, 72 N. C., 73; *Cobb v. Elizabeth City*, 75 N. C., 1.

² *Cobb v. Elizabeth City*, 75 N. C., 1. See *Young v. Henderson*, 76 N. C., 420.

³ *London v. Wilmington*, 78 N. C., 109.

⁴ *Wilson v. Charlotte*, 74 N. C., 748. A tax of \$1 on a party to any civil suit is not forbidden by this provision. *Hewlett v. Nutt*, 79 N. C., 263. Merchants may be taxed in proportion to their sales. *Gatlin v. Tarboro*, 78 N. C., 119. For cases of peculiar charter contracts, see *Richmond, etc., R. Co. v. Orange County*, 74 N. C., 506; *Same v. Brogden*, 74 N. C., 707; *North Car. R. R. Co. v. Alamance*, 77 N. C., 4.

⁵ *Gatlin v. Tarboro*, 78 N. C., 119. See *Worth v. Petersburg, etc., R. Co.*, 89 N. C., 301.

⁶ *Worth v. Wilmington, etc., R. Co.*, 89 N. C., 291.

⁷ *Young v. Henderson*, 76 N. C., 420.

amount of the state levy except for special purposes and with the special approval of the general assembly. A bridge tax for specified bridges is a special purpose within this provision.¹ The requirement of uniformity in taxation applies to local taxes as well as to others,² but special assessments by benefits are not forbidden.³

Ohio. The constitution provides that "laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint stock companies or otherwise, and also all real and personal property according to its true value in money; but burying grounds, public school-houses, houses used exclusively for public worship, institutions of purely public charity, public property used exclusively for any public purpose, and personal property to an amount not exceeding in value \$200 for each individual, may, by general laws, be exempted from taxation," etc. This provision renders it imperative that all the property of which exemption is not permitted by it shall be taxed, and precludes any other exemptions than those indicated.⁴ It also precludes the debts of the tax payer being deducted from the value of his property, this being inconsistent with the requirement that *all* property shall be taxed.⁵ But it does not preclude the taxation of business as such, the licensing of stores, etc.⁶

The constitution furnishes the rule for local as well as general taxation,⁷ and it forbids commutations for taxes, equally with direct exemptions.⁸ But the privilege of a foreign cor-

¹ *Brodnax v. Groom*, 64 N. C., 244.

² *French v. Wilmington*, 75 N. C., 477; *Weinstein v. Newbern*, 71 N. C., 335; *Cobb v. Elizabeth City*, 75 N. C., 1; *Young v. Henderson*, 76 N. C., 420.

³ *Cain v. Commissioners*, 86 N. C., 8, a fence case. See *Simpson v. Commissioners*, 84 N. C., 158.

⁴ *Zanesville v. Richards*, 5 Ohio St., 590. See *Hill v. Higdon*, 5 Ohio St., 243; *West. U. Tel. Co. v. Mayer*, 28 Ohio St., 521; *Fields v. Commissioners*, 36 Ohio St., 476.

⁵ *Bank of Columbus v. Hines*, 3 Ohio St., 1. But see *Wetmore v. Multnomah Co.*, 6 Or., 463. Obligations for the payment of money are property, and must be taxed. *Ibid.*

⁶ *Baker v. Cincinnati*, 11 Ohio St., 534.

⁷ *Zanesville v. Richards*, 5 Ohio St., 590.

⁸ *Zanesville v. Richards*, 5 Ohio St., 590. See *Fields v. Commissioners*, 36 Ohio St., 476; *New Orleans v. Insurance Co.*, 28 La. An., 756; *Louisiana*

poration to do business in the state is not property, and such corporation may be assessed for taxation by such other standard than an estimate of property by value as the legislature may prescribe.¹

Oregon. The meaning of the constitutional provision that taxes shall be uniform is, that each tax must be uniform through the taxing district; a state tax through the state, a county tax through the county, etc.² Allowing an assessed valuation to be reduced by deductions for the owner's indebtedness does not operate to render taxation unconstitutional as being unequal.³

Pennsylvania. The constitutional provision that "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax," does not require that the real estate of railroad companies should be taxed as such, or preclude the companies being taxed upon their franchises instead of upon their property as such.⁴ An act taxing coal companies according to the quantity of coal mined is a tax on the franchise, and valid as such;⁵ and this and similar acts, in force when the constitution was adopted, are not repealed by the constitutional provision that all taxes "shall be levied and collected under general laws," which is mandatory to the legislature, but otherwise inoperative until the legislature takes action under it.⁶ The provision that "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax" does not preclude the legislature from classifying a part of the lands in a city as "rural," and assessing them at a lower rate

Cotton Manuf. Co. v. New Orleans, 31 La. An., 440; *Louisiana Lottery Co. v. New Orleans*, 24 La. An., 86; *Id. v. Finneran*, 29 Kan., 569; *Ill. Cent. R. Co. v. McLean Co.*, 17 Ill., 291; *Daughdrill v. Insurance Co.*, 31 Ala., 91.

¹ *West. U. Tel. Co. v. Mayer*, 28 Ohio St., 521.

² *East Portland v. Multnomah County*, 6 Or., 62.

³ *Wetmore v. Multnomah County*, 6 Or., 463. See *Bank of Columbus v. Hines*, 3 Ohio St., 1.

⁴ *Northampton County v. Lehigh Coal, etc., Co.*, 75 Pa. St., 461.

⁵ *Kittanning Coal Co. v. Commonwealth*, 79 Pa. St., 100.

⁶ *Lehigh Iron Co. v. Lower Macungie*, 81 Pa. St., 482. See, for similar rulings, *Indiana County v. Agricultural Society*, 85 Pa. St., 357; *Coatesville Gas Co. v. Chester County*, 97 Pa. St., 476.

than other lands in the city.¹ Nor will it prevent foreign and domestic corporations being classified separately for purposes of taxation.²

South Carolina. Under the provisions of the constitution for the uniform assessment of property by value, an act of legislation which provides that every railroad shall pay a tax to the county, for the use of the state, in proportion to the length of its track, is void because not laid on property in proportion to value.³ The requirement that municipal taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same is not violated by the taxation of business as such, nor by the classification of different kinds of business for different taxation,—no personal distinctions being made.⁴

Tennessee. A constitutional provision that “all property shall be taxed according to its value,” and that “no one species of property from which a tax may be collected shall be taxed higher than any species of property of equal value,” has no reference to the taxation of *privileges*, and such taxation is in the discretion of the legislature. It is therefore competent to authorize a town to levy license taxes on the various occupations carried on therein.⁵ The provision applies to local as well as to general levies,⁶ and forbids exemptions except as the constitution in express terms allows them,⁷ and for the purposes of local taxation it will preclude a railroad being assessed as an entirety, and the valuation apportioned among the municipalities in proportion to the length of road within them.⁸

¹ Roup's Case, 81½ Pa. St., 211.

² Germania L. Ins. Co. v. Commonwealth, 85 Pa. St., 518. As to equality of taxation in general, see Weber v. Reinhardt, 73 Pa. St., 370.

³ State v. Railroad Corporations, 4 S. C., 376.

⁴ State v. Columbia, 6 S. C., 1.

⁵ Adams v. Somerville, 2 Head, 363; State v. Crawford, 2 Head, 460. See State v. Schlier, 3 Heisk., 281; Apperson v. Memphis, 2 Flip., 363.

⁶ Taylor v. Chandler, 9 Heisk., 349.

⁷ Louisville, etc., R. Co. v. State, 8 Heisk., 663; Chattanooga v. Railroad Co., 7 Lea, 561.

⁸ Chattanooga v. Railroad Co., 7 Lea, 561, overruling Louisville, etc., R. Co. v. State, 8 Heisk., 663, in this particular.

Texas. The constitutional provision that "taxation shall be equal and uniform throughout the state" is not violated by a statute for the levy of special local assessments;¹ nor by graduating a tax on business by the population of the town in which the business is carried on,² or according to the business done.³

Virginia. The requirement that taxation shall be equal and uniform does not preclude the state from authorizing a county to levy a tax on a county office,⁴ nor does it require the license taxes on privileges or occupations to be equal or uniform as between different occupations,⁵ though they must be as between those following the same occupation.⁶ The constitution is not violated by allowing a city to tax for a railroad purpose the property within half a mile of the city limits.⁷

West Virginia. Under constitutional provisions that all property, both real and personal, shall be taxed, "but property used for educational, literary, scientific, religious or charitable purposes, and public property, may by law be exempted from taxation," it is not within the power of the legislature to exempt the property of a railroad corporation from taxation, and an exemption until the profits of the corporation shall reach a certain percentage is void.⁸ The provision that taxation shall be equal and uniform throughout the state, and that all property, real and personal, shall be taxed in proportion to

¹ Roundtree v. Galveston, 42 Tex., 612.

² Texas Banking, etc., Co. v. State, 42 Tex., 636; Blessing v. Galveston, 42 Tex., 641.

³ West. U. Tel. Co. v. State, 55 Tex., 814.

⁴ Gilkerson v. Frederick Justices, 18 Grat., 577. See, also, Gordon's Executor v. Baltimore, 5 Gill, 281. Compare Camden & Amboy R. R. Co. v. Hillegas, 18 N. J., 11; Same v. Commissioners of Appeals, 18 N. J., 71, and Gardner v. State, 21 N. J., 557, in which a provision in a charter that the corporation should pay a certain tax, "and no other tax or impost shall be levied or assessed" upon it, was held to apply to county and town taxes, as well as those imposed for state purposes.

⁵ Slaughter v. Commonwealth, 13 Grat., 767.

⁶ Ex parte Thornton, 4 Hughes, 220. See, for some discussion of the constitutional provision, Va. & Tenn. R. Co. v. Washington Co., 80 Grat., 471.

⁷ Langhorne v. Robinson, 20 Grat., 661.

⁸ Chesapeake & O. Co. v. Miller, 19 W. Va., 408.

value," has no application to local assessments.¹ Insurance companies cannot be made a special class by themselves for the purposes of taxation, and taxed differently from other corporations.²

Wisconsin. The constitutional provision that "the rule of taxation shall be uniform" extends to taxation by cities, towns and counties, as well as that levied by the state.³ It does not preclude license taxes under the police power.⁴ And the state having for a long period been in the practice of collecting specific taxes from corporations in lieu of the taxes on property levied generally, it was decided, but against the opinion of the judges as to what the rule should be, that such specific taxes were not in violation of the constitutional requirement of uniformity.⁵ The provision is not violated by an act which exempts from taxation for a term of years the lands which have been granted in aid of public improvements, or by an extension of such exemption for a further term thereafter.⁶ Nor is it violated by permitting real and personal estate to be assessed as of different days.⁷ But it is necessary under this provision that all kinds of property not absolutely exempt shall be taxed alike, by the same standard of valuation, equally with other taxable property, and co-extensive with the district; and therefore the levy of a tax for a public improvement which is restricted to real estate is unconstitutional and void.⁸

¹ *Douglass v. Harrisville*, 9 W. Va., 162.

² *Franklin Ins. Co. v. State*, 5 W. Va., 849. *Contra*, *Insurance Co. v. New Orleans*, 1 Woods, 85; *Hughes v. Cairo*, 92 Ill., 339, and many other cases.

³ *Knowlton v. Supervisors of Rock Co.*, 9 Wis., 410; *Hale v. Kenosha*, 29 Wis., 599; *Gilman v. Sheboygan*, 2 Black, 610.

⁴ *Carter v. Dow*, 16 Wis., 298 (dog license); *Tenney v. Lenz*, 16 Wis., 566; *Fire Department v. Helfenstein*, 16 Wis., 136.

⁵ *Kneeland v. Milwaukee*, 15 Wis., 454, overruling *Attorney-General v. Plankroad Co.*, 11 Wis., 85.

⁶ *Wisconsin Cent. R. Co. v. Taylor Co.*, 52 Wis., 37. There is a very full discussion of the subject in the light of previous Wisconsin decisions in this case.

⁷ *Wisconsin Cent. R. Co. v. Lincoln Co.*, 57 Wis., 137.

⁸ *Gilman v. Sheboygan*, 2 Black, 610. See *Kittle v. Shervin*, 11 Neb., 65; *Waring v. Savannah*, 60 Ga., 93. In *Winter v. Montgomery*, 65 Ala., 403, the levy of a tax to pay railroad aid bonds on real estate exclusively was held to be an irregularity merely, which the parties concerned ought to have

The rule of taxation must be uniform within the district for which the tax is laid;¹ but the constitutional requirement of uniformity may be violated as well by evasion or disregard of duty on the part of officers as otherwise; and if this occurs to an extent that defeats general equality and uniformity in the assessment, it cannot become the foundation for a valid tax.²

The general right to make exemptions. Having now given some of the constitutional provisions which have a bearing upon exemptions, we proceed to consider the rule on that subject when the constitution is silent, or at least has failed to cover the subject fully.

The general rule on the subject is familiar, and has been too often declared to be open to question. The right to make exemptions is involved in the right to select the subjects of taxation and apportion the public burdens among them, and must consequently be understood to exist in the law-making power wherever it has not in terms been taken away.³ To some extent it must exist always; for the selection of subjects of taxation is of itself an exemption of what is not selected; but the power to exempt even from among such subjects is more likely to be restricted than to be altogether prohibited. Pertaining as it does to the sovereign power to tax, the inferior municipalities of a state are not possessed of it, and they cannot therefore make exemptions except as expressly authorized by the state.⁴ And it would obviously not be within the compe-

had corrected by *mandamus* if necessary, and that they were not entitled, after paying the tax, to sue and recover back. The query is suggested, whether, under statutory authority to levy the tax on real and personal estate, the city might not legally confine the levy to one species of property.

¹ Wis. Cent. R. Co. v. Taylor Co., 52 Wis., 37.

² Marsh v. Supervisors, 42 Wis., 502. See Wis. Cent. R. Co. v. Taylor Co., 52 Wis., 37.

³ Butler's Appeal, 73 Pa. St., 448. See People v. Colman, 4 Cal., 46; State v. North, 27 Mo., 464; Hill v. Higdon, 5 Ohio St., 243; State v. Parker, 33 N. J., 312; Indianapolis v. Sturdevant, 24 Ind., 391; Wells v. Central Vt. R. Co., 14 Blatch., 426; Scotland County v. Railroad Co., 65 Mo., 123; Probasco v. Moundsville, 11 W. Va., 501; Williamson v. Massey, 83 Grat., 237; Savings Bank v. Rutland, 52 Vt., 463; Wis. Cent. R. Co. v. Taylor County, 52 Wis., 37.

⁴ State v. Hannibal & St. J. R. Co., 75 Mo., 209; State v. Gracey, 11 Nev., 223. Authority to commissioners of taxes and assessments to remit or reduce taxes does not empower to make exemptions. They can remit no tax

tency of legislation to confer a general power to make exemptions, since this would be nothing short of a general power to establish inequality.¹ Exemptions when properly made must be determined in the legislative discretion; but even this is not untrammelled; it is not an arbitrary discretion, and there must underlie its exercise some principle of public policy which can support a presumption that the public interest will be subserved by the exemptions which are allowed.

Customary Exemptions. Some of the customary exemptions are in themselves so reasonable that they readily receive universal assent as proper and politic. Such are the exemptions of household furniture, tools of trade, etc., to a moderate amount,² and of the personal property of those who by reason of age, infirmity or poverty are unable to contribute to the public burdens.³ Sometimes a homestead of limited value is exempted.⁴ For the encouragement of manufactures, exemptions have also been made in some cases, but on very doubtful grounds.⁵

except for legal cause. They cannot therefore remit the tax on a medical college and hospital which is not exempt by law. *People v. Campbell*, 93 N. Y., 196. In Georgia municipalities are held to possess the power to make exemptions. The point is not reasoned. *Athens v. Long*, 54 Ga., 330; *Waring v. Savannah*, 60 Ga., 93. See *Cutliff v. Albany*, 60 Ga., 597. A city, it seems, may make an exemption from taxation a part of the consideration for a water company supplying it with water. *Grant v. Davenport*, 36 Ia., 396. *Contra*, *New Orleans v. Water Works Co.*, 36 La. An., 432. See *Nebraska City v. Gas Light Co.*, 9 Neb., 339.

¹*Brewer Brick Co. v. Brewer*, 62 Me., 62; *Farnsworth v. Lisbon*, 62 Me., 451. The legislature cannot confer a general power to remit taxes upon a board of supervisors; this being equivalent to a general power to make exemptions. *Wilson v. Supervisors of Sutter*, 47 Cal., 91. See *Dubuque v. Illinois, etc., R. Co.*, 39 Ia., 56; *New Orleans v. Sugar Shed Co.*, 35 La. An., 548; *Zanesville v. Richards*, 5 Ohio St., 590.

²See *Smith v. Osburn*, 53 Ia., 474.

³When officers have power by law to make exemptions in special cases, if they refuse to make one, the party concerned is without remedy unless an appeal is given by law. *Clinton School District's Appeal*, 56 Pa. St., 315. Such a power is only admissible where an examination into facts is essential in order to determine whether the case is within the general rule of exemption prescribed by law. See *Brewer Brick Co. v. Brewer*, 62 Me., 62.

⁴When it is, the sale of the tract which includes the homestead is void. *Penn v. Clemans*, 19 Ia., 372; *Stewart v. Corbin*, 25 Ia., 144. See *Oliver v. White*, 18 S. C., 235, for construction of a homestead exemption.

⁵See *Gardiner, etc., Co. v. Gardiner*, 5 Me., 133; *Columbian, etc., Co. v. Vanderpoel*, 4 Cow., 556; *Jones v. Raines*, 35 La. An., 996; *State v. Assess-*

Charitable Organizations. It is also customary to exempt from taxation the property of charitable corporations and associations, so far as it is actually made use of for charitable purposes. This is upon the ground that they perform service for the public, and to some extent, at least, relieve the state from expense. The question, what is to be regarded as a charitable organization within the meaning of a statute making exemptions, is sometimes one of much difficulty, and it has been discussed in numerous cases which are referred to in the margin.¹

Schools. School property, and all actually devoted to the business of public instruction, is also commonly exempted, though held and owned by private corporations or individuals. Sometimes the exemption is general, and sometimes it is restricted to some particular class of schools.² If the exemption is only of property used for school purposes, it will not apply to property merely held for revenue.³

Libraries. Where the advantages of a library are offered to the public, it is common to exempt it from taxation, and the property also which is held for its purposes.⁴

Church Property. The property owned by religious societies, and made use of for the purposes of public worship, is also commonly exempted; the exemption being made uniform

ors, 36 La. An., 847; *New Orleans v. Arthurs*, 36 La. An., 98. Exemptions to encourage the planting of trees are sometimes made, but they may be recalled even after the trees are planted. *Shiner v. Jacobs*, 62 Ia., 392.

¹ See *State v. Addison*, 2 S. C., 499; *Savannah v. Solomon's Lodge*, 53 Ga., 93; *State v. Board of Assessors*, 34 La. An., 574; *Bangor v. Masonic Lodge*, 73 Me., 428; *Appeal Tax Court v. Grand Lodge*, 50 Md., 421; *State v. Powers*, 10 Mo. App., 263, and 74 Mo., 476; *Thiel College v. Mercer County*, 101 Pa. St., 530; *Cleveland Lit. Inst. v. Pelton*, 36 Ohio St., 253; *Hennepin County v. Grace*, 27 Minn., 503; *Orphan Asylum v. School District*, 90 Pa. St., 21; *Donahugh's Appeal*, 86 Pa. St., 306; *Delaware Co. Institute v. Delaware County*, 94 Pa. St., 163.

² As to what would come within an exemption of free public schools, see *St. Joseph's Church v. Assessors*, 12 R. I., 19. See, also, *Chegaray v. New York*, 13 N. Y., 220; *State v. Ross*, 24 N. J., 497.

³ See *State v. Assessors*, 35 La. An., 668. Compare *University v. People*, 99 U. S., 309; *Wesleyan Academy v. Wilbraham*, 99 Mass., 599.

⁴ See *Providence Athæneum v. Tripp*, 9 R. I., 559.

so as to embrace the property of all sects and denominations of worshipers.¹

In any of these cases if the property which is exempted for a particular use is leased or otherwise appropriated to any other use, the exemption is lost;² but school property will not lose its exemption by being leased in vacation,³ neither will church property by a merely incidental and occasional use for schools.⁴

Cemeteries. The property of cemetery associations is also commonly exempted, so far as it is actually appropriated to the purposes of burial.⁵ But a mere appropriation on paper is not sufficient for the purpose,⁶ and the appropriation of one acre in forty would not be sufficient to give exemption to the whole.⁷

¹Exemption of church property held not to include a parsonage. *State v. Lyon*, 32 N. J., 360; *State v. Krollman*, 38 N. J., 323; *State v. Artell*, 41 N. J., 117; *Hennepin County v. Grace*, 27 Minn., 508; *Gerke v. Purcell*, 25 Ohio St., 229.

²*Pierce v. Cambridge*, 2 Cush., 611; *Proprietors, etc., v. Lowell*, 1 Met., 538; *New Haven v. Sheffield*, 30 Conn., 160; *County Commissioners v. Sisters of Charity*, 48 Md., 34; *Appeal Tax Court v. Grand Lodge*, 50 Md., 421; *Same v. Baltimore Academy*, 50 Md., 437; *State v. Board of Assessors*, 34 La. An., 574; *Armand v. Dumas*, 28 La. An., 403; *Old South Society v. Boston*, 127 Mass., 378; *New Orleans v. Russ*, 27 La. An., 413; *Lee v. New Orleans*, 28 La. An., 426; *Wyman v. St. Louis*, 17 Mo., 335; *State v. Assessors*, 35 La. An., 608; *Enaut v. Tax Collectors*, 36 La. An., 804.

³*Temple Grove Sem. v. Cramer*, 98 N. Y., 121; S. C. below, 26 Hun, 309.

⁴*St. Mary's Church v. Tripp*, 14 R. I., 307. See further for questions of exemptions under these heads, *Griswold College v. Iowa*, 46 Ia., 275; *Laurent v. Muscatine*, 59 Ia., 404; *Fort Des Moines Lodge v. Polk County*, 56 Ia., 34; *Monticello Seminary v. People*, 106 Ill., 398; *Theological Seminary v. People*, 101 Ill., 578; *Redemptionists v. Howard County*, 50 Md., 449; *Appeal Tax Court v. St. Peter's Academy*, 50 Md., 321; *Same v. St. Mary's Seminary*, 50 Md., 333; *Same v. Red Men's Hall*, 50 Md., 352; *Temple Grove Seminary v. Cramer*, 33 Hun, 309; *People v. Seamen's Friend Society*, 87 Ill., 246; *Chapel of Good Shepherd v. Boston*, 120 Mass., 212; *Workingmen's Aid Society v. Lynn*, 136 Mass., 283; *Redemptionist Fathers v. Boston*, 129 Mass., 178; *First Presb. Church v. New Orleans*, 30 La. An., 259; *Trinity Church v. Boston*, 118 Mass., 164.

⁵*People v. Cemetery Co.*, 36 Ill., 336. As to what would be exempt as a church burial ground, see *Appeal Tax Court v. Zion's Church*, 50 Md., 352.

⁶*Woodland Cemetery v. Everett*, 118 Mass., 354.

⁷*Mulroy v. Churchman*, 60 Ia., 717. An old burial ground held by a cemetery company is exempt. *Swan Pt. Cem. v. Tripp*, 14 R. I., 199.

Exemptions in these cases are granted on considerations of general public policy; and, being freely granted, they may as freely be recalled when the legislative view of public policy may have changed. In law they are to be regarded as favors or privileges to the class exempted, granted and to be held at the pleasure of the sovereign power. There is no pledge by the state that they shall be permanent, and no wrong done when they are recalled.¹

State Indebtedness. A state sometimes makes the bonds or other evidences of indebtedness issued by itself non-taxable. When this is done before the indebtedness is incurred, a contract is established between the state and those who become its creditors, which precludes withdrawing the exemption; but one state cannot make exemptions for others; and the obligation, though not taxable by the state issuing it, may be taxed in other states if held there.²

Taxability Presumed. As taxation is the rule, and exemption the exception, the intention to make an exemption ought to be expressed in clear and unambiguous terms; and it cannot be taken to have been intended when the language of the statute on which it depends is doubtful or uncertain.³

¹ *Ante*, p. 69. See *Hospital v. Philadelphia*, 24 Pa. St., 229; *Commonwealth v. Fayette, etc., R. R. Co.*, 55 Pa. St., 452; *Brewster v. Hough*, 10 N. H., 138; *St. Joseph v. Railroad Co.*, 39 Mo., 476; *State v. Dulle*, 48 Mo., 282; *Tomlinson v. Jessup*, 15 Wall., 454; *Appeal Tax Court v. Grand Lodge*, 50 Md., 421; *Same v. Regents*, 50 Md., 457; *Shiner v. Jacobs*, 62 Ia., 392; *Probasco v. Moundsville*, 11 W. Va., 501; *State v. Hannibal, etc., R. Co.*, 60 Mo., 148.

² *Appeal Tax Court v. Patterson*, 50 Md., 354. The liability of a corporation to taxation where it exists will not preclude taxation of its shares in other states where they may be held. *Appeal Tax Court v. Gill*, 50 Md., 377. Or of its bonds. *Ibid.*

³ See *ante*, pp. 69-72, and cases cited in the notes. "Taxation is an act of sovereignty, to be performed, so far as it conveniently can be, with justice and equality to all. Exemptions, no matter how meritorious, are of grace, and must be strictly construed." This was said in a case where the court felt compelled to hold that a married woman was subject to a tax for the raising of bounty moneys, though her husband was actually in the military service. *Crawford v. Burrell*, 53 Pa. St., 219, 220. See, also, *Lord Colchester v. Kewney*, Law R., 1 Exch., 368; *Platt v. Rice*, 10 Watts, 352; *Providence Bank v. Billings*, 4 Pet., 514; *Minot v. Philadelphia, etc., R. R. Co.*, or the Delaware Railroad Tax, 18 Wall., 206; *Trask v. Maguire*, 13

Strict Construction of Exemptions. It is also a very just rule that, when an exemption is found to exist, it shall not be enlarged by construction. On the contrary it ought to receive a strict construction; for the reasonable presumption is that the state has granted in express terms all it intended to grant at all, and that unless the privilege is limited to the very terms of the statute the favor would be extended beyond what was meant.¹ On this ground it is held that an exemption of property

Wall., 391; *Gordon v. Baltimore*, 5 Gill, 231; *Howell v. Maryland*, 8 Gill, 14; *Baltimore v. State*, 15 Md., 376; *Hannibal, etc., R. R. Co. v. Shacklett*, 30 Mo., 550; *Washington University v. Rowse*, 42 Mo., 308; *Pacific R. R. Co. v. Cass County*, 53 Mo., 17; *Stewart v. Davis*, 3 Murphy, 244; *State v. Town Council*, 12 Rich., 339; *Martin v. Charleston*, 13 Rich. Eq., 50; *Anderson v. State*, 23 Miss., 459; *B. & O. R. R. Co. v. Marshall County*, 3 W. Va., 319; *Same v. Wheeling*, 3 W. Va., 372; *State v. Bank of Smyrna*, 2 Houst., 99; *Municipality v. Railroad Co.*, 10 Rob. (La.), 187; *Louis. Canal Co. v. Commonwealth*, 7 B. Monr., 160; *St. Peter's Church v. Scott County*, 12 Minn., 395; *Portland, S. & P. R. R. Co. v. City of Saco*, 60 Me., 196; *State v. Parker*, 32 N. J., 426; *Hart v. Plum*, 14 Cal., 148; *People v. Whyler*, 41 Cal., 351; *Biscoe v. Coulter*, 18 Ark., 428; *Harvard College v. Boston*, 104 Mass., 470, 475; *Orr v. Baker*, 4 Ind., 86; *City of Indianapolis v. McLean*, 8 Ind., 338; *City of Madison v. Fitch*, 18 Ind., 83; *Methodist Church v. Ellis*, 88 Ind., 3; *Washburn College v. Shawnee County*, 8 Kan., 344; *Vail v. Beach*, 10 Kan., 214; *St. Mary's College v. Crawl*, 10 Kan., 442; *Miami County v. Brackenridge*, 12 Kan., 114; *No. Mo. R. R. Co. v. Maguire*, 20 Wall., 46; *Redemptionist Fathers v. Boston*, 129 Mass., 178; *People v. Commissioners*, 95 N. Y., 554; *Franklin St. Soc. v. Manchester*, 60 N. H., 342; *Lima v. Cem. Ass'n*, 42 Ohio St., 128; *State v. Woodruff*, 37 N. J., 139; *State v. Elizabeth*, 37 N. J., 330; *Carpenter v. School Trustees*, 12 R. I., 574; *Bridge Co. v. Dist. of Columbia*, 1 Mack., 217; *Union Pass. R. Co. v. Philadelphia*, 83 Pa. St., 429; *Hope Mining Co. v. Kennon*, 3 Mont., 35; *Balt. & O. R. R. Co. v. Dist. of Columbia*, 2 Mack., 122; *Wright v. Railroad Co.*, 64 Ga., 783.

If by its charter a ferry company is not to be taxed higher than any other ferry company, this provision is not in itself an exemption, and is not violated unless some other ferry company is taxed less. *Wiggins Ferry Co. v. East St. Louis*, 107 U. S., 365. Whether a license fee is a tax within the meaning of the provision, see *Same v. Same*, 102 Ill., 560.

A railroad company having a perpetual lease of a road, held not to be owner so as to be entitled as such to a statutory exemption. *State v. Housatonic R. Co.*, 48 Conn., 44. Where a corporation by its charter is exempt from taxation, an amendment of the charter which is accepted by it may repeal the exemption. *Petersburgh v. Railroad Co.*, 20 Grat., 773.

¹*Erie Railway v. Pennsylvania*, 21 Wall., 492; *Conklin v. Cambridge*, 58 Ind., 180; *Plaisted v. Lincoln*, 62 Me., 91; *Chadwick v. Maginnes*, 94 Pa. St., 117; *Westmore Lumber Co. v. Orne*, 48 Vt., 90; *Richmond, etc., R. Co. v.*

from taxation will not preclude business or privilege taxes being imposed on the favored class;¹ and that bequests to colleges, etc., may be taxed under the general statute taxing bequests, though after being received they would be exempt under the general statute exempting the property of such institutions.² So an academy of arts is not exempted under an exemption of "universities, colleges, academies and school-

Alamance Co., 76 N. C., 212; *Hand v. Savannah, etc., R. R. Co.*, 12 S. C., 315; *Commonwealth v. Ches. & O. R. Co.*, 27 Grat., 344; *Baton Rouge, etc., R. Co. v. Kirkland*, 33 La. An., 622; *People v. Commissioners of Taxes*, 83 N. Y., 459; *Buchanan v. County Commissioners*, 47 Md., 286; *State v. Fuller*, 40 N. J., 328; *State v. Collector, etc.*, 38 N. J., 270; *Louisville, etc., Co. v. Gaines*, 3 Fed. Rep., 266.

An exemption of mortgages from taxation will not be held to include so-called building association mortgages, in which the sum to be paid eventually is uncertain. *Appeal Tax Court v. Rice*, 50 Md., 302. An exemption of lands from taxation for general city purposes does not exempt from school taxation. *South Bend v. University*, 69 Ind., 344. An exemption of the property of an orphan asylum will not exempt from a collateral inheritance tax. *Miller v. Commonwealth*, 27 Grat., 110. But an exemption of the lands of a cemetery company will cover its improvements. *Appeal Tax Court v. Baltimore Cem. Co.*, 50 Md., 432. An exemption from city taxation of the agricultural products of a state will not prevent the imposition of an occupation tax on the business of one who sells it. *Davis v. Macon*, 64 Ga., 128. The exemption of "an endowment or fund of any religious society," etc., will not embrace lands. *State v. Krollman*, 38 N. J., 323, 574. See *State v. Lyon*, 32 N. J., 360. An exemption of "mines and mining claims" allows of the taxation of surface improvements. *Gold Hill v. Caledonia, etc., Co.*, 5 Sawy., 575. Where a statute provides that every foreign railroad company which extends its line within the state shall be subject to taxation, such a company will be liable for taxes upon a line purchased from a domestic corporation which was exempt from taxation. *Railway Co. v. Counties*, 5 Dill., 289. See for a somewhat similar point, *Hoge v. Railroad Co.*, 99 U. S., 348.

¹ *New Orleans v. Savings, etc., Co.*, 31 La. An., 637. Exemption of stock and real estate of a corporation will not preclude a license tax. *New Orleans v. Canal Bank*, 32 La. An., 104; *New Orleans v. State Nat. Bank*, 34 La. An., 892.

² *Barringer v. Cowan*, 2 Jones, Eq., 436. See for a peculiar case, *Mass. Gen. Hospital v. Somerville*, 101 Mass., 319. An exemption from state, municipal and parish taxes held not to preclude an occupation license tax. *New Orleans v. Canal, etc., Co.*, 32 La. An., 104. Compare *New Orleans v. People's Bank*, 32 La. An., 82. A saw-mill not exempt as "property employed in the manufacture of textile fabrics, machinery, agricultural implements and furniture, and other articles of wood." *Jones v. Raines*, 35 La. An., 996.

houses,¹ and a statute for the exemption of factories will not be applied to such as were erected previous to its passage.²

Local Assessments. The most striking illustration of the rule of strict construction of exemptions is seen in the case of special assessments for local improvements, such as the paving and repair of streets, etc. It is almost universally held that a general exemption from taxation will not extend to such assessments. In the leading case, the words of the exemption were that no church or place of public worship "should be taxed by any law of this state." Upon this the court remarked:³ "The

¹ *Academy v. Philadelphia*, 23 Pa. St., 496. The exemption from taxation of the property of soldiers in actual service will not exempt from a tax actually imposed before the soldier enlisted. *Tobin v. Morgan*, 70 Pa. St., 239.

² *Baugh v. Ryan*, 51 Ala., 212.

³ *Matter of Mayor, etc.*, of New York, 11 Johns., 77; *Bleeker v. Ballou*, 3 Wend., 263; *Chegaray v. Jenkins*, 3 Sandf., 409; *People v. Roper*, 35 N. Y., 639; *Buffalo City Cemetery v. Buffalo*, 46 N. Y., 506; *Northern Liberties v. St. John's Church*, 13 Pa. St., 104; *Crawford v. Burrell*, 53 Pa. St., 219, 220; *Second Universalist Society v. Providence*, 6 R. I., 235; *Matter of College St.*, 8 R. I., 474; *Patterson v. Society, etc.*, 24 N. J., 385; *State v. Robertson*, 24 N. J., 504; *State v. Newark*, 27 N. J., 185; *State v. Mills*, 34 N. J., 177; *State v. Newark*, 35 N. J., 157; S. C., 10 Am. Rep., 223; *Broadway Baptist Church v. McAtee*, 8 Bush, 508; S. C., 8 Am. Rep., 480; *Alexander v. Baltimore*, 5 Gill, 393, 396; *Baltimore v. Cemetery Co.*, 7 Md., 517; *Le Fevre v. Detroit*, 2 Mich., 586; *Kendrick v. Farquar*, 8 Ohio, 189, 197; *Armstrong v. Treasurer of Athens County*, 10 Ohio, 235; *Cincinnati College v. State*, 19 Ohio, 110; *Brewster v. Hough*, 10 N. H., 138; *Seymour v. Hartford*, 21 Conn., 481; *Bridgeport v. N. Y. & N. H. R. Co.*, 36 Conn., 255; *First Presbyterian Church v. Fort Wayne*, 36 Ind., 338; S. C., 10 Am. Rep., 35; *Palmer v. Stumph*, 29 Ind., 329; *Trustees of Church v. Ellis*, 38 Ind., 3; *Bank of Republic v. Hamilton*, 21 Ill., 53; *Canal Trustees v. Chicago*, 12 Ill., 403; *Chicago v. Colby*, 20 Ill., 614; *McBride v. Chicago*, 22 Ill., 574; *Peoria v. Kidder*, 26 Ill., 351; *Pleasant v. Kost*, 29 Ill., 490, 494; *Paine v. Spratley*, 5 Kan., 525; *Orange & Alexandria R. R. Co. v. Alexandria*, 17 Grat., 176; *Crowley v. Copeley*, 2 La. An., 329; *La Fayette v. Orphan Asylum*, 4 La. An., 1; *Rooney v. Brown*, 21 La. An., 51; *St. Louis Public Schools v. St. Louis*, 26 Mo., 468; *Sheehan v. Good Samaritan Hospital*, 50 Mo., 155; S. C., 11 Am. Rep., 412; *Lockwood v. St. Louis*, 24 Mo., 20 (sewer tax); *Emery v. Gas Co.*, 28 Cal., 346; *Taylor v. Palmer*, 31 Cal., 240; *Hale v. Kenosha*, 29 Wis., 599; *Seamen's Friend Society v. Boston*, 116 Mass., 181; *Agricultural Society v. Worcester*, 116 Mass., 189; *Allen v. Galveston*, 51 Tex., 302; *Roosevelt Hospital v. New York*, 84 N. Y., 108; *State v. Newark*, 38 N. J., 478; *State v. Jersey City*, 42 N. J., 97; *Harvey v. South Chester*, 99 Pa. St., 565; *Railroad Co. v. Wright*, 68 Ga., 311.

Some of the exemptions in these cases seem very strong and comprehen-

word *taxes* means burdens, charges or impositions put or set upon persons or property for public uses, and this is the definition which Lord Coke gives of the word *talliage*, 2 Inst., 232; and Lord Holt in *Carth.*, 438, gives the same definition in substance of the word *tax*. The legislature intended by that exemption to relieve religious and literary institutions from these public burdens, and the same exemption was extended to the real estate of any minister not exceeding in value \$1,500. But to pay for the opening of a street in the ratio of the benefit or advantage derived from it is no burden. It is no *talliage* or

saive, but they were generally applied only to the customary taxes. The following instances may be given: In *Baltimore v. Cemetery Co.*, 7 Md., 517, an exemption from "any tax or public imposition whatever" was held to apply only to "taxes or impositions levied or imposed for the purpose of revenue," and not to relieve the cemetery from "such charges as are inseparably incident to its location in regard to other property;" *e. g.*, an assessment for paving the street in front. In *Buffalo City Cemetery v. Buffalo*, 46 N. Y., 506, where the cemetery was by law exempt from "all public taxes, rates and assessments," it was held not exempt from a paving assessment. *Folger, J.*, says: "We think that the current of authorities in this and some of the sister states runs to this result: that public taxes, rates and assessments are those which are levied and taken out of the property of the person assessed, for some public or general use or purpose, in which he has no direct, immediate and peculiar interest; being exactions from him towards the expense of carrying on the government, either directly and, in general, that of the whole commonwealth, or more mediately and particularly through the intervention of municipal corporations; and that those charges and impositions which are laid directly upon the property in a circumscribed locality to effect some work of local convenience, which in its result is of peculiar advantage and importance to the property, especially assessed for the expense of it, are not public but are local and private so far as this statute is concerned." The same holding as to a sewer assessment. *Olive Cemetery Co. v. Philadelphia*, 93 Pa. St., 129. In *Patterson v. Society*, etc., 24 N. J., 385, the exemption was from "taxes, charges and impositions;" but it was held not to extend to an assessment for grading and paving a street. In *State v. Newark*, 27 N. J., 185, the exemption was from "charges and impositions," and the same ruling was had. In *Sheehan v. Good Samaritan Hospital*, 50 Mo., 155, exemption from "taxation of every kind" was held not to extend to an assessment for street improvements. Compare *Dunlieth, etc., Bridge Co. v. Dubuque*, 32 Ia., 427; *Brightman v. Kirner*, 22 Wis., 54. In *Bridgeport v. N. Y. & N. H. R. R. Co.*, 36 Conn., 255, the railroad company paid a tax which, by its charter, was to be "in lieu of all other taxes;" but the company was, nevertheless, held liable to a street assessment.

A covenant by a lessee to pay "the taxes of every name and kind that should be assessed on the premises" will not cover an assessment for bene-

tax within the meaning of the exemption, and has no claim upon the public benevolence. Why should not the real estate of a minister as well as of other persons pay for such an improvement in proportion as it is benefited? There is no inconvenience or hardship in it, and the maxim of law that *qui sentit commodum debet sentire onus*, is perfectly consistent with the interests of science and religion." And yet these assessments are a legal exercise of the taxing power, and can only be justified on that ground.¹

Railroad Exemptions. Cases of the exemption of railroad property from taxation furnish many illustrations of the rule of strict construction, but they depend so much upon their special facts that little can be done here beyond making general reference. For the most part these exemptions are in the nature of commutations, the railroad company paying some

fits accruing from street improvements. *Beals v. Providence Rubber Co.*, 11 R. I., 381. See *Love v. Howard*, 6 R. I., 116; and compare *Blake v. Baker*, 115 Mass., 188; *Cassady v. Hammer*, 62 Ia., 359.

These cases show that the general inclination has been to confine the application of all such general language to the taxes imposed for ordinary revenue. But in Massachusetts it has been held that an assessment for altering a street is a civil imposition within the meaning of a college charter exempting the college property from "all civil impositions, taxes and rates." *Harvard College v. Boston*, 104 Mass., 470. An exemption from "taxes and assessments" will exempt from local assessments. *State v. Newark*, 36 N. J., 478; reversing *Same Case*, 35 N. J., 157. See *Patterson v. Society, etc.*, 24 N. J., 385; *Codman v. Johnson*, 104 Mass., 491.

In Pennsylvania a general exemption from county and city taxes is held to exempt from special assessments. *Olive Cem. Co. v. Philadelphia*, 98 Pa. St., 129; *Erie v. First Univ. Church*, 105 Pa. St., 278.

¹*People v. Brooklyn*, 4 N. Y., 419; *Sharp v. Spier*, 4 Hill, 76; *Patterson v. Society, etc.*, 24 N. J., 385; *State v. Fuller*, 34 N. J., 237; *State v. Newark*, 35 N. J., 168, 171; *Weeks v. Milwaukee*, 10 Wis., 242; *Motz v. Detroit*, 18 Mich., 495; *Baltimore v. Cemetery Co.*, 7 Md., 517; *Glasgow v. Rouse*, 43 Mo., 479, 489; *McComb v. Bell*, 2 Minn., 256; *Pray v. Northern Liberties*, 31 Pa. St., 69; *Walsh v. Mathews*, 29 Cal., 123; *Chambers v. Satterlee*, 40 Cal., 497; *Yeatman v. Crandall*, 11 La. An., 220; *Matter of Opening of Streets*, 20 La. An., 497; *Reeves v. Treasurer of Wood Co.*, 8 Ohio St., 333; *Hines v. Leavenworth*, 3 Kan., 186.

The case of *People v. Brooklyn*, in 4 N. Y., is somewhat questioned in *Dalrymple v. Milwaukee*, 53 Wis., 178, in which "tax certificates" in a limitation law was held to embrace a certificate on a sale for local assessments.

prescribed tax as a consideration for exemption from all other taxation.¹ But the rule of strict construction is nevertheless

¹ Construction of a railroad exemption of right of way, etc. *Richmond, etc., R. Co. v. Commissioners*, 84 N. C., 504. As to whether change in name, etc., of company deprives it of the exemption. *Cheraw, etc., R. Co. v. Commissioners*, 88 N. C., 519. An exemption of the road-bed, etc., of a railroad does not preclude the taxation of the franchise. *Atlantic, etc., R. Co. v. Commissioners*, 87 N. C., 129. Construction of exemption of transportation companies from local taxation. *Railroad Co. v. Berks County*, 6 Pa. St., 70; *Erie County v. Transportation Co.*, 87 Pa. St., 434; *Northampton County v. Lehigh, etc., Co.*, 75 Pa. St., 461; *Wayne County v. Del. & Hud. Canal Co.*, 3 Harr., 351.

Exemption of the stock of a railway company from taxation held to include all property necessary and proper for the purpose of laying, building and sustaining the road. *Ordinary of Bibb County v. Central R. R. Co.*, 40 Ga., 646. As to when an exemption from taxation to a railroad company will be held not to apply to an investment in another road, though paid for out of its profits, see *Railroad Co. v. Commissioners*, 87 N. C., 414. As to taxation of a railroad company which has succeeded to the rights of a canal company, see *Nichols v. New Haven, etc., Co.*, 42 Conn., 103.

A specific state tax on a railroad company held to preclude taxation of its property by valuation. *Camden & Amboy R. R. Co. v. Commissioners*, 18 N. J., 11. And see *State v. Cook*, 32 N. J., 338; *Cook v. State*, 33 N. J., 474; *Douglass v. State*, 34 N. J., 485.

A railroad company paid the state a specific tax under a law which provided that it should not "be assessed with any tax on its lands, buildings or equipments." Held not to preclude municipal taxation. *Orange & Alexandria R. R. Co. v. Alexandria*, 17 Grat., 176. Compare this with *Richmond v. Richmond & Danville R. R. Co.*, 21 Grat., 604, where an exemption from "any charge or tax whatsoever" was held to cover municipal as well as state taxes. See, also, *Southern R. R. Co. v. Jackson*, 38 Miss., 334; *Neustadt v. Illinois Central R. R. Co.*, 31 Ill., 484; *Gardner v. State*, 21 N. J., 557.

A branch road to procure gravel held liable to ordinary taxation. *State v. Hancock*, 33 N. J., 315. Compare *State v. Hancock*, 35 N. J., 537; *Atlantic, etc., Co. v. Allen*, 15 Fla., 637. A provision in a railroad charter was that "all machines, wagons, vehicles or carriages belonging to the company, with all its works and all the property which may accrue from the same, shall be vested in the respective shareholders forever, in proportion to their respective shares, and shall be deemed personal estate, and exempt from any charge or tax whatever." This makes all the property of the company, owned and used for its purposes, personal estate and exempt. A city in which the company owns property cannot dispute this exemption on the ground of its lessening its power to pay its debts. *Richmond v. Richmond & Danville R. R. Co.*, 21 Grat., 604. General exemption of the *property* of a corporation from taxation construed to include the *franchise*. *Wilming-ton R. R. Co. v. Reid*, 13 Wall., 264; *Raleigh, etc., Railroad Co. v. Reid*, 13 Wall., 269; *State v. Berry*, 17 N. J., 80; *Camden & Amboy R. R. Co. v. Hillegas*, 18 N. J., 11; *Same v. Commissioners of Appeal*, 18 N. J., 71. See *Nichols v. New Haven, etc., Co.*, 42 Conn., 103.

applicable, though perhaps with less force than when the exemption is total.

A street railway company exempt from ordinary state taxation will nevertheless be liable to a dog tax. *Hendrie v. Kalthoff*, 48 Mich., 306.

An exemption to a railroad company of "all machines, wagons, vehicles or carriages belonging to the company, *with all their works*," etc., held to apply to their real estate as well as to their rolling stock. *Richmond v. Richmond & Danville R. R. Co.*, 21 Grat., 604, citing *Baltimore v. B. & O. R. R. Co.*, 6 Gill, 288. A provision that a certain tax on the capital and debts of railroad companies should "take the place of all other taxes on railroad and horse railroad property and franchises," held to exempt property whether used for railroad purposes or not. *Osborn v. N. Y. & N. H. R. R. Co.*, 46 Conn., 491. And see in general, *The Tax Cases*, 12 G. & J., 117.

A general exemption of railroad property from taxation has been said to be co-extensive with the right of the railroad company to take property for its use by condemnation, and that the limit of such right is the limit of the exemption. *State v. Hancock*, 33 N. J., 315; *Milwaukee, etc., R. R. Co. v. Milwaukee*, 34 Wis., 271; *State v. Western, etc., R. Co.*, 54 Ga., 428; *Same v. Same*, 66 Ga., 563; *State v. Baltimore, etc., Co.*, 48 Md., 49.

If a railroad company is exempt from taxation on its franchises and capital stock, it is exempt from taxation on gross receipts. *State v. Baltimore, etc., R. Co.*, 48 Md., 49. If the capital stock of a company is exempted from taxation forever, and its road, fixtures, appurtenances, etc., for only twenty years, the latter may be taxed after the time limited has expired. *Railroad Companies v. Gaines*, 9 U. S., 697. See *Railroad Co. v. Loftin*, 98 U. S., 559; *Same v. Same*, 105 U. S., 258. The act incorporating the Illinois Central Railroad Company provides as follows: "The . . . stock, property and assets belonging to said company shall be listed by the president, secretary, or other officer, with the auditor of state, and an annual tax for state purposes shall be assessed by the auditor upon all the property and assets of every name, kind and description belonging to said corporation. Whenever the taxes levied for state purposes shall exceed three-fourths of one per cent. per annum, such excess shall be deducted from the gross proceeds or income herein required to be paid by said corporation to the state, and the said corporation is hereby exempted from all taxation of every kind except as herein provided for." *Held*, that this exemption did not apply to a wharf boat and to a steamboat used principally in conveying the passengers and freight from the terminus of the road to the terminus of another railroad, thus making connections. *Illinois Central R. R. v. Irvin*, 72 Ill., 452. The lands of this company are exempt where it has given a contract for their sale but the contract has been declared forfeited for non-performance. *Ill. Cent. R. Co. v. Goodwin*, 94 Ill., 262. But the exemption ceases when the contract has been performed, though no deed has been given. *Champaign Co. v. Reed*, 100 Ill., 304.

The effect of the consolidation of railroads upon exemptions or privileges in respect to taxation previously existing in one of the roads has been considered and passed upon in many cases which are so different in their facts

Corporate Stock and Property. An exemption of the corporate stock of a corporation is an exemption of the shares.¹ But

as to render useless anything more than a citation in this place. See *Tomlinson v. Branch*, 15 Wall., 460; *Charleston v. Branch*, 15 Wall., 470; *Bailey v. Railroad Co.*, 22 Wall., 604; *Delaware Railroad Tax Case*, 18 Wall., 206; *Branch v. Charleston*, 92 U. S., 677; *Central Railroad Co. v. Georgia*, 92 U. S., 665, reversing 54 Ga., 501; *Chesapeake, etc., R. Co. v. Virginia*, 94 U. S., 718; *Railroad Co. v. Maine*, 96 U. S., 499; *Railroad Co. v. Georgia*, 98 U. S., 359, affirming 55 Ga., 312; *Railroad Co. v. Gaines*, 97 U. S., 711; *St. Louis, etc., R. Co. v. Berry*, 113 U. S., 465; *Tennessee v. Whitworth*, 22 Fed. Rep., 81; *State v. Railroad Co.*, 45 Md., 361; *Wright v. Southwestern R. R. Co.*, 64 Ga., 783; *State v. Northern Central R. Co.*, 44 Md., 131; *Atlanta, etc., R. Co. v. State*, 63 Ga., 483; *Louisville, etc., R. Co. v. Palmes*, 109 U. S., 244; *Louisville, etc., R. Co. v. Commonwealth*, 10 Bush, 43; *Quincy Bridge Co. v. Adams County*, 88 Ill., 615; *State Treasurer v. Auditor-General*, 46 Mich., 224; *Atlantic, etc., R. Co. v. Allen*, 15 Fla., 637; *Central, etc., R. Co. v. State*, 54 Ga., 401; *Chicago, etc., R. Co. v. Auditor-General*, 53 Mich., 79. "According to the principle of those decisions (*Morgan v. Louisiana*, 93 U. S., 217; *Wilson v. Gaines*, 103 U. S., 417; *Louisville, etc., R. Co. v. Palmes*, 109 U. S., 244), the exemption from taxation must be construed to have been the personal privilege of the very corporation specifically referred to, and to have perished with that, unless the express and clear intention of the law requires the exemption to pass as a continuing franchise to a successor. This statutory rule of interpretation is founded upon an obvious public policy, which regards such exemptions as in derogation of the sovereign authority and of common right, not to be extended beyond the exact and express requirement of the grants, construed *strictissimi juris*." In this case a railroad exempt from taxation had attempted to transfer its franchises to another corporation, which therefore claimed the exemption and filed its bill to restrain taxation. The bill was dismissed. *Memphis R. R. Co. v. Com'rs*, 112 U. S., 609.

An exemption of railroad property from taxation on payment of a percentage on gross earnings was held not to be personal, but to attach to the property, in *State v. Nor. Pac. R. Co.*, 33 Minn., 294, citing *State v. St. Paul, etc., R. Co.*, 30 Minn., 311; *First Div., etc., R. Co. v. Parcher*, 14 Minn., 297.

Giving to a municipality the power to tax railroads does not of itself authorize it to tax a railroad running through it, which, by its charter, is exempt. *Elizabethtown, etc., R. Co. v. Trustees*, 12 Bush, 233.

The statute withdrawing an exemption from taxation may or may not empower municipalities to levy local taxes on the property previously exempt. Compare *Bailey v. Magwire*, 22 Wall., 215, with *Savannah v. Jesup*, 106 U. S., 563.

¹ *Railroad Co. v. Gaines*, 97 U. S., 697; *Farrington v. Tennessee*, 95 U. S., 679; *Bank of Georgia v. Savannah*, Dudley, 130; *Bank of Cape Fear v. Edwards*, 5 Ired., 516; *Johnson v. Commonwealth*, 7 Dana, 338; *State v. Tunis*, 23 N. J., 546; *Citizens' Bank v. Bouny*, 32 La. An., 239; *Tennessee v. Whitworth*, 22 Fed. Rep., 75. An exemption of the "stock" of a corporation is

exemption is not a franchise, and therefore could not pass as such to a purchaser of the corporate property.¹

A general or qualified exemption of the capital stock or property of a corporation is generally held not to extend to property which the corporation may become owner of, but which is not needed for corporate purposes, and is only held or used for the profit of its members. But the question in every case is one of legislative intent, and the cases cited in the margin will abundantly show that the exemptions made are so far diverse in their terms as to raise many troublesome controversies.²

an exemption of its gross income also, it being but an accessory to the stock. *State v. Hood*, 15 Rich. Law, 177. An exemption of the stock and property of a corporation held to preclude a privilege tax. *Grand Gulf, etc., Co. v. Buck*, 53 Miss., 246, citing *Railroad Co. v. Reid*, 18 Wall., 264; *Mobile, etc., R. Co. v. Moseley*, 52 Miss., 127. Exemption of corporate stock exempts corporate property. *Scotland County v. Railroad Co.*, 65 Mo., 123. Where the property of a corporation and the shares therein are exempt, it cannot be taxed in any way. *Worth v. Wilmington, etc., R. Co.*, 89 N. C., 291. See *Worth v. Petersburg, etc., R. Co.*, 89 N. C., 301.

Where the shares of stock in a corporation were exempt from taxation, the property of the corporation was held to be exempt also. *Baltimore v. B. & O. R. R. Co.*, 6 Gill, 288. See *State v. Branin*, 23 N. J., 484; *State v. Wilson*, 53 Md., 638; *Frederick County v. National Bank*, 48 Md., 117; *County Commissioners v. Annapolis, etc., Co.*, 47 Md., 592.

¹ *Morgan v. Louisiana*, 93 U. S., 217; *Railroad Co. v. Gaines*, 97 U. S., 697. See *Railroad Co. v. Hamblen Co.*, 102 U. S., 273; *Wilson v. Gaines*, 103 U. S., 417; *Louisville, etc., R. Co. v. Palmes*, 109 U. S., 244; *Memphis R. Co. v. Commissioners*, 112 U. S., 609; *Alexandria, etc., Co. v. Dist. Col.*, 1 MacA., 217; *Railroad Co. v. Commissioners*, 103 U. S., 1; *Detroit City S. R. Co. v. Guthard*, 51 Mich., 180. Compare *Gonzales v. Sullivan*, 16 Fla., 791; *Atlantic, etc., Co. v. Allen*, 15 Fla., 637.

Exemptions may in general be waived, but a corporation cannot waive its exemption as against its bonds previously issued. *Hand v. Savannah, etc., R. Co.*, 17 S. C., 219.

Exemption of unpatented mines held not to extend to their property. *Hope Mining Co. v. Kennon*, 3 Mont., 35. For a discussion as to whether an exemption is a contract, see *International, etc., R. Co. v. Anderson Co.*, 59 Tex., 654.

² Where a canal is exempt from taxation the toll house is not taxable. *Schuylkill Nav. Co. v. Commissioners of Berks Co.*, 11 Pa. St., 202. Where a railroad is exempt, this will cover its water stations and depots, but not warehouses, coal lots, coal shutes, machine shops, wood yards, etc., which are only necessary to the profits to be made by the company. *Railroad Co. v. Berks County*, 6 Pa. St., 70. See *Lehigh Co. v. Northampton*, 8 W. & S., 334; *Wayne Co. v. Delaware & Hudson Canal Co.*, 15 Pa. St., 351, 357,

Invidious exemptions. An exemption, it would seem, in order to be admissible, ought to be either made on the basis of

where the subject is considered at length; *N. Y. & Erie R. R. Co. v. Sabin*, 26 Pa. St., 242; *West Chester Gas Co. v. Chester Co.*, 30 Pa. St., 232; *Lackawana Iron Co. v. Luzerne Co.*, 42 Pa. St., 424; *Milwaukee, etc., R. R. Co. v. Supervisors of Crawford*, 29 Wis., 116; *Milwaukee, etc., R. R. Co. v. Milwaukee*, 34 Wis., 271; *Orange, etc., R. R. Co. v. Alexandria*, 17 Grat., 176, which does not allow the implied exemptions; *Vermont Cent. R. R. Co. v. Burlington*, 28 Vt., 193; *Souhegan Nail, etc., Factory v. McConihe*, 7 N. H., 309; *Gardner v. State*, 21 N. J., 557; *State v. Mansfield*, 23 N. J., 510; *State v. Flavell*, 24 N. J., 370; *State v. Blundell*, 24 N. J., 402; *State v. Betts*, 24 N. J., 555; *State v. Newark*, 25 N. J., 315; *State v. The Collector of Newark*, 26 N. J., 519; *State Treasurer v. Somerville & Easton Railroad Co.*, 28 N. J., 21; *State v. Elizabeth*, 28 N. J., 103; *State v. Leicester*, 29 N. J., 541; *State v. Hancock*, 33 N. J., 315; *Hannibal & St. Joseph Railroad Co. v. Shacklett*, 30 Mo., 550; *State v. H. & St. Jo. R. R. Co.*, 37 Mo., 265; *Boston & Me. R. R. Co. v. Cambridge*, 8 Cush., 237; *Wilmington R. R. Co. v. Reid*, 13 Wall., 264, 268, per *Davis, J.*; *State v. Western R. R. Co.*, 66 Ga., 563; *Railroad Co. v. Wright*, 68 Ga., 311.

An exemption from taxation of "property necessarily used in operating the railroad," held to apply to an inn used exclusively by persons arriving and departing on the railroad. *Milwaukee, etc., R. R. Co. v. Supervisors of Crawford County*, 29 Wis., 116. See *Chicago, etc., R. R. Co. v. Supervisors of Crawford*, 48 Wis., 666; *State v. Baltimore, etc., R. Co.*, 48 Md., 49.

For other cases of special exemption, see *State Bank v. Madison*, 3 Ind., 43; *Orr v. Baker*, 4 Ind., 86; *Lord v. Litchfield*, 86 Conn., 116; *State v. Haight*, 35 N. J., 40; *Rex v. Calder*, 1 B. & Ald., 263; *State v. Minton*, 23 N. J., 529; *Philadelphia, etc., R. R. Co. v. Bayless*, 2 Gill, 355; *State v. Norwich & Worcester R. R. Co.*, 30 Conn., 290; *Armstrong v. Athens Co.*, 16 Pet., 281.

An exemption of the "road, rolling and live stock" of a street railway company is not an exemption of its lots used for shops, stables, etc. *Atlanta St. R. Co. v. Atlanta*, 66 Ga., 104.

A provision that the payment of certain fees by life insurance companies shall be "in lieu of all fees and taxes whatever, except that they may be taxed upon their paid-up capital stock the same as other property in the county for county and municipal purposes," will not prevent the taxation of other property owned by companies over and above par value of capital stock. *St. Louis M. L. Ins. Co. v. Board of Assessors*, 56 Mo., 508.

An exemption of the stock of stockholders in corporations taxable on their capital has no application to stockholders in foreign corporations taxable only on their property in the state. *Sturges v. Carter*, 114 U. S., 511. See *Worth v. Ashe Co.*, 90 N. C., 409. A tax deed given on a sale of exempt lands is void. The question whether the exemption has not been forfeited cannot be raised in an action between individuals based on such a deed. *Mackall v. Canal Co.*, 94 U. S., 308.

Where a bank charter provided that the bank might "purchase and hold a lot of ground for the use of an institution as a place of business," and

contract, in which case the public is supposed to receive a full equivalent therefor, or it ought to be made on some ground of public policy, such as might justify a pension or a donation of the public funds on some general rule of which all who come within it may have the benefit; or such as, at least, makes the public at large interested in encouraging or favoring the class or interest in whose behalf the exemption is made.¹ It is difficult to conceive of a justifiable exemption law which should select single individuals or corporations, or single articles of property, and, taking them out of the class to which they belong, make them the subject of capricious legislative favor. Such favoritism could make on pretense to equality; it would lack the semblance of legitimate tax legislation. It is certain that municipal bodies or taxing officers have no authority to make such exemptions unless expressly empowered by legislation; and to make any would render invalid the whole tax roll on which the exempted property or person ought to have appeared. The motives of the exemption or the beneficial purposes expected to be accomplished by it can make no difference. No man is obliged to be more generous than the law requires; each may stand strictly on his legal rights, and refuse to submit to any exaction that purposely is made more burdensome to him than the rules of law permit.² The legis-

also hold such property as might be conveyed to it to secure debts due the institution, and that it should pay to the state an annual tax of one-half of one per cent. on each share of capital stock, "which shall be in lieu of all other taxes," held, that so much of the bank building as was not used for its business was taxable. *Bank v. Tennessee*, 104 U. S., 498. See *De Soto Bank v. Memphis*, 6 Bart., 415.

Where the property of a bank is exempt from taxation, the purchase of land by the bank does not divest existing tax liens. *State v. Ewing*, 11 Lea, 172.

¹See, on this subject, what is said by *Robertson*, Ch. J., in *Sutton's Heirs v. Louisville*, 5 Dana, 28, 31. Also *Morrison v. Larkin*, 26 La. An., 699.

²Per *Paine*, J., in *Weeks v. Milwaukee*, 10 Wis., 242, 263. The case was one of an exemption of a block in the city of Milwaukee on which a hotel was about to be constructed; the common council directing it to be made "in view of the great public benefit which the construction of the hotel would be to the city." Compare *Exchange Bank v. Hines*, 3 Ohio St., 1; *Adams v. Beman*, 10 Kan., 87. In *Southern Hotel Co. v. St. Louis County*, 62 Mo., 134, the exemption of a hotel from taxation for ten years was enforced without question of the right.

In *Henry v. Chester*, 15 Vt. 460, a tax list was held void on two grounds: "1. The plain and obvious requisitions of the statute in regard to making

lature is equally powerless if the constitution has prescribed a rule of equality which forbids exemptions.¹ Such a rule, it has been seen, is prescribed by the constitutions of some of the states, which, in terms or by necessary implication, require all private property in the state to be taxed in proportion to its value.²

Accidental omissions from taxation. It has been decided in a number of cases that accidental omissions from taxation, of persons or property that should be taxed, occurring through the negligence or default of officers to whom the execution of the taxing laws is intrusted, would not have the effect to vitiate the whole tax. The reasons for this conclusion are summarized in one of the cases as follows: "The execution of these laws is necessarily intrusted to men, and men are fallible, liable to frequent mistakes of fact, and errors of judgment. If such errors on the part of those who are attempting in good

up were disregarded, both by important and essential omissions, and by arbitrary additions without even the color of right or legal warrant. If this may be done and still the list be regarded as legal, so might it with equal propriety if the entire real estate in town were omitted or inserted wholly at random without even the form of an appraisal." See *State v. Branin*, 23 N. J., 484; *Hersey v. Supervisors, etc.*, 16 Wis., 185; *Crosby v. Lyon*, 37 Cal., 242; *Primm v. Belleville*, 59 Ill., 142; *Kneeland v. Milwaukee*, 15 Wis., 454; *Smith v. Smith*, 19 Wis., 615; *People v. McCreery*, 34 Cal., 432. Including in the assessment persons who are not liable, and against whom a tax cannot be enforced, does not invalidate the tax against the rest. *Inglee v. Bosworth*, 5 Pick., 498. See *Dillingham v. Snow*, 5 Mass., 547.

An illegal exemption by the common council of one man from a sewer tax will not authorize another to have his tax enjoined where it appears that his payment is not increased by the exemption. *Page v. St. Louis*, 20 Mo. 136. The principle is that no one is to be heard to complain of that which works no injury to him. See *Sanford v. Dick*, 15 Conn., 447; *Case v. Dean*, 16 Mich., 12.

¹It is not competent to lay a tax for a general public purpose exclusively on one species of taxable property. *Gilman v. Sheboygan*, 2 Black, 510. See *Sinclair v. Learned*, 51 Mich., 335. Or on the property of only one section of the taxable district. *Dyar v. Farmington*, 70 Me., 515. Compare *Bright v. McCullough*, 27 Ind., 223; *Primm v. Belleville*, 59 Ill., 142. In assessing by benefits the tax will be void if it appears that exemptions are made of property which should be taxed. *Alexander v. Baltimore*, 5 Gill, 883, 890. Compare *Page v. St. Louis*, 20 Mo., 136.

²See *ante*, pp. 177, 180, 195. Lands owned by the state were omitted in laying local assessment, though they were expressly made assessable. Held to vitiate the roll. *Hassen v. Rochester*, 67 N. Y., 528. See *Same Case*, 65 N. Y., 516. Also *Clark v. Dunkirk*, 12 Hun, 181.

faith to perform their duties should vitiate the whole tax, no tax could ever be collected. And therefore, though they sometimes increase improperly the burden of those paying taxes, the rule which holds the tax not thereby avoided is absolutely essential to the continuation of the government."¹ It seems difficult to resist the force of this reasoning, and it applies to the case of a mistake of law with the same cogency as to the case of a mistake of fact. Indeed, where the omission has occurred through no purpose to evade or disregard official duty, the occasion which produced it seems wholly immaterial.²

¹*Paine, J.*, in *Weeks v. Milwaukee*, 10 Wis., 242, 262, where the following cases are cited and relied upon: *Spear v. Braintree*, 24 Vt., 414; *State v. The Collector of Jersey City*, 24 N. J., 108; *Insurance Co. v. Yard*, 17 Pa. St., 331; *Williams v. School District*, 21 Pick., 75. See, also, *State v. Randolph*, 25 N. J., 427, 431; *Smith v. Smith*, 19 Wis., 615; *Schofield v. Watkins*, 22 Ill., 66; *Dunham v. Chicago*, 55 Ill., 357, 361; *People v. McCreery*, 34 Cal., 432. In *Watson v. Princeton*, 4 Met., 599, 602, *Shaw, Ch. J.*, says that the case of omission, through error of judgment or mistake of law, to tax property that should be taxed, can give no right of action to recover back any portion of the tax paid by another. "Various other remedies may be resorted to to secure just and legal taxation. The law is strict in requiring that the whole valuation shall be laid before the tax-paying inhabitants, in order that any omission, mistake or irregularity may be corrected before the tax is collected. It is for the interest of the town, and of the inhabitants generally, that each inhabitant liable should be taxed, and to the extent of his liability; and therefore it must be presumed to be the inclination of assessors to impose rather than omit a tax, in case of doubt, leaving the individual aggrieved to raise the question if he shall think fit. And the final remedy, if the inhabitants believe that their assessors are acting upon erroneous principles, is to elect others in their places." See, also, *George v. School District*, 6 Met., 497; *Dean v. Gleason*, 16 Wis., 1. A mistake without intentional wrong or fraud, whereby personal property which should have been taxed is omitted from the tax list, will not invalidate the list. *Wilson v. Wheeler*, 55 Vt., 446, citing *Henry v. Chester*, 15 Vt., 460; *Spear v. Braintree*, 24 Vt., 414. And see *Burlington, etc., R. Co. v. Seward County*, 10 Neb., 211; *Same v. Saline County*, 12 Neb., 396; *State v. Maxwell*, 27 La., An., 722.

There has been some disposition in Illinois to hold that, even in the case of intentional omissions, the parties aggrieved should be left to their remedy against the assessor, and the tax roll sustained. *Schofield v. Watkins*, 22 Ill., 72; *Merritt v. Farris*, 22 Ill., 303, 311; *Dunham v. Chicago*, 55 Ill., 357, 361. But see *Primm v. Belleville*, 59 Ill., 142. And see *New Orleans v. Fourchy*, 30 La. An., 910.

²See *People v. McCreery*, 34 Cal., 432, where the mistake was one of law, but the omission was held not to be fatal. See, also, *Muscatine v. Railroad*

Invidious assessments. A tax when assessed by valuation may be made unequal and oppressive by the unfairness with which the valuation is made. The remedies for an excessive valuation we have no purpose to consider in this place; they belong more properly to a subsequent part of the work. As a general rule, a tax cannot depend for its validity upon the ability of those who lay it to make plain its justice to the satisfaction of a court or jury. Value is matter of opinion, and when the law has provided officers upon whom the duty is imposed to make the valuation, it is the opinion of those officers to which the interests of the parties are referred. The court cannot sit in judgment upon their errors, nor substitute its own opinion for the conclusions the officers of the law have reached. It is possible, however, that there may be circumstances under which the action of the officers will not be conclusive. Suppose it admitted, or established beyond a peradventure, that a public officer who has been empowered by the law to apportion certain burdens among the citizens, as in his judgment shall be just, has been actuated by a fraudulent purpose, and, instead of attempting to carry the law into effect, has wholly disregarded its mandate, declined to bring his judgment to bear upon the question submitted to him, and arbitrarily, with the intent and purpose to defeat the equity at which the law aims, has determined to impose an excessive burden upon a particular citizen. Suppose this to be unquestioned or unquestionable, can it be that the citizen has no remedy against the wrong intended?

Such a question, it would seem, could admit of but one answer. "A discretionary power cannot excuse an officer for refusal to exercise his discretion. His judgment is appealed to; not his resentments, his cupidity or his malice. He is the instrument of the law to accomplish a particular end, through specified means; and when he purposely steps aside from his duty to inflict a wanton injury, the confidence reposed in him

Co., 1 Dill., 536; Burlington, etc., R. Co. v. Saline County, 12 Neb., 396; State v. Maxwell, 27 La. An., 722.

Proof that in some cases there was an undervaluation is not sufficient to avoid a roll. *Marshall v. Benson*, 48 Wis., 558. Even though it is intentional and general. *Moss v. Cummings*, 44 Mich. 359. But if, even by error of judgment, an excessive proportion of tax is levied upon real property, a sale of lands for the tax is void. *Sinclair v. Learned*, 51 Mich., 335. See *Kennedy v. Troy*, 14 Hun, 308.

has not disarmed the law of the means of prevention. His judgment may indeed be final if he shall exercise it, but an arbitrary and capricious exertion of official authority, being without law, and done to defeat the purpose of the law, must, like all other wrongs, be subject to the law's correction."¹ Assessors indeed are clothed with a power which is *quasi* judicial, but fraud vitiates even the most solemn judgments of courts, and the action of these *quasi* judicial bodies cannot stand on any higher ground. It may be that all presumptions should so far favor their action as to protect them against personal actions at the suit of parties aggrieved, but such presumptions cannot preclude inquiry when their action is questioned for fraud. The policy of the law may protect the person, but it would be defeated if legal effect should be given to such fraudulent levies.²

Duplicate taxation. It has been remarked on a preceding page,³ that, when personal property is taxed, duplicate taxation is sometimes imposed. By this was meant that such property

¹Merrill v. Humphrey, 24 Mich., 170. See Woodman v. Auditor-General, 52 Mich., 28; Adams v. Beaman, 10 Kan., 87; Albany, etc., R. R. Co. v. Canaan, 16 Barb., 244; Buffalo, etc., R. R. Co. v. Erie County, 48 N. Y., 93; Western R. R. Co. v. Nolan, 48 N. Y., 518; Fuller v. Gould, 20 Vt., 648, 644; Stearns v. Miller, 25 Vt., 20; Wilson v. Marsh, 34 Vt., 352; State v. Central Pacific R. R. Co., 7 Nev., 99; Law v. People, 87 Ill., 385; Chicago, etc., R. Co. v. Livingston County, 68 Ill., 458; Bureau County v. Railroad Co., 44 Ill., 229; Clarke v. Lincoln County, 54 Wis., 580; Brauns v. Green Bay, 55 Wis., 113; Pelton v. National Bank, 101 U. S., 143; Cummings v. National Bank, 101 U. S., 158.

That neither a state nor a municipality has a right to discriminate in taxation between residents and non-residents, see *ante*, p. 99; City Council of Charleston *ads*. State, 2 Speers, 719; Nashville v. Althorp, 5 Cold., 554. Compare Jones v. Columbus, 25 Ga., 610, where it was held competent to discriminate between residents and non-residents of a city in the taxation of slaves employed therein. But any such discrimination must be expressly authorized by law. Robinson v. Charleston, 2 Rich., 317.

²See Lefferts v. Supervisors of Calumet, 21 Wis., 688; Merrill v. Humphrey, 24 Mich., 170; Milwaukee Iron Co. v. Hubbard, 29 Wis., 51; Mason v. Lancaster, 4 Bush, 406, 408. Inequality in a legal sense is not produced by certain tax payers taking proceedings which vacate an assessment as to them, while others, who have lost the like right by delay, remain taxed, especially when the lands relieved are liable to re-assessment. Matter of DeLancy, 53 N. Y., 89.

³*Ante*, p. 87.

too distinctly borne in mind that any possible system of tax legislation must inevitably produce unequal and unjust results in individual instances; and if inequality in result must defeat the general law, then taxation becomes impossible, and governments must fall back upon arbitrary exactions. But no such impracticable principle is recognized in revenue laws. While equality and justice are constantly to be aimed at, impossibilities are not demanded. Tax legislation must be practical.¹ It is one of the reasons for levying indirect taxes, and other taxes than those on property by value, that they are supposed to diminish the inequalities that would exist if a single species of taxation only were to be levied. The legislature must judge of the general result, and when the law has apportioned the tax, individual hardships must be regarded as among the inconveniences which are incident to regular government. The same necessity that justifies any taxation will justify and sustain any reasonable provisions for giving it effect. The necessity of the state and of reasonable provisions for the security of the individual must be equally considered; the state is no more to be deprived of its revenue, because of individual hardship, resulting from general rules, than is the individual to be stripped of his property without law, because in its necessity the state finds it more convenient to take it thus than by regular proceedings. The incidental hardship or inconvenience must be submitted to in either case.

These general views have often been declared by able jurists. "Property," it is said in one case, "is liable in many cases to be taxed twice, when it would appear difficult or unsafe to make provision by law to prevent. Thus, stock in trade may

a corporation, it is the aggregate of the sum subscribed and paid in, or to be paid in, by the shareholders, with the addition of profits on the residue, after the deduction of losses. *People v. Commissioners of Taxes*, 23 N. Y., 192, 219. In *Mechanics', etc., Bank v. Townsend*, 5 Blatch., 315, *capital* was held not to include surplus earnings, though undivided.

¹ "There is nothing poetical about tax laws. Wherever they find property they claim a contribution for its protection, without any special respect to the owner or his occupation." *Lowrie*, Ch. J., in *Finley v. Philadelphia*, 32 Pa. St., 381. It is not possible to avoid what in its final outcome is duplicate taxation, and therefore a tax cannot be avoided by a showing that such is the result. *St. Louis M. L. Ins. Co. v. Assessors*, 56 Mo., 503. And see *Pittsburgh, etc., R. Co. v. Commonwealth*, 66 Pa. St., 73; *State v. Newark*, 25 N. J., 315.

be taxed to the owner, while he may be indebted for it to many persons, who may be taxed for those debts or the money loaned to purchase it. Real estate may be taxed to a mortgagor in possession while the mortgagee is taxed for the money secured by the mortgage. . . So imperfect are all human institutions that perfect equality in the imposition of burdens is not to be expected. These provisions for valuation are not considered to be in conflict with the general purpose to have all property subjected to taxation once, and only once at the same time."¹ "The power to tax twice," it is said in another case, "is as ample as to tax once."² We make out, therefore, no

¹*Augusta Bank v. Augusta*, 36 Me., 255, 259, per *Shepley*, Ch. J. See *People v. Worthington*, 21 Ill., 170; *Kirby v. Shaw*, 19 Pa. St., 258; *St. Louis Life Ins. Co. v. Assessors*, 56 Mo., 508, per *Voris*, J. For cases of apparent double taxation by a tax on business, see *Savannah v. Charlton*, 36 Ga., 460; *Burch v. Savannah*, 42 Ga., 596; *Sacramento v. Crocker*, 16 Cal., 119; *Coulson v. Harris*, 43 Miss., 728; *Woolman v. State*, 2 Swan, 353.

As to the impossibility of avoiding inequalities in highway taxes, see *Hingham, etc., Turnpike Co. v. Norfolk Co.*, 6 Allen, 353, 359, per *Bigelow*, Ch. J. Railroad bonds are taxable to the owner though the company pays a tax on the market value of its stock and on its debt, in lieu of all taxes on property and franchises. *Bridgeport v. Bishop*, 33 Conn., 187.

²*West Chester Gas Co. v. Chester County*, 30 Pa. St., 232, per *Porter*, J., cited with approval in *Pittsburgh, etc., R. R. Co. v. Commonwealth*, 66 Pa. St., 73, 77-8. See, also, *Erie Railway Co. v. Commonwealth*, 66 Pa. St., 84; *Eberville Coal Co. v. Commonwealth*, 91 Pa. St., 47, 54; *Davidson v. New Orleans*, 96 U. S., 97; *Reclamation Dist. v. Hagar*, 6 Sawy., 567. Congress having levied a tax upon an article is not thereby precluded from levying another. *U. S. v. Benzon*, 2 Cliff., 512. In *Philadelphia Savings Fund v. Yard*, 9 Pa. St., 359, 361, in referring to the case of *The Carlisle Bank*, 8 Watts, 291, the following remarks are made: "The horror of double taxation, manifested in that case, is unsuited to the times; for it has obtained, and must prevail in the exigencies of the commonwealth. It exists in the case of ground rents, where the ground itself and the *reditum* issuing from it are taxed; in a tax upon a mortgage to the whole value of the land, and the land itself. And so, where A. borrows money on mortgage and loans it to C. on bond, and who loans a part of it to D., it is taxed in the current of each actual employment. In the complexity and involutions of business, a dollar is employed many times in a day, and in each actual employment represents the property, business or the person of him who uses it. And in cases of this kind, it is the usufruct, and not the actual or identical money, that is taxed." In *Pittsburgh, etc., R. R. Co. v. Commonwealth*, 66 Pa. St., 77, it is said double taxation is of frequent occurrence. "The real and personal property of a corporation may be taxed, although it pays a tax on the stock which purchased it. *Lackawana Iron Co. v. Luzerne County*, 42 Pa. St., 424, 431. See *Carbon Iron Co. v. Carbon County*,

conclusive case against a tax, when we show that it reaches twice the same property for the same purpose. This may have been intended, and in many cases, at least, is admissible.¹

89 Pa. St., 251; *West Chester Gas Co. v. Chester County*, 80 Pa. St., 832; *Philadelphia Savings Fund v. Yard*, 9 Pa. St., 361. The power of the legislature is as ample to tax twice as to tax once (30 Pa. St., 332); and it is done daily, as all experience shows. 9 Pa. St., 361. Equality of taxation is not required by the constitution. *Kirby v. Shaw*, 19 Pa. St., 258. The stock may be full taxed to the institution and also to the stockholders (*Whitsell v. Northampton County*, 49 Pa. St., 526, 529); and the stockholder in a corporation of another state is obliged to pay a tax to Pennsylvania on his stock, he being a resident here, although the whole profit and stock is subject to taxation in the state of its location." See, also, *Toll-bridge Co. v. Osborn*, 35 Conn., 7; *St. Louis Life Ins. Co. v. Board of Assessors*, 56 Mo., 503. In *Eyre v. Jacob*, 14 Grat., 422, a tax on collateral inheritances was sustained against an objection that taxation of property was required to be uniform. *Lee, J.*, points out that it is not a tax on property, but on the privilege of succeeding to the inheritance.

¹ The case of *The Toll-bridge Co. v. Osborn*, 35 Conn., 7, is a very strong one. A corporation was chartered to build and maintain a toll-bridge, with power, "for the purpose of carrying the resolve into effect," to purchase and hold lands not exceeding one hundred acres. The company built the bridge, and soon after purchased a large quantity of mud flats adjoining the bridge, and erected wharves upon it, which became of great value and were profitably rented. An act, passed in 1847, provided that the real estate of any private corporation, "above what was required and used for the transaction of its appropriate business," should be liable to be assessed and taxed to the same extent as if owned by individuals. *Held*, that the real estate thus used by the company for wharves was liable to taxation under the statute.

The facts in this case were such, that the property was really taxed several times. By the decision of the court, the corporation was compelled to pay a tax upon this property; the shareholders paid a tax upon their shares of stock which represented this property; and the corporation also paid a tax upon its capital stock; and, furthermore, as a great part of the stock was owned by a railway company, they might be taxed as shareholders, and also upon their capital stock, of which these shares were a part, while the shareholders in the railway company might be required to pay a tax upon their shares also.

The court held that it mattered not, so long as the legislative intent was clear. While it was the general policy of the law to avoid duplicate taxation, yet, where the meaning of the statutes is clear, the court cannot pronounce them invalid because they admit of duplicate taxation. Compare *Jones, etc., Manuf. Co. v. Commonwealth*, 69 Pa. St., 137.

Hotel property may be taxed and at the same time the keeper required to pay an occupation tax. *St. Louis v. Bircher*, 7 Mo. App., 169. See for the same principle, *St. Louis v. Green*, 7 Mo. App., 468; *New Orleans v. People's Ins. Co.*, 27 La. An., 519; *New Orleans v. Ins. Co.*, 27 La. An., 656.

It is competent for a state to tax the real estate of railroads as that of in-

There is a sense, however, in which duplicate taxation may be understood—and which we think is the proper sense—which would render it wholly inadmissible under any constitution requiring equality and uniformity in taxation. By duplicate taxation in this sense is understood *the requirement that one person or any one subject of taxation shall directly contribute twice to the same burden, while other subjects of taxation belonging to the same class are required to contribute but once.*

We do not see, for instance, how a tax on a merchant's stock distinctively by value could be supported, when by the same authority and for the same purpose the same stock was taxed by value as a part of his whole property. This is a very different thing from one tax upon property and another upon the business, though the latter may indirectly reach the property: here is no circumlocution, no question of ultimate effects; but a tax levied twice on the same subject, only under different names. The same may be said of a tax on the property of a corporation and also on the capital which is invested in the property; if the latter is taxed as property, this also is duplicate taxation, and as much unequal as would be the taxation of a farmer's stock by value when on the same basis it is taxed as a part of his general property. When, for instance, the money paid in as capital of a manufacturing corporation has been invested in buildings and machinery, these are what then represent the capital, and to tax the capital as valuable property distinct from that which then represents it would be to tax a mere shadow;¹ it would be to make the shadow stand for the

dividuals is taxed, notwithstanding such real estate is essential to enable them to exercise their franchises in the operation of their roads. *Penn. R. Co. v. Pittsburgh*, 104 Pa. St., 522. Where a person moves into a city before the time for listing him for taxation there, the fact that he is already listed for taxation at his former place of residence will not preclude city taxation. *Hilgenberg v. Wilson*, 55 Ind., 210.

¹ That the capital of a corporation is represented by the property in which it has been invested can hardly require the citation of authorities, but the following may be referred to: *Gordon v. Baltimore*, 5 Gill, 231; *Baltimore v. Baltimore & Ohio R. R. Co.*, 6 Gill, 288; *Tax Cases*, 12 Gill & J., 117; *Rome R. R. Co. v. Rome*, 14 Ga., 275; *Augusta v. Georgia R. R., etc., Co.*, 26 Ga., 651; *Hannibal, etc., R. R. Co. v. Shacklett*, 30 Mo., 550; *Auditor, etc., v. New Albany, etc., R. R. Co.*, 11 Ind., 570; *Conwell v. Connersville*, 15 Ind., 150; *Mutual Ins. Co. v. Supervisors of Erie*, 4 N. Y., 442; *Salem Iron Factory v. Danvers*, 10 Mass., 515; *Amesbury Woolen, etc., Co. v.*

substance in order that it might be taxed, when the substance itself is taxed directly under its own proper designation. We do not speak here of a taxation of the property and also of the franchise, these being two things, as will be seen further on.¹

Amesbury, 17 Mass., 461; Boston, etc., Glass Co. v. Boston, 4 Met., 181; Boston Water Power Co. v. Boston, 9 Met., 199; Bangor & Piscataqua R. R. Co. v. Harris, 21 Me., 533; Cumberland Marine R. v. Portland, 37 Me., 444; Savings Bank v. New London, 20 Conn., 111, 117; Bridgeport v. Bishop, 33 Conn., 187; Toll Bridge Co. v. Osborn, 85 Conn., 7; New Haven v. City Bank, 31 Conn., 106; Bank of Cape Fear v. Edwards, 5 Ired., 516; Smith v. Exeter, 37 N. H., 556; Fitchburgh R. R. Co. v. Prescott, 47 N. H., 62; Burke v. Badlam, 57 Cal., 594; San Francisco v. Mackey, 21 Fed. Rep. 539; Coatesville Gas Co. v. Chester County, 97 Pa. St., 476; Middlesex R. R. Co. v. Charlestown, 8 Allen, 330.

For the distinction between a tax on the franchise of a corporation, and a tax on its capital *as property*, see Bank of Commerce v. New York City, 2 Black, 620; Van Allen v. The Assessor, 3 Wall., 573; Bradley v. People, 4 Wall., 459. The law of these cases is that where the tax is on the capital by a valuation as property, it is invalid if the capital is invested in non-taxable securities. But in taxing banks, legal tenders received in current business are not to be excluded. New Orleans v. Canal, etc., Co., 29 La. An., 851; Same v. Same, 33 La. An., 157.

Cash in the treasury is not taxable separately, as it enters into the value of the shares. Fall River v. Bristol County, 125 Mass., 567.

The stock of a domestic corporation owned by non-residents held to be taxable in Maryland, though in determining the value real estate owned by the corporation in another state was taken into account. American Coal Co. v. Allegany Co., 59 Md., 185.

¹ When the capital stock of a corporation is required to be assessed at its "actual value," this means above or below the par value, according to the fact. Oswego Starch Factory v. Dolloway, 21 N. Y., 449.

When a railroad is taxable at a certain rate only upon the capital stock paid in, "if the property is of greater value than the whole amount paid in, the excess is not stock within the sense and meaning of the charter, but accumulation from appreciation or profit, and is therefore subject to taxation at the general rate at which the property of the people is assessed." If the paid-up stock exceed the amount authorized by charter, such excess "would not fall under the charter limit as to the rate of taxation." Goldsmith v. Rome R. R. Co., 62 Ga., 473. As to taxing the property instead of the capital stock, see this case, and also Goldsmith v. Georgia R. R. Co., 62 Ga., 485. The statute prohibited the collection of any tax on mortgages. Held that this did not preclude the taxation of a corporation on its whole capital stock, though some of it was represented by mortgages; the purpose of the statute being only to exempt mortgages as such. Emory v. State, 41 Md., 38.

There is no duplicate taxation where a corporation is assessed on its tangible property, and also on the value of its capital stock in excess of the value

Presumption against duplicate taxation. It has very properly and justly been held that a construction of tax laws was not to be adopted that would subject the same property to be twice charged for the same tax, unless it was required by the express words of the statute, or by necessary implication.¹ It is a fundamental maxim in taxation that the same property shall not be subject to a double tax payable by the same party, either directly or indirectly; and where it is once decided that any kind or class of property is liable to be taxed under one provision of the statutes, it has been held to follow, as a legal conclusion, that the legislature could not have intended that the same property should be subject to another tax, though there may be general words in the law which would seem to imply that it may be taxed a second time.² This is a sound

of tangible property. *Porter v. Rockford, etc., R. Co.*, 76 Ill., 561; *Chicago, etc., R. Co. v. Siders*, 88 Ill., 320, and cases cited; *Chicago, etc., R. Co. v. Raymond*, 97 Ill., 212; *Hamilton Manuf. Co. v. Massachusetts*, 6 Wall., 632, and cases cited. In assessing shares the value of the franchise is to be considered. *Stratton v. Collins*, 43 N. J., 562.

If a corporation holds any of its own stock, it is taxable for it when an individual owner would be. *Richmond, etc., R. Co. v. Alamance Co.*, 84 N. C., 504. Where a bank owned its bank building and rented a part of it, it was held that this represented the capital stock in part, and a tax on the par value of the shares was a tax on the whole. *Lackawana County v. National Bank*, 94 Pa. St., 221.

¹ *Salem Iron, etc., Co. v. Danvers*, 10 Mass., 514; *Amesbury Woolen, etc., Co. v. Amesbury*, 17 Mass., 461; *Water Power Co. v. Boston*, 9 Met., 199, 202; *Bank of Georgia v. Savannah*, Dudley, 130; *Gordon's Executors v. Baltimore*, 5 Gill, 231; *The Tax Cases*, 12 Gill & J., 117; *Savings Bank v. New London*, 20 Conn., 111, 117; *Toll Bridge Co. v. Osborn*, 35 Conn., 7; *Osborn v. N. Y. & N. H. R. R. Co.*, 40 Conn., 491; *Smith v. Burley*, 9 N. H., 423; *Savings Bank v. Portsmouth*, 52 N. H., 17; *Kimball v. Milford*, 54 N. H., 406; *State v. Collector*, 37 N. J., 258; *People v. Commissioners of Taxes*, 95 N. Y., 554.

² *Savings Bank v. Nashua*, 46 N. H., 389-398, citing *Smith v. Burley*, 9 N. H., 423, and other cases. And see *Osborn v. N. Y. & N. H. R. R. Co.*, 40 Conn., 491; *American Bank v. Mumford*, 4 R. I., 478; *Rome R. Co. v. Rome*, 14 Ga., 275; *Smith v. Exeter*, 37 N. H., 556; *Kimball v. Milford*, 54 N. H., 406; *U. S. Express Co. v. Ellyson*, 28 Ia., 370; *Cook v. Burlington*, 59 Ia., 251; *Board of Rev. v. Gas Light Co.*, 64 Ala., 269. In *State v. Sterling*, 20 Md., 502, a law taxed savings banks a certain percentage on all deposits held by them on a certain day. Held to be void because not exempting the investments in securities otherwise taxed or not taxable at all. When by authority of law city lots are appropriated for a railroad track and assessed as such by the state, they cannot also be assessed as city lots by the local

and very just rule of construction, and it has been applied in many cases where, at first reading of the law, a double taxation might seem to have been intended.¹

Application of the Presumption. A few instances in which this rule of presumption has been applied will show what taxation has been held to be in effect duplicate taxation, and for that reason excluded from the general language made use of in tax laws.

Under a statute in Massachusetts, shares in any incorporated company possessing taxable property were taxable to the owners in the towns of their residence respectively. While this was in force, a manufacturing corporation was assessed under the general law for the taxation of property to its owners, for all its real and personal estate in the town where its business was carried on. It was held that this taxation of shares was by implication to be regarded as standing in the place of a taxation of the personal estate to the corporation itself, since, if both were taxed, it would in effect be duplicate taxation. As to the real estate, however, the conclusion was different. The taxes upon land had always, in that state, been paid exclusively

authorities. *Chicago, etc., R. Co. v. Miller*, 73 Ill., 144. But this right of way only includes land actually used for the road itself, not ground used for stations and machine shops. *Chicago, etc., R. Co. v. Paddock*, 75 Ill., 616. See *People v. Ohio, etc., R. Co.*, 96 Ill., 411.

When the state lays a specific tax on banks measured by the stock, a bank is not liable upon its capital stock as "taxable property." To tax it thus would be to tax it on its debts. So held in *Trustees of Eminence v. Deposit Bank*, 12 Bush, 538. Compare *San Francisco v. Spring, etc., Works*, 54 Cal., 571. A tax of a specified sum on family vehicles already taxed by value is invalid as a double tax and as grossly disproportionate. *Livingston v. Paducah*, 80 Ky., 656.

¹ *Bank of Georgia v. Savannah*, Dudley, 130; *Factory Co. v. Gardiner*, 5 Me., 133; *Glass Co. v. Boston*, 4 Met., 181; *Savings Bank v. Worcester*, 10 Cush., 128; *American Bank v. Mumford*, 4 R. I., 478, 482; *Savings Bank v. Gardiner*, 4 R. I., 484; *Smith v. Exeter*, 37 N. H., 566; *Toll Bridge Co. v. Osborn*, 35 Conn., 7; *State v. Hannibal, etc., R. R. Co.*, 87 Mo., 265. In the case of *Kimball v. Milford*, 54 N. H., 406, stock in a foreign corporation, which by its charter pays a specific tax in lieu of all others, was held not taxable in New Hampshire, under its statutes. See as to a law for taxing the gains of a corporation, and the dividends declared or earned, *Board of Revenue v. Gas Light Co.*, 64 Ala., 269. And further for the general rule, *Coatesville Gas Co. v. Chester County*, 97 Pa. St., 476; *Rice County v. National Bank*, 23 Minn., 280.

to the town in which it was situated. In all successive valuations made in pursuance of the laws for that purpose, each town had been charged with the value of all the real estate within it, in the apportionment of the tax among the several towns. It would therefore be unjust if the real estate which was included in estimating the amount of taxes charged on a town, by being assessed as represented by the shares of stockholders elsewhere, should be exempted from contributing to the discharge of such taxes. The policy of all the tax laws had been that the land should contribute to the local taxes irrespective of the residence of the owner, and the implication that this was intended in the case of corporate real estate was so strong that the counteracting presumption against an intent to impose duplicate taxation must yield to it.¹

So in Georgia it has been held, under a city charter empowering the corporation in general terms to levy taxes on real and personal estate, that while the city might tax the stockholders of a bank upon their shares, this taxation would by implication exclude the taxation of the bank on its capital stock.² In Pennsylvania it has been decided that a tax on the discount business of a bank is in a degree a tax upon the capital of the bank. Where, therefore, it was provided by its

¹*Salem Iron Factory v. Danvers*, 10 Mass., 514. This case was followed, after some change in the statute, in *Amesbury Woolen, etc., Co. v. Amesbury*, 17 Mass., 461. And see as to the real estate, *Amesbury Nail Factory Co. v. Weed*, 17 Mass., 53; *Tremont Bank v. Boston*, 1 Cush., 142; *Boston Water Power Co. v. Boston*, 9 Met., 199. In *Middlesex R. R. Co. v. Charleston*, 8 Allen, 330, where shareholders in a street railway were taxable on their shares in the towns where they resided, it was held not competent to tax the personal property of the corporation used in and necessary for the prosecution of its business. "The value of the personal property owned by the corporation is included as a subject of taxation in the value of the shares; as in the case of banks, insurance companies, manufacturing corporations and other railroads." *Hoar, J.*, p. 333. Compare *The Tax Cases*, 12 G. & J., 117. To tax a bank on its property and also the stockholders on their shares was regarded as duplicate taxation, and not allowable under the Maryland laws, in *Gordon's Ex'rs v. Baltimore*, 5 Gill, 231, and *Baltimore v. B. & O. R. R. Co.*, 6 Gill, 288. And see *American Bank v. Mumford*, 4 R. I., 478; *Providence Institution v. Gardiner*, 4 R. I., 484; *Farrington v. Tennessee*, 95 U. S., 679; *Railroad Co. v. Gaines*, 97 U. S., 697.

²*Bank of Georgia v. Savannah*, Dudley, 130, citing with approval Massachusetts cases. See *Bank of Cape Fear v. Edwards*, 5 Ired., 516; *Johnson v. Commonwealth*, 7 Dana, 338; *State v. Tunis*, 23 N. J., 546.

charter that the bank should not be subject to taxation on its capital stock, for any other than state purposes, the tax on its discount business would be inadmissible but for the fact that the charter was granted under and subject to a provision in the state constitution which made it at all times subject to legislative alteration or repeal.¹

So in Massachusetts it is held that a bank which pays a specific tax on its capital stock is not taxable on collaterals deposited with it as security for loans.² Further illustrations will appear in cases cited in the margin.³

On the other hand a tax on the market value of the capital stock of a corporation, over and above the value of its real and personal property, is not duplicate taxation by reason of the tangible property being also taxed, but is a tax upon the franchise.⁴ So a tax on the deposits of savings societies has been held a tax on the franchise and not a tax on property.⁵ And where by statute "no income shall be taxed

¹ *Iron City Bank v. Pittsburgh*, 87 Pa. St., 840.

² *Waltham Bank v. Waltham*, 10 Met., 334; *Tremont Bank v. Boston*, 1 Cush., 142; and see *Salem Iron Factory v. Danvers*, 10 Mass., 514.

³ *State v. Branin*, 23 N. J., 484, which cites *Johnson v. Commonwealth*, 7 Dana, 388; *Tax Cases*, 12 G. & J., 117; *Gordon's Ex'rs v. Baltimore*, 5 Gill, 231; *Smith v. Burley*, 9 N. H., 423. See, also, *State v. Bentley*, 23 N. J., 532; *State v. Powers*, 24 N. J., 400; *Bank of Cape Fear v. Edwards*, 5 Ired., 516; *Wilmington, etc., R. R. Co. v. Reid*, 13 Wall., 264.

⁴ So held in *Hamilton Co. v. Massachusetts*, 6 Wall., 632, in reliance upon a settled course of decisions in Massachusetts. See *Commonwealth v. Hamilton Manuf. Co.*, 12 Allen, 298, 306; *Porter v. Rockford, etc., R. Co.*, 76 Ill., 561; *Chicago, etc., R. Co. v. Siders*, 88 Ill., 320; *Chicago, etc., R. Co. v. Raymond*, 97 Ill., 212. Shares of stock in a foreign corporation may be taxed in full to resident owners, irrespective of the taxation of its property where it is located. *Dwight v. Boston*, 12 Allen, 316. A state may tax the franchise or the capital of a corporation by such rule as it may prescribe, even though it be arbitrary. And if the corporation be a railroad company owning a road in two states, one state may tax the corporation on a proportional part of its stock, measured by the length of the road in that state. *Minot v. Philadelphia, etc., R. R. Co.*, 18 Wall., 206.

⁵ *Society of Savings v. Coite*, 6 Wall., 594; *Provident Institution v. Massachusetts*, 6 Wall., 611. See *Portland Bank v. Apthorp*, 12 Mass., 252; *People v. Savings Bank*, 5 Allen, 428; *People v. Supervisors of Niagara*, 4 Hill, 20; *Farmers' Loan & Trust Co. v. New York*, 7 Hill, 261; *Bank of Utica v. Utica*, 4 Paige, 399; *Coite v. Society for Savings*, 32 Conn., 173; *Coite v. Conn. Mu. Life Ins. Co.*, 36 Conn., 512; *Illinois Mu. Ins. Co. v. Peoria*, 29 Ill., 180; *Olivier v. Washington Mills*, 11 Allen, 268; *Commonwealth v.*

which is derived from property subject to taxation," a merchant may nevertheless be taxed on his income under the general law taxing income from a profession, trade or employment, this income being the "net result of many combined influences: the use of the capital invested; the personal labor and services; . . . the skill and ability with which they lay in or from time to time renew their stock; the carefulness and good judgment with which they sell and give credit; and the foresight and address with which they hold themselves prepared for the fluctuations and contingencies affecting the general commerce and business of the country. To express it in a more summary and comprehensive form, it is the creation of capital, industry and skill."¹ So it is competent to tax brokers upon their annual receipts, notwithstanding they pay a license tax for the privilege of carrying on that business.² So a tax upon the amount of the nominal capital of a bank, without regard to loss or depreciation, has been likened to "one annexed to the franchise as a royalty for the grant."³ A tax on the interest paid by a corporation on its indebtedness, though collected from the corporation, is still a tax on the creditor; the corporation being only made use of as a convenient means of collecting the tax.⁴ So a tax on the shares of stockholders in a corporation is a different thing from a tax on the corporation itself or its stock, and may be laid irrespective of any taxation of the corporation

Carey Improving Co., 98 Mass., 19; *Attorney-General v. Mining Co.*, 99 Mass., 148.

As to what is a franchise tax, see *post*, ch. XII.

¹ *Wilcox v. Commissioners of Middlesex*, 103 Mass., 544, per *Ames, J.*

² *Drexel v. Commonwealth*, 46 Pa. St., 81.

³ *Bank of Commerce v. New York*, 2 Black, 620, 629, per *Nelson, J.*

⁴ *Haight v. Railroad Co.*, 6 Wall., 15; *Railroad Co. v. Jackson*, 7 Wall., 262; *United States v. Railroad Co.*, 17 Wall., 322. In the second of these cases a state tax on the interest on bonds issued by a railroad company and secured by mortgage on a line lying partly in another state was held to be void, on the ground that to the extent of the road out of the state she was "taxing property and interests beyond her jurisdiction." It is to be said of this case that the plaintiff was a non-resident, and for that reason not taxable in the state on his bonds, under the subsequent decision of the same court. *State Tax on Foreign Held Bonds*, 15 Wall., 300, 323. Railroad bonds are taxable to the owners notwithstanding the company pays a tax on "the market value of their stock and their funded and floating debt, in lieu of all other taxes on railroad property and franchises." *Bridgeport v. Bishop*, 38 Conn., 187.

when no contract relations forbid.¹ So it has been held that a corporation which was required to pay a bonus on its capital in lieu of a tax on dividends might nevertheless be taxed on its "net earnings or income;" this not being the same thing as dividends.² So in case of a corporation which pays a specific tax, an exemption "from any other or further tax or imposition" will not prevent any real estate it may own, and which is not needed for corporate purposes, from being taxed. "The power granted to a corporation to hold land is limited to the purposes for which the power was conferred. This is the general rule, and governs in the construction of the exempting clause. The tax levied may so far operate as a double tax, the property being already taxed in the shape of capital; but if the company choose to invest capital in property not necessary for their business, such as the legislature did not contemplate in their grant, they cannot complain that it is twice taxed. Double taxation is not unconstitutional."³

It has often been decided that a tax on the franchise of a corporation, and also on its capital or property, was not duplicate taxation.⁴ The franchise, nevertheless, has a property

¹*Tremont Bank v. Boston*, 1 Cush., 142; *State v. Petway*, 2 Jones, Eq., 396; *State v. Thomas*, 26 N. J., 181; *Lycoming County v. Gamble*, 47 Pa. St., 106; *Whitesell v. Northampton County*, 49 Pa. St., 526; *Union Bank v. State*, 9 Yerg., 490; *Oswego Starch Factory v. Dolloway*, 21 N. Y., 449; *People v. Bradley*, 39 Ill., 130, 141; *Conwell v. Connersville*, 15 Ind., 150; *Van Allen v. Assessors*, 3 Wall., 573, 584; *State Tax on Foreign Held Bonds*, 15 Wall., 300, 323; *Cumberland Marine Railway v. Portland*, 37 Me., 444; *Salt Lake City Nat. Bank v. Golding*, 2 Utah, 1; *Nashville Gas Light Co. v. Nashville*, 8 Lea, 406; *Emsly v. Memphis*, 6 Baxt., 553; *New Orleans v. Canal, etc.*, Co., 32 La. An., 157; *Cook v. Burlington*, 59 Ia., 251; *Republic Life Ins. Co. v. Pollak*, 75 Ill., 292.

See *Farrington v. Tennessee*, 95 U. S., 679; *Porter v. Railroad Co.*, 70 Ill., 591; *Belo v. Commissioners*, 82 N. C., 415; *Tennessee v. Whitworth*, 22 Fed. Rep., 75.

²*Jones, etc., Manuf'g Co. v. Commonwealth*, 69 Pa. St., 137. That stock divided among stockholders as profits are dividends, see *Lehigh Crane Iron Co. v. Commonwealth*, 55 Pa. St., 448; *State v. Farmers' Bank*, 11 Ohio, 94; *Sun Mu. Ins. Co. v. New York*, 8 N. Y., 241, 250. See *Bailey v. Railroad Co.*, 22 Wall., 604.

³*Potts, J.*, in *State v. Newark*, 25 N. J., 315, 317, citing *Tatem v. Wright*, 23 N. J., 429. See, also, *Railroad Co. v. Reid*, 18 Wall., 264, 268, per *Davis, J.*; *Illinois Central R. R. Co. v. Irvin*, 72 Ill., 452.

⁴*Carbon Iron Co. v. Carbon County*, 39 Pa. St., 251; *Lackawana Iron Co. v. Luzerne County*, 42 Pa. St., 424; *Tremont Bank v. Boston*, 1 Cush., 142;

value, and as a question of construction, it may sometimes be necessary to hold that an exemption of the property of a corporation from taxation is an exemption of the franchise also. It has been so held in the case of a railroad corporation whose charter provided that "the property of said company and the shares therein shall be exempt from any public charge or tax whatever."¹ The intent in such a case, when reasonably apparent on the face of the legislation, must control. It has been held that a tax on the capital stock measured by dividends was not a tax on dividends, and the corporation subject to it was therefore liable to a tax on net earnings under a statute which provides that corporations not paying a tax on dividends shall be taxed on net earnings.² A tax on "the capital stock actually paid in or secured to be paid in" is a tax on the capital at its nominal amount, and is not to be increased or diminished by

Commonwealth v. Lowell Gas Light Co., 12 Allen, 75; *Commonwealth v. Hamilton Manuf'g Co.*, 12 Allen, 298; *Wilmington, etc., R. R. Co. v. Reid*, 64 N. C., 226; *Mason v. Lancaster*, 4 Bush, 406; *Monroe Savings Bank v. Rochester*, 37 N. Y., 365; *Bank of Commerce v. New York*, 2 Black, 620, 629; *Minot v. Railroad Co.*, 18 Wall., 206. In *Commonwealth v. N. E. Slate & Tile Co.*, 13 Allen, 391, 393, *Wells, J.*, says: "The fact that the defendant corporation held property which was the subject of taxation in other ways does not render this tax upon its franchise illegal. In the practical operation of the powers of taxation, which are given in several forms, it is inevitable that double taxation shall occur in some cases. The legislature may relieve against it by allowing deductions if it sees fit to do so; but the court can only apply the law as it stands." If the capital is invested in non-taxable securities, the franchise may still be taxed. *Monroe Savings Bank v. Rochester*, 37 N. Y., 365. And see *Society for Savings v. Coite*, 6 Wall., 594; *Provident Inst. v. Massachusetts*, 6 Wall., 611; *Hamilton Co. v. Massachusetts*, 6 Wall., 632.

¹ *Wilmington Railroad Co. v. Reid*, 13 Wall., 264; *Raleigh, etc., Railroad Co. v. Reid*, 13 Wall., 269. In New Jersey, where a corporation by its charter was to pay a certain tax on its capital stock paid in, and it was declared that "no further or other tax or impost shall be levied or assessed upon said company," this was held to exempt not the franchises merely, but the property also. *State v. Berry*, 17 N. J., 80; *Camden & Amboy R. R. Co. v. Commissioner of Appeals*, 18 N. J., 71. So it has been held that a tax on the gross income of a corporation cannot be laid when the stock is exempt. *State v. Hood*, 15 Rich., 177.

² *Phoenix Iron Co. v. Commonwealth*, 59 Pa. St., 104. A tax on capital invested in shipping is not duplicate taxation as applied to vessels upon which the harbor-master's fees have been paid. *State v. Charleston*, 4 Rich., 286.

accumulations or losses.¹ These cases will perhaps illustrate sufficiently the power of the legislature to impose taxation that in its result duplicates the burden, as well as the force of the presumption that the legislature, in its desire to lay all burdens of government justly, has never intended duplicate taxation unless plain language expressive of that intent has been employed.

So far, the subject has been considered as the questions of equality and justice in taxation arise on the tax laws themselves. Of the steps necessary or proper to be taken in order to secure equality under such laws, it will be necessary to speak further on.

Commuting taxes. Tax laws sometimes provide for commutation; that is to say, for the substitution of something else for the tax that is levied. Thus, road taxes are sometimes levied in labor, with permission to commute by the payment of what is deemed an equivalent in money. There is no doubt of the right to pass laws which allow of such commutations,² provided they are general and impartial; but if they offer the privilege of commutation to certain classes of the people only, they will be held void.³ Such commutations are competent when not forbidden by the constitution, and they are not supposed to cause inequality or injustice.⁴ Many of the special exemptions which have been referred to were in the nature of commutations, being made in consideration of something received or to be received by the state which was supposed to be the equivalent of regular taxation.⁵

¹ *Farmers' Loan & Trust Co. v. New York*, 7 Hill, 261, citing *Bank of Utica v. Utica*, 4 Paige, 399; *People v. Supervisors of Niagara*, 4 Hill, 20. See *Gordon v. New Brunswick Bank*, 6 N. J., 100; *Rudderow v. State*, 31 N. J., 512.

² *Daughdrill v. Insurance Co.*, 31 Ala., 91.

³ *Cooper v. Ash*, 76 Ill., 11.

⁴ *Gardner v. State*, 21 N. J., 557; *Daughdrill v. Insurance Co.*, 31 Ala., 91.

⁵ See *ante*, p. 69; also, Ill. Cent. R. Co. *v. McLean Co.*, 17 Ill., 291; *Waters v. State*, 1 Gill, 302; *Balt. & O. R. Co. v. Maryland*, 21 Wall., 456; *Milwaukee, etc., R. Co. v. Crawford Co.*, 29 Wis., 116; *New Orleans v. Insurance Co.*, 28 La. An., 756; *New Orleans v. St. Charles, etc., Co.*, 28 La. An., 497; *New Orleans v. Sugar Shed Co.*, 35 La. An., 548; *Hunsaker v. Wright*, 30 Ill., 146; *Johnston v. Macon*, 62 Ga., 645.

Diversity of taxation in different districts. Reference has been made to cases which recognize the right of the state to establish different rules of taxation for the local levies in different districts, even when, by the state constitution, uniformity and equality in taxation are required. Such different rules are made in view of the universal custom to consult the circumstances of different districts, and, when deemed important, the wishes of their people regarding the taxes to be levied therein as district taxes; and all presumptions are against any purpose to set aside that custom. Local taxes may be levied on a different system in the different municipal districts, and for different purposes; not only when they are laid to supply mere local works and conveniences, but also when they are for purposes—like the highways, for instance—which, though paid for locally, are for the benefit of the whole state and the use of all its people.¹

Monopolies. It seems scarcely necessary to say that the rule of equality in taxation will forbid the power being employed for the purpose of building up monopolies. That it is capable of being so employed needs no demonstration; and that it sometimes has been so employed, especially in the arrangement of the customs duties, is unquestionable; always, of course, under the pretense of an apportionment of taxes for the public good. Taxation of business and the license taxes are peculiarly liable to abuse in this direction,² especially if they undertake to limit the number to whom permits shall be granted; and if the state can exempt the large manufacturer from taxation while taxing his feeble competitor, as has been done in one state at least, it may take in this way a long stride in the direction of establishing a monopoly. The spirit of a free constitution, if not its letter, forbids such legislation, and sound public policy forbids it also. One reason why taxation for private purposes is inadmissible is, that its tendency is to the building up of monopolies at the expense of the public

¹ See, in general, *People v. Central Pacific R. R. Co.*, 43 Cal., 398; *Bright v. McCullough*, 27 Ind., 223; *Commissioners of Schools v. Alleghany County*, 20 Md., 449, 457; *Merrick v. Amherst*, 12 Allen, 500.

² See Judge *Nott's* article on Monopolies in the *International Review*, vol. 1, p. 370. Charles I. was able to exact large sums of money by enforcing a

who would suffer from them;¹ it begins in a pretense for the public good, and it ends in crippling the general industry while it excites the general discontent.²

Permanence in legislation. It should be added, that, in order that tax laws may not be oppressive, they should not be subject to frequent changes. Tariff laws frequently changed become a serious impediment to the business of the country, from the impossibility on the part of business men to calculate upon the future. To all the other contingencies of business is added this one, which is, perhaps, greatest of all: that the federal legislature may so change the customs laws as to detract considerably from the market value of merchandise on hand, or increase largely the cost of something employed in manufacture, or in some other way to change greatly the outlook for any particular trade. The excise laws are seldom changed without serious injury to individuals; and if others, perhaps, make fortunes by the change, the possibility of such prosperity leads to speculations in prospective changes, and even to endeavors by indirect means to procure alterations for speculative purposes. Changes in other tax laws are not so injurious, but they are always liable to be oppressive in individual cases, and for this reason are not to be made except to cure positive evils. Mere inconveniences, to which the people have become accustomed, or even impolitic or unequal taxation to which trade and business have adjusted themselves, are usually less harmful than considerable changes in the law made with a view to their correction. This is a consideration of policy, with which the courts have no concern, but it seems sufficiently important to justify mention in this connection.

royal proclamation forbidding the erection of buildings in extension of London, and granting special permits on the payment of large sums for the privilege. Green's England, ch. 8, sec. 5.

¹ See *Philadelphia Association v. Wood*, 39 Pa. St., 73, 82, per *Lourie*, Ch. J.

² The right of a city to levy a tax for the construction of a patented pavement has been denied in some states, on the express ground that the patent was a monopoly, and there could be no competition in bidding for the contract to construct it. *Nicolson Pavement Co. v. Fay*, 35 Cal., 695; *Same v. Painter*, 35 Cal., 699; *Dean v. Charlton*, 23 Wis., 590; *Burgess v. Jefferson*, 21 La. An., 143. *Contra*, *Hobart v. Detroit*, 17 Mich., 246; *In re Eager*, 46 N. Y., 100; *In re Dugro*, 50 N. Y., 513.

CHAPTER VII.

THE APPORTIONMENT OF TAXES.

When the state has need of the property of citizens for its sovereign purposes, it may lawfully appropriate it against the will of the owner either under the power to tax or the right of eminent domain. There is a difference in the two cases which is vital. When property is appropriated under the right of eminent domain, a particular item or parcel is taken, because for public purposes there is special need of it, and the state takes it under proceedings which amount, so far as the owner is concerned, to a forced sale. But taxation is based upon the idea of calling upon the people for equal and proportional contributions to the public wants, that the burdens of government may fall ratably upon all who in justice should bear them.¹ Apportionment of the burden is therefore a necessary element in all taxation.

Two things are involved in apportionment. The first is the selection of the subjects of taxation. No state undertakes to tax everything which comes within the reach of the taxing power; and it would be idle as well as mischievous in the last degree if it were to attempt it. For while the state may tax all persons as such, and all property as such, it may also tax all occupations, all amusements, and the very enjoyment of customary rights and privileges, until the exactions would be oppressive from their very number when not otherwise onerous, and a free people would not endure them. The more reasonable and politic course is to select for taxation as few subjects as possible, consistent with a fair distribution of the burden.

The other requisite in apportionment is the laying down of a rule by which to measure the contribution which each of the subjects selected for taxation shall make. This rule only the legislative power of the state is competent to prescribe, and apportionment, therefore, is always an act of legislation.²

¹*People v. Brooklyn*, 4 N. Y., 419; *Woodbridge v. Detroit*, 8 Mich., 274; *Booth v. Woodbury*, 82 Conn., 118; *Macon v. Patty*, 57 Miss., 378.

²*Scoville v. Cleveland*, 1 Ohio St., 126; *Youngblood v. Sexton*, 83 Mich., 406.

"The power of taxing and the power of apportioning taxation are identical and inseparable. Taxes cannot be laid without apportionment, and the power of apportionment is, therefore, unlimited, unless it be restrained as a part of the power of taxation."¹

The methods of apportionment are numerous and dissimilar, but most taxes may be classified under the three heads of specific taxes, *ad valorem* taxes, and taxes apportioned by special benefits.

Specific Taxes. Under this head may be classed those which impose a specific sum by the head or number, or by some standard of weight or measurement, and which require no assessment beyond a listing and classification of the subjects to be taxed. License taxes and other taxes on business or occupations, stamp taxes, taxes on franchises and privileges, are usually specific, as are also other excise and customs taxes.

As regards all such taxes, the law by which they are laid is of itself a complete apportionment. Ministerial officers have nothing to do but to list the subjects of taxation; classify them where that is necessary; ascertain the number, weight, measurement, etc., when taxation depends upon it, and collect the sum which the law has definitely fixed. If the taxes are stamp or license taxes, even the listing may not be required, but the individual who is to pay them will purchase his stamp or his license, and thus make voluntary payment, as he may have occasion.

Ad Valorem Taxes. A large proportion of the duties on imports are of this description, and so, sometimes, are many of the taxes which make up the internal revenue. The statute laying them prescribes the rule, but requires the action of appraisers in apportioning them between individuals. By far the larger proportion of all state taxation is also upon property by a valuation, and effect can only be given to it by means of assessors, who value the property and apportion the tax by their estimate.

¹ *Ruggles, J.*, in *People v. Brooklyn*, 4 N. Y., 419, 426-7. See *Glasgow v. Rowse*, 43 Mo., 479, 489; *Butler's Appeal*, 73 Pa. St., 448.

Taxes Apportioned by Benefits. As between *districts*, where an object for which taxes are to be levied pertains to two or more, the legislature sometimes makes the apportionment by its own action directly, with reference to the supposed interest of each in such object, or to the benefit each is likely to derive therefrom. It may also provide for the apportionment by commissioners appointed for the purpose. This often becomes necessary in the case of roads and bridges lying partly in two or more districts.¹

The case of the division of counties and towns affords many opportunities for state apportionment. If one municipality is set off from another, the old one, as has been seen, unless it is otherwise provided by statute, will retain the public property and remain liable for the corporate debts.² It will also retain the right to proceed in the collection of the taxes previously voted, and they will belong to it, though collected in part from the territory now set off.³ And this will be the case even as to a special tax levied for a particular local work, the whole benefit of which will be received by the old municipality.⁴ The duty of collecting the tax will also be upon the officers of the old municipality.⁵ If this rule results in injustice to either

¹ See *Salem Turnpike v. Essex Co.*, 100 Mass., 283; *Shaw v. Dennis*, 10 Ill., 405; *Supervisors of Will Co. v. People*, 110 Ill., 511.

² See *ante*, pp. 162-3.

³ *Devor v. McClintock*, 9 W. & S., 80; *Waldron v. Lee*, 5 Pick., 323; *Harmen v. New Marlborough*, 9 Cush., 525; *Moss v. Shear*, 25 Cal., 38; *Morgan County v. Hendricks County*, 32 Ind., 234. See *Alvis v. Whitney*, 43 Ind., 83.

⁴ *Marion Co. v. Harvey Co.*, 26 Kan., 181. See the same case as to a similar question regarding railroad aid taxation. And compare *Chandler v. Reynolds*, 19 Kan., 249; *Lamb v. Burlington, etc.*, R. Co., 39 Ia., 333.

⁵ *Fender v. Neosho Falls*, 23 Kan., 305. As to the collection and disbursement of taxes in unorganized territory, see *Roscommon v. Midland*, 39 Mich., 424. Cutting off a portion of a school district from a township takes away at once all power of the township as to school taxes in the part set off. *Folkerts v. Power*, 42 Mich., 283. But when a new township is erected of territory taken from an old one, it does not become a township as to the assessment, levy and collection of taxes until it has officers, and the old township may until then continue to tax for its own use. *Com'rs v. Harrisville*, 45 Mich., 442. See *Milwaukee, etc., R. Co. v. Kossuth Co.*, 41 Ia., 57.

When an addition is made to a municipality, the district added comes in under a liability for previous municipal obligations. But there may be legislation to protect against any injustice in such cases. See *United States v. Memphis*, 97 U. S., 284; *Cleveland v. Hensley*, 41 Ohio St., 670.

the one party or the other, there can be no remedy except in legislation, for neither could have an action against the other based on equities growing out of the division.¹

But the legislature has full power to do justice in such cases by making the proper division of property and debts, either directly or through commissioners, or by the aid of the local official boards. And when the apportionment is made, it may compel the necessary taxes to be levied for the payment of any award.² It is not uncommon to provide for such apportionment by general law.³

In the preceding chapter the constitutional provisions of a number of the states are referred to, which require state taxation of property to be by value. The judicial decisions are also cited, which hold that the local levies, commonly known under the head of assessments, though laid under the taxing power, are not taxes in the technical sense of that term as it is commonly employed in state constitutions, and that therefore they may be laid by some other standard than that of value, if the legislature shall so prescribe. The standard more often established than any other is one which seeks to put upon each item of property a tax proportioned to the special benefit it is to receive from the expenditure. There are two general methods of making the apportionment between individuals, the one or the other of which is prescribed as is thought most just and equal. The first is, the appointment of assessors or commis-

¹ See *Laramie Co. v. Albany Co.*, 92 U. S., 307, where it was held that a county which was largely indebted, and from which another county had been set off, could not, after paying the debt, maintain an action against the new county for contribution.

² *Bristol v. New Chester*, 3 N. H., 524; *Londonderry v. Derry*, 8 N. H., 320; *Willimantic v. Windham*, 14 Conn., 457; *Hartford Bridge Co. v. East Hartford*, 16 Conn., 149, 172; *Granby v. Thurston*, 23 Conn., 416; *Montpelier v. East Montpelier*, 29 Vt., 12, 20; *Milwaukee v. Milwaukee*, 12 Wis., 93; *State v. Rice*, 35 Wis., 178; *Bowdoinham v. Richmond*, 6 Greenl., 112; *Marshall County Court v. Calloway County Court*, 2 Bush, 93; *Richland County v. Lawrence County*, 12 Ill., 1; *Borough of Dunmore's Appeal*, 52 Pa. St., 374; *Sedgwick County v. Bunker*, 16 Kan., 498.

³ See *Marathon v. Oregon*, 8 Mich., 372. As to what is a "fund due" on the division of a municipality, see *Jasper v. Sheridan*, 47 Ia., 183. On the creation of a new district by the union of two, the property of both becomes its property. It has no power to bargain and pay over to the old district the value of its school-house, or to levy a tax for the purpose. *Bacon v. School District*, 97 Mass., 421.

sioners empowered to examine the district and apportion the tax according as they shall find that benefits will be received. The second is a determination by the legislature itself that the benefits will be in proportion to value, area or frontage, and apportionment accordingly. In another place it is shown that either course may be admissible.¹

General principles of apportionment. The principles by which the legislative apportionment of taxes is to be tested have been so admirably stated in a Kentucky case, that we prefer quoting the language of the court in preference to any attempt at stating them in words of our own: "When shall a tax be levied? To what amount? Shall it be a capitation or property tax? Direct or indirect? *Ad valorem* or specific? And what classes of property are the fittest subjects of taxation? are all questions wisely confided by our constitution to the discretion of the legislative department, subject to no other limitation than that of the moral influence of public virtue or responsibility to public opinion. But in some other respects, and so far as the power of taxation may be effectual without being thus limited, it is in our opinion limited by some of the declared ends and principles of the fundamental laws. Among these political ends and principles, *equality*, as far as practicable, and security of property against irresponsible power, are eminently conspicuous in our state constitution. An exact equalization of the burdens of taxation is unattainable and utopian. But still there are well defined limits within which the practical equality of the constitution may be preserved, and which, therefore, should be deemed impassable barriers to legislative power. Taxation may not be universal, but it must be general and uniform. Hence, if a capitation tax be laid, none of the class of persons thus taxed can be constitutionally exempt upon any other ground than that of public service; and if a tax be laid on land, no appropriation land within the limits of the state can be constitutionally exempted, unless the owner be entitled to such immunity on the ground of public service. The legislature, in the plenitude of the taxing power, cannot have constitutional authority to exact from one citizen, or even

¹ See ch. XX.

from one county, the entire revenue for the whole commonwealth. Such an exaction, by whatever name the legislature might choose to call it, would not be a tax, but would be, undoubtedly, the taking of private property for public use, and which could not be done constitutionally without the consent of the owner or owners, or without retribution of the value in money.

"The distinction between constitutional taxation and the taking of private property for public use by legislative will may not be definable with perfect precision. But we are clearly of the opinion, that whenever the property of a citizen shall be taken from him by the sovereign will, and appropriated without his consent to the benefit of the public, the exaction should not be considered as a tax unless similar contributions be made by that public itself, or shall be exacted rather by the same public will from such constituent members of the same community generally as own the same kind of property.

"Taxation and representation go together. And representative responsibility is one of the chief conservative principles in our form of government. When taxes are levied, therefore, they must be imposed on the public in whose name and for whose benefit they are required, and to whom those who impose them are responsible. And although there may be a discrimination in the subjects of taxation, still persons in the same class, and property of the same kind, must generally be subjected alike to the same common burden. This alone is taxation according to our notion of constitutional taxation in Kentucky. And this idea, fortified by the spirit of our constitution, is, in our judgment, confirmed by so much of the twelfth section of the tenth article as declares, 'Nor shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him.'"¹

Apportionment presumptively just. Whatever the rule of apportionment that is thus established by legislation, it is pre-

¹ *Robertson*, Ch. J., in *Lexington v. McQuillan's Heirs*, 9 Dana, 513, 516. See, also, *Youngblood v. Sexton*, 32 Mich., 406. The sentence quoted from the constitution, however, while it formulates a general idea in constitutional law, has special reference only to the eminent domain. *Martin v. Dix*, 52 Miss., 53.

sumptively as just and equal in the opinion of the legislature as the circumstances would permit. It is not, therefore, to be questioned on any grounds of policy, and it cannot be set aside on any showing that in particular cases its operation is unjust.¹

Apportionment imperative. But the requirement of apportionment is absolutely indispensable in any exercise of the power to tax.² There can be no such thing as valid taxation when the burden is laid without rule, either in respect to the subjects of it or to the extent to which each must contribute. In this respect the legislature is as powerless as any subordinate authority, it being impossible there should be taxation

¹As to diversity in apportionment, see *Anderson v. Kerns Draining Co.*, 14 Ind., 199; *Layton v. New Orleans*, 12 La. An., 515; *Wallace v. Shelton*, 14 La. An., 498. Taxation of merchants by sales is not unequal. *Sacramento v. Crocker*, 16 Cal., 119. See ch. XVIII. That the courts can afford no relief for what is merely an unwise apportionment, see *Tallman v. Butler County*, 12 Ia., 581.

That a license tax may be apportioned in reference to the size of the town in which the privilege is to be exercised, see *State v. Schlier*, 8 Heisk., 281. A peculiar case of apportionment was that in *Ould v. Richmond*, 23 Grat., 404. The tax was a license tax on lawyers, who were classified in six classes by the finance committee of the common council, and the tax was different in the several classes. The tax was sustained against an objection to its inequality. The classification seems to have had in view the value of the privilege the license gave, the extent of the business, the income, etc.

In *Berney v. The Tax Collector*, 2 Bailey, 654, 681, *O'Neill, J.*, in speaking to objections which were made to a tax on bank dividends, says: "It may be that the tax on the dividends may operate unequally in that it is virtually a tax on money at interest, which is not generally subjected to taxation. This objection, however, is not addressed to the proper *forum*; it belongs to the legislature, not to the judiciary, to decide on its propriety and force. The legislature may select any property they please, to be taxed. If the tax is to operate generally on every citizen who may own the property declared liable to it, it would be constitutional. If an act purports to exempt one class of citizens, owning property upon which it imposes a tax in the hands of others, it might be a discriminating tax, and unconstitutional." In *Youngblood v. Sexton*, 32 Mich., 406, a tax on business was objected to because the sum levied was uniform and did not discriminate according to the business done; but the court say, this is clearly within the power of the legislature, who must determine conclusively whether this method is or is not more just and politic than any other.

²*Henry v. Chester*, 15 Vt., 460; *Tide Water Co. v. Coster*, 18 N. J. Eq., 518, per *Beasley, Ch. J.*

that is at once arbitrary and valid.¹ Whenever, therefore, the tax is to be levied upon property, agencies for its apportionment by the prescribed rule are as indispensable as the rule itself. And the duty they have to perform is, to make the sum demanded of any one person or laid upon any one parcel of property have some fixed ratio, not only to the whole tax, but also to that demanded of every other person, or laid upon every other piece of property. Without this, as has been forcibly said, the exactions of money for the public are mere forced contributions, and taxation will differ from the eminent domain only in this: that the latter demands the property of the citizen when necessity requires it, and on making compensation, while the former exacts it at discretion and without compensation.²

In respect to the apportionment of taxes in general, after the subjects of taxation have been determined upon, the following may be stated as general principles:

1. The taxing district through which the tax is to be apportioned must be the district which is to be benefited by its collection and expenditure. The district for the apportionment of a state tax is the state, for a county tax the county, and so on. Subordinate districts may be created for convenience, but the principle is general, and in all the subordinate districts the rule must be the same.

¹ A legislative act which is in effect a selection of individuals from a general class for taxation is not to be sustained by showing that it is no more onerous a burden than they ought to bear; "this fact does not affect the question of legislative power and cannot give validity to the act." *Albany, etc., Bank v. Maher*, 9 Fed. Rep., 884. See *Stuart v. Palmer*, 74 N. Y., 183.

An act of legislation excluding certain lands from the established limits of a drainage district and exempting them from future drainage assessments is void. "The improvement necessary or indispensable to, and undertaken by, a district, must be not merely commenced, but executed either in whole or in part by the entire district. Unless or until all are released by the execution or failure of the undertaking, or—according to circumstances—by the satisfaction of the full or proportionate share of their liability, all are and remain bound." *New Orleans Canal, etc., Co. v. New Orleans*, 30 La. An., 1871.

² *Christiancy, J.*, in *Woodbridge v. Detroit*, 8 Mich., 274, 309, following and approving *Lexington v. McQuillan's Heirs*, 9 Dana, 513. Compare *State v. Portage*, 12 Wis., 562; *Weeks v. Milwaukee*, 10 Wis., 242, 258; *Chicago v. Larned*, 34 Ill., 203; *Creote v. Chicago*, 56 Ill., 422; *Waller v. St. Paul*, 5 Minn., 70; *Wilson v. Supervisors of Sutter*, 47 Cal., 91.

2. The basis of apportionment which is fixed upon by the general rule must be applied throughout the district.¹ There cannot be two rules of apportionment for the same tax in the same district; if there could be, there might be any number, and in effect there would be none at all, and every man might be assessed arbitrarily.²

¹ When a city is part of a township, it is not competent for the legislature to exempt its inhabitants from the payment of township taxes for highway purposes. *O'Kane v. Treat*, 25 Ill., 458. See for a similar case, *Fletcher v. Oliver*, 25 Ark., 289.

² *Tide Water Co. v. Coster*, 18 N. J. Eq., 518. In *Wilson v. Supervisors of Sutter*, 47 Cal., 91, it was held incompetent to authorize the supervisors to remit a levee tax on part of the district. And yet it would have been competent originally to so bound the district as to exclude the part on which it was proposed to remit the tax.

That the basis of the apportionment is not necessarily the same for general and local taxes, even when value is the standard, is illustrated by the case of *Insurance Co. v. Baltimore*, 23 Md., 296. It appears from that case that for the purposes of an apportionment of state taxation among the municipal divisions, the nominal capital of private corporations was assumed to be the value. But in imposing the tax on the corporations themselves, or their members, the actual value was ascertained. This method would be likely to lead to some inequalities in the distribution of state taxation between districts, but they could not be serious.

In this connection may be mentioned several cases in which classes of taxable property were attempted to be relieved from the apportionment. In one of these, the personal property was not to be taxed for the payment of a city debt, for the reason, probably, that the purpose for which the debt was contracted was supposed to have benefited specially the real estate. *Gilman v. Sheboygan*, 2 Black, 510.

Others were where, in assessing the real estate for municipal taxes, the value of improvements was required to be excluded. In all these cases, the discrimination has been held to be beyond the constitutional power of the legislature. If the tax is to be assessed for a corporate purpose, it must be uniform as to persons and property. The burden must be imposed upon all the property within the limits to be taxed. Any other rule would utterly destroy the equality and uniformity contemplated by the constitution. If personal property or improvements may be exempted, with the same propriety and justice the law might compel one-half the real estate within the district to sustain the whole burden. *Thornton, J.*, in *Primm v. Belleville*, 59 Ill., 142, 144; *Hale v. Kenosha*, 29 Wis., 599. The tax in the Wisconsin case was for a railroad debt; in the other for a sewer. In *Baltimore v. Hughes*, 1 G. & J., 480, where a city council had authority to levy a tax for a public improvement on the district benefited thereby, it was held that if the ordinance providing for the tax showed the improvement to be for the general benefit of the city, and not of the particular district in which the tax was ordered, the tax was void.

3. Though the apportionment must be general, a diversity in the methods of collection violates no rule of right, and is as much admissible as a diversity in police regulations. Indeed, diversity in this regard may, under some circumstances, be an absolute necessity. Of this the country had illustrations in the case of federal taxes during the late civil war. The taxes under internal revenue laws were laid by general rules, but special regulations were required for their enforcement in insurrectionary districts, and were therefore provided. So the federal land tax might be assumed by one state, while in another it might be necessary to have elaborate provisions for the sale of the property taxed.

4. It is no objection to a tax that the rule of apportionment which has been provided for it fails in some instances, or even in many instances, of enforcement. Evasions of duty are liable to occur under all laws; but an evasion by one individual cannot give another a legal right to be excused. If the law establishes a uniform rule, its validity cannot depend upon the certainty or uniformity of its enforcement.¹

5. The apportionment of the tax is not to be extended to embrace persons or property outside the district. This is a matter of jurisdiction, and if there are any exceptions to the rule they must stand on very special and peculiar reasons.²

6. Although exemptions may be made, as has been previously shown, special and invidious discriminations against individuals are illegal.³ This, so far as we know, is not disputed; and there is plausible ground for at least a question, whether the

¹ In *United States v. Riley*, 5 Blatch., 204, 209, *Shipman, J.*, speaking of the internal revenue law, says: "The law is uniform, and thereby conforms to the constitution. Its validity does not depend on the celerity or uniformity with which it can be executed in some disturbed districts of the country. Tax laws, both state and national, are required to be uniform. This is an elementary principle of legislation, resting upon the solid foundation of justice. But it is a novel doctrine that a law, uniform in its provisions, can be annulled by the refusal of a portion of those on whom it is designed to operate to comply with its provisions. If this notion were to prevail, civil commotion or foreign invasion within a small district of the country would paralyze the government and repeal the fundamental law upon which its existence depends."

² See *ante*, pp. 14, 42.

³ The rule of uniformity applies to wharf and dockage charges laid on the commerce of a city. *People v. S. Fr., etc., Railroad Co.*, 85 Cal., 606.

principle may not apply in some cases to the establishment of small districts for the construction of important public works; districts, the establishment of which, in view of the purpose for which the tax is to be laid, is equivalent to the singling out of a few persons for invidious discrimination. It has been held in one case that a statute was void which, as to certain portions of a city street, empowered the common council to cause it to be improved in a manner exceptionally expensive, at the cost of the abutting owners and against their will, when as to all the other streets of the city the owners of the larger proportion of the frontage must petition for such an improvement before it could be ordered.¹ The statute was looked upon as an abuse of the legislative power to apportion taxes; as perhaps it was. But the case must be very extraordinary to warrant the court in holding that the legislature, in acting upon a subject within its admitted authority, has deprived itself of power by abusing it.² It must in effect be a case in which the legislature, while assuming to do one thing which was within its power, has actually attempted another which was not.

¹ *Howell v. Bristol*, 8 Bush, 493, 497. Compare *Covington v. Casey*, 3 Bush, 686; *Washington Avenue*, 69 Pa. St., 352.

² In *Arbegust v. Louisville*, 2 Bush, 271, 275, *Williams, J.*, has the following remarks regarding the change of taxing districts by extension of city boundaries: "When, in the judgment of the legislature, the interest of a suburban population demands local regulations, and the peace, tranquillity and order of the public indicates that such is necessary, we cannot doubt its constitutional power to so enact, nor question its power to tax, for such purposes, the real as well as the personal estate of the people, nor the large as well as the small lots included therein; for it is more consonant with the entire genius, equality and justice of our constitution and laws, that each should bear the burdens of that government which protects his person and property according to the worth of his estate, than to discriminate against the small in favor of the large property holders. But whatever may be said of the intrinsic justice of such a measure, there is no power in the courts to control this, when the taxing power is conferred in good faith to uphold local government and give police regulations to the population, and not merely to embrace taxable property for revenue purposes in order to lighten the burdens of others."

CHAPTER VIII.

OFFICIAL ACTION IN MATTERS OF TAXATION.

Necessity for official action. Taxation is an act of government. Government can only perform its functions by means of officers, and must make all its demands upon its citizens through the medium of official action. However just it may be that an individual, in any condition or under any specified circumstances, should contribute a part of his means to government revenues, there is no lawful method of compelling him to do so except through the compulsion of official process. No individual as such, or by virtue of his citizenship, can compel another to perform his duty to the state. He must come clothed with the authority of the state for the purpose, or, in contemplation of law, he comes as a trespasser, whose lawless intrusion may rightfully be resisted and repelled.¹

Officers, who are. An office is defined to be a public charge or employment, and he who performs the duties of that office is an officer.² There are legislative, executive and judicial officers, with duties pertaining to their respective departments of the government, and there are also inferior officers, commonly designated ministerial, whose duty it is to execute mandates lawfully directed to them by superiors, whether of one department or of another.³ The proceedings in tax cases are intrusted by the law in part to officers who perform mere ministerial duties, and in part are confided to those who, though not belonging to the judicial department, have functions which in a certain sense are judicial.

¹ A sale for taxes is invalid, and a deed given on it a nullity, if based on a levy made by an unauthorized officer. *Morris v. Tinker*, 60 Ga., 466. The enforcement of an assessment made by an unauthorized officer will be enjoined. *Union Pac. R. Co. v. Donnellan*, 3 Wy., 459.

² *Marshall*, Ch. J., in *United States v. Maurice*, 2 Brock., 96, 102. *Bouvier's* definition of an officer is "one who is lawfully invested with an office;" which seems to exclude what are known as officers *de facto*.

³ *Bouvier's Dict.*, tit. Officers; *People v. The Governor*, 29 Mich., 320.

Officers de facto. It is sometimes found that the person who is performing the duties of an office is not the one to whom the law, if properly followed, would have confided it. This may happen from an uncertainty regarding the method by which the officer should be chosen, a dispute of fact concerning the result of the election which has been held, or from many other causes. If, in any such case, a person claiming to be chosen solves the doubt in his own favor, and takes possession of the office, and if the public acquiesce in his assumption, he then performs the duties of the office, and comes within the definition which has been given of an officer. But while he is an officer in fact, if he is not rightfully such he may at any time be ousted of his position by judicial proceedings, instituted in behalf of the state, at the instance of the public prosecutor. Perhaps also the law of the state will allow the person rightfully entitled, and who, by the wrongful possession, is excluded from the office, to institute a proceeding for the purpose on his own behalf. From what has been said, it will be seen that there may therefore be officers *de jure* and officers *de facto*. An officer *de jure* is one who is not only invested with the office, but has been lawfully appointed or chosen, and therefore has a right to retain the office and receive its perquisites and emoluments. An officer *de facto* is defined to be one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law.¹ He comes in by claim and color of right, or he exercises the office with such circumstances of acquiescence on the part of the public as at least afford a strong presumption of right, though by reason of some defect in his title, or of some informality, omission or

¹ *Parker v. Kett*, 1 Ld. Raym., 658, per *Holt*, Ch. J.; *King v. Corp. of Bedford Level*, 6 East, 356, 368, per *Ellenborough*, Ch. J.; *Tucker v. Aiken*, 7 N. H., 113, 140; *Davis v. Police Jury*, 1 La. An., 288; *Ray v. Murdock*, 36 Miss., 692. "An officer *de facto* is one who exercises the duties of an office under color of appointment or election to that office." *Storrs*, J., in *Plymouth v. Painter*, 17 Conn., 585, 588. To the same effect is *Brown v. Lunt*, 37 Me., 423, 438; *Strang, Ex parte*, 21 Ohio St., 610. An ineligible party, appointed and actually performing the duties of the office, is an officer *de facto*. *Wolfe v. Murphy*, 60 Miss., 1.

As to what is sufficient proof of official right, see *Bird v. Perkins*, 33 Mich., 28. A deputy collector's act in making a sale is the act of the collector. *Villey v. Jarreau*, 33 La. An., 291.

want of qualification, or by reason of the expiration of his term of service, he is unable to maintain his possession, when called upon by the government to show by what title he holds it.¹ It is immaterial in what the defect consists, or whether the claim is in good faith or merely colorable. The public acquiescence and reputation attach certain important consequences to his occupation of the office, which the interest of the state does not permit to depend upon his own motives or the degree of plausibility which attaches to his claim.²

¹ Blackwell on Tax Titles, 92-3; Wilcox v. Smith, 5 Wend., 231.

² In several recent cases, where persons have been performing official functions under assumed legislative authority which proved to be unconstitutional, the position has been taken, that one who acts as an officer under legislation of this nature could not be an officer *de facto*, because the legislation was no law and consequently could give no color of right. It has also been insisted, that an officer *de facto* always is one who comes in by color of appointment or election by the authority having competent power to appoint or elect; so that, if any office is elective, it matters not that the governor claims and exercises the right to appoint, and that the appointee is enabled by public acquiescence to act: the appointment being without authority of law, the appointee is a mere usurper. The subject is very carefully considered in *State v. Carroll*, 38 Conn., 449, 471; S. C., 9 Am. Rep., 409, where the authorities are reviewed at length. The conclusions are summarized by Butler, Ch. J., as follows: "An officer *de facto* is one whose acts, though not those of a lawful officer, the law upon principles of policy and justice will hold valid, so far as they involve the interests of the public and of third persons, where the duties of the office were exercised: 1. Without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be. 2. Under color of a known and valid appointment or election, but where the officer has failed to conform to some precedent requirement or condition, as to take an oath, give a bond, or the like. 3. Under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, by reason of some defect or irregularity in its exercise; such ineligibility, want of power or defect being unknown to the public. 4. Under color of an election or appointment by or pursuant to a public unconstitutional law, before the same is adjudged to be such." In *Commonwealth v. McCombs*, 56 Pa. St., 436, substantially the same conclusion was reached. So it was also in *Ex parte Strang*, 21 Ohio St., 610, where the legislature, in disregard of a requirement of the constitution, had made an appointment. The following cases, the most of which are referred to in *State v. Carroll*, support the same views: *O'Brian v. Knivan*, Cro. Jac., 552; *Harris v. Jays*, Cro. Eliz., 699; *Parker v. Kett*, 1 Ld. Raym., 658; *Fowler v. Beebe*, 9 Mass., 231; *Taylor v. Skrine*, 2 Brev., 516; *Wilcox v. Smith*, 5 Wend., 231; *Parker v. Baker*,

Usurpers. It is possible also that one may attempt to perform the duties of an office, who neither is chosen to do so, pursuant to law, nor supported by the public acquiescence. Such a person cannot acquire the reputation of being the officer he assumes to be; he is a mere usurper, and his acts are wholly void for all purposes. No one is under obligation to recognize his claim to the office, and whoever does so must take upon himself the consequences. It is of high importance that the encouragement of such claims should not be allowed to bring disorder and insecurity into public affairs.¹

Questioning title of officer *de facto*. The case of an officer *de facto* is different. To deny validity to his acts would lead to insecurity in both public and private affairs. It would compel those having occasion to transact business with a public officer, before they could put faith in his official acts, to go into a careful examination of all the evidences of his title, and of the provisions of law bearing upon them, in order to determine whether the assumption of official character is warranted by law, and is supported by a compliance with the necessary formalities. "It would constitute every citizen a judge of official titles. He must look to the constitution to see that the officer was eligible to an election or appointment; to the statute to ascertain when, where and how the election or appointment is

8 Paige, 428; *People v. Kane*, 23 Wend., 414; *People v. White*, 24 Wend., 520; *Burke v. Elliott*, 4 Ired., 355; *Gilliam v. Reddick*, 4 Ired., 368; *Brown v. Lunt*, 37 Me., 423, 428; *State v. Bloom*, 17 Wis., 521; *People v. Bangs*, 24 Ill., 184; *Clark v. Commonwealth*, 29 Pa. St., 129; *Mallett v. Uncle Sam Co.*, 1 Nev., 188; *Kimball v. Alcorn*, 45 Miss., 151; *Cocke v. Halsey*, 16 Pet., 71; *Gibb v. Washington*, 1 McAll., 430; *Vaccari v. Maxwell*, 3 Blatch., 368; *State v. Duryea*, 40 N. J., 266; *Tyler v. Flanders*, 57 N. H., 618; *Odiorne v. Rand*, 59 N. H., 504; *Wolfe v. Murphy*, 60 Miss., 1; *Yorty v. Paine*, 62 Wis., 154.

¹ See *Plymouth v. Painter*, 17 Conn., 585, 593; *Peck v. Holcombe*, 3 Port., 329; *Keeler v. Newbern*, 1 Phil., N. C., 505; *Munson v. Minor*, 53 Ill., 594. In *Birch v. Fisher*, 13 S. & R., 208, an assessment made by persons not shown to have been either elected or sworn, held to be by "mere intruders who came in without color of authority." An officer who holds over in good faith, though without warrant of law, is not a usurper. *Kreidler v. State*, 24 Ohio St., 22. Compare *State v. McFarland*, 25 La. An., 547. To support one's acts as those of an officer *de facto*, they must have been done under color of an office whose duties have been discharged by him. *Bailey v. Fisher*, 38 Iowa, 229.

required to be made, and to the poll books and archives of the state for the purpose of ascertaining the facts; and then determine at his peril the mixed question of law and fact involved in the ascertainment of official character."¹ The mere statement of the case is sufficient to show that such a requirement would in the highest degree be unjust to the private citizen, and detrimental to public interests. But to treat the official acts of a *de facto* incumbent as void would be equally unjust to him. When the controversy should arise collaterally, as commonly it must, the officer himself would not be a party to the record, and would have no opportunity and no privilege of meeting the issue raised, although the decision might as effectually determine his right to act as if he had been proceeded against directly by the appropriate process of *quo warranto*. "This would be judging a man unheard, contrary to the principles of natural justice and the policy of the law." Until he is removed by proceedings directly instituted for the purpose, and in which he is permitted to be heard, "he holds the office by the sufferance of the state, and the silence of the government is construed by the courts as a ratification of his acts, which is equivalent to a precedent authority. When the government acquiesces in the acts of such an officer, third persons ought not to be permitted to question them."² When, however, the officer himself attempts to build up a right in his own favor, it is not unreasonable to require him to defend his right, as he would be compelled to do if he should assert title to any article of property as against the true owner. His suit for the legal fees may therefore be successfully resisted, as may any attempt by him to enforce official process by the aid of the law. These are cases in which he is a party, and is properly called upon to demonstrate his title. Besides, if citizens were not permitted to resist his official claims in such proceedings, their acquiescence in them, until the state itself should be able to bring to a conclusion the formal proceedings to try

¹ Blackwell on Tax Titles, 94.

² Blackwell on Tax Titles, 94; *Bucknam v. Ruggles*, 15 Mass., 180. See *People v. Lothrop*, 24 Mich., 235. Proceedings of a common council in levying a tax cannot be contested on the ground that by a change in the charter a portion of the seats were vacated, if the members continued *de facto* to act. *Scoville v. Cleveland*, 1 Ohio St., 126.

the title, would be only an enforced acquiescence, and could not justly support a title to an office by reputation. The most that public policy could require in such cases would be that his *de facto* incumbency should be evidence of a right *prima facie* in his favor, but leaving the actual right subject to be disproved.¹ And if he is sued for any act which he can only justify as an officer, he is put to the proof that he was duly elected or appointed, and that any conditions precedent have been complied with.²

Validity of acts of officers *de facto*. On the other hand, the public, by whose acquiescence the *de facto* officer has been permitted to act, and individuals who have transacted official

¹ *Kent v. Atlantic Delaine Co.*, 8 R. I., 805, where it was held that one who sues as collector to recover a tax gives sufficient *prima facie* evidence of his authority if he shows he has acted as such officer in regard to that tax; but that this *prima facie* case is open to rebuttal. See, also, *Colton v. Beardsley*, 38 Barb., 29; *Capwell v. Hopkins*, 10 R. I., 378; *Auditors of Wayne v. Benoit*, 20 Mich., 176; *Pejescott Proprietors v. Ransom*, 14 Mass., 145. It was decided in *Universalist Society v. Leach*, 35 Vt., 108, that if an ineligible person is chosen sole prudential committee of a school district, his assessment of a tax voted by the district is void.

² *Lightly v. Clouston*, 1 Taunt., 113; *Riddle v. Bedford*, 7 S. & R., 386, 392; *Fetterman v. Hopkins*, 5 Watts, 539; *Pike v. Hanson*, 9 N. H., 491; *Colburn v. Ellis*, 5 Mass., 427; *Fowler v. Beebe*, 9 Mass., 231, 234; *Sprague v. Bailey*, 19 Pick., 436; *Patterson v. Miller*, 2 Met. (Ky.), 493; *People v. Hopson*, 1 Denio, 574, 579; *Greene v. Burke*, 23 Wend., 488, 492; *Schlencker v. Risley*, 3 Scam., 483; *Blake v. Sturtevant*, 12 N. H., 567; *Cummings v. Clark*, 15 Vt., 653; *Olney v. Pearce*, 1 R. I., 292; *Samis v. King*, 40 Conn., 298, 310; *Venable v. Curd*, 2 Head, 582. In *First Parish in Sherbourne v. Fiske*, it is said that if parish assessors fail to take the oath of office, a tax assessed by them would be illegal and might be recovered back. 8 Cush., 264. But a tax which has been paid cannot be recovered back on the ground that the collector *de facto* had never been legally elected and sworn. *Williams v. School District*, 21 Pick., 75. It is not intended to assert here that in every case in which the state might oust an officer by *quo warranto* an individual could also take advantage of a defect in his title. The inquiry on behalf of the state may and does go beyond that which individuals may institute. A *prima facie* right is sufficient as against individuals, but only an indefeasible right as against the state. As an illustration of what is meant, the case of one holding a legal certificate of election may be taken: if a lawful election was held, the certificate may conclude private parties, but the government would be at liberty to go beyond it and show that the election was accomplished by illegal votes, or that for any other reason the *prima facie* case was defective. See the discussion in *Auditors of Wayne v. Benoit*, 20 Mich., 176.

business with him, have a right to rely upon the validity of that which has been done by him, to the same extent precisely as if the same acts had been performed in the same way by an *officer de jure*. When such acts come collaterally in question, neither the public that has thus acquiesced, nor individual citizens, are permitted to question them. They are as valid, to all intents and purposes, as if the title to the office had been unquestionable. This is the general rule, as it has been settled on grounds of public policy from the time of the Year Books.¹

¹ "The law favors the acts of one in a reputed authority, and the inferior shall never inquire if his authority is lawful." Vin. Abr., tit. "Officer," G., 3. See Bac. Abr., "Offices and Officers," B.; *People v. Collins*, 7 Johns., 549, 551; *McInstry v. Tanner*, 9 Johns., 135; *People v. Dean*, 3 Wend., 438; *Wilcox v. Smith*, 5 Wend., 231, 234; *Parker v. Baker*, 8 Paige, 429; *People v. Kane*, 23 Wend., 414; *People v. White*, 24 Wend., 520; *Fowler v. Beebe*, 9 Mass., 231; *Commonwealth v. Fowler*, 10 Mass., 290; *Nason v. Dillingham*, 15 Mass., 170; *Bucknam v. Ruggles*, 15 Mass., 180; *Gilmore v. Holt*, 4 Pick., 257; *Williams v. School District*, 21 Pick., 75; *Blackstone v. Taft*, 4 Gray, 250; *Burke v. Elliott*, 4 Ire.l., 355; *Gilliam v. Reddick*, 4 Ired., 368; *Farmers & Merchants' Bank v. Chester*, 6 Humph., 458; *Beard v. Cameron*, 3 Murph., 181; *Brush v. Cook*, Brayt., 89; *Taylor v. Skrine*, 2 Brev., 516; *Plymouth v. Painter*, 17 Conn., 585; *Douglass v. Wickwire*, 19 Conn., 489; *State v. Carroll*, 38 Conn., 449; *Samis v. King*, 40 Conn., 298; *McGregor v. Balch*, 14 Vt., 428; *Downer v. Woodbury*, 19 Vt., 329; *Lyon v. State Bank*, 1 Stew., 442; *Barret v. Reed*, 2 Ohio, 409; *Johnson v. Steadman*, 3 Ohio, 94, 96; *Eldred v. Sexton*, 5 Ohio, 216; *Ex parte Strang*, 21 Ohio St., 610; *Justices of Jefferson v. Clark*, 1 T. B. Monr., 82, 86; *Rice v. Commonwealth*, 3 Bush, 14; *Prickett v. People*, 1 Gilm., 525, 529; *Keyser v. McKissam*, 2 Rawle, 139; *Riddle v. Bedford County*, 7 S. & R., 386, 392; *Baird v. Bank of Washington*, 11 S. & R., 411; *Neal v. Overseers*, 5 Watts, 538; *McKim v. Somers*, 1 Penrose & Watts, 297; *Commonwealth v. McCoombs*, 56 Pa. St., 436; *Gregg v. Jamison*, 55 Pa. St., 468; *Cooper v. Moore*, 4 Miss., 386; *Kimball v. Alcorn*, 45 Miss., 145; *Cabot v. Given*, 45 Me., 144; *Jones v. Gibson*, 1 N. H., 266; *Moore v. Graves*, 3 N. H., 408; *Morse v. Calley*, 5 N. H., 222; *State v. Tolan*, 33 N. J., 195; *Leach v. Cassidy*, 23 Ind., 449; *McCormick v. Fitch*, 14 Minn., 252; *Auditors of Wayne County v. Benoit*, 20 Mich., 176; *Ex parte Bollman*, 4 Cranch, 75; *Sawyer v. Steele*, 3 Wash. C. C., 464; *Willink v. Miles*, Pet. C. C., 188; *Ronkendorf v. Taylor*, 4 Pet., 349; *Lawrence v. Sherman*, 2 McLean, 488; *United States v. Bachelder*, 2 Gall., 15; *Pierce v. Wear*, 41 Ia., 378; *New Orleans v. Klein*, 26 La. An., 493.

It has been held to be no defense to an action for the recovery of a school tax that the district was only *de facto* a corporation. *Trumbo v. People*, 75 Ill., 561.

There is a discussion in *McNutt v. Lancaster*, 9 S. & M., 570, of the question whether, where the statute declared that the acts of one who should presume to execute the duties of an office, before taking the official oath.

Officers de facto in tax cases. It remains to be seen whether these general principles are applicable in tax cases. It has sometimes been urged that in tax proceedings there was no proper room for the application of the doctrine which is applied in other cases in support of action by officers *de facto*; that the proceedings are summary and for the most part *ex parte*; that they may deprive the owner of his freehold by means of process which usually and perhaps necessarily is somewhat arbitrary, and that he is therefore entitled of right to have all the security which the law has intended he should have; in the character and standing of an officer duly and properly chosen for the particular duty; in the official oath of such officer, when one is required by law; in the official bond if one is made necessary; and indeed such security as would be afforded by a strict compliance with every provision which has been made by the revenue laws for the protection of tax payers.¹ The reasons are plausible, but they are not very conclusive. Indeed if official action of officers *de facto* in judicial

should be "absolutely void," such acts could have any validity as those of an officer *de facto*. No decision was reached.

¹ Payson v. Hall, 30 Me., 319; Coite v. Wells, 2 Vt., 318; Isaacs v. Wiley, 12 Vt., 674; People v. Hastings, 29 Cal., 449. Some of the cases which may seem to support this view are properly to be referred to some other principle. They turn often upon the question whether the statute is mandatory in requiring that something should be done which has been omitted, or whether the person who has assumed to act as officer held *de facto* the particular office to which the duty pertained; or some other question foreign to the precise point now under discussion.

Upon the construction of a statute in Vermont the failure to take the official oath by listers has been held fatal, and a tax paid under protest has been allowed to be recovered back though the list was sworn to. Ayers v. Moulton, 51 Vt., 115. But neglect to record the oath is not fatal. Day v. Peaseley, 54 Vt., 310.

That the requirement of an oath to the invoice and assessment is in New Hampshire directory merely, see Odiorne v. Rand, 59 N. H., 504, and cases cited. It was held in Oldtown v. Blake, 74 Me., 280, without in terms overruling Payson v. Hall, *supra*, that a collector who had been duly chosen, and had given bond but not taken the oath of office, was a good officer *de facto*, and payment to him would discharge the tax. And see Stockle v. Silsbee, 41 Mich., 615; Petition of Kendall, 85 N. Y., 302. But in Maine, where selectmen are to become assessors when none are elected, on taking an oath of office as such, it is held that if they assume to act without taking the oath they are not assessors *de facto*. Dresden v. Goud, 75 Me., 298.

positions can be sustained, as it often has been,¹ though not only property but also liberty may depend upon it, it is difficult to suggest any distinguishing reason to remove tax cases from the application of the same principle. The clear and very strong preponderance of authority is, that the general policy of the law requires the acts of officers *de facto* to be sustained in tax cases, under the same circumstances and on the same imperative reasons that sustain them in others.²

Estoppel against intruders who have acted. The rule which supports official action may, perhaps, in some cases be carried with propriety even farther than is above stated. If one has assumed to act as an officer under revenue laws, and has made collections as such, he cannot be permitted, when the government calls upon him for an accounting, to turn about and say that he was never elected or appointed, but has acted as a mere usurper without right, and that the proper remedy of the government was to have resisted his intrusion, or caused his ouster. On every principle of right and justice he is precluded from denying his official character under such circumstances.³ Such a person has a right at any time to refuse to

¹ Lord Dacre's Case, 1 Leon., 288; Margate Pier v. Hannam, 3 B. & Ald., 266; Wilcox v. Smith, 5 Wend., 231; People v. Kane, 23 Wend., 414; People v. White, 24 Wend., 520; Brown v. Lunt, 37 Me., 423; Taylor v. Skrine, 2 Brev., 516; Mallett v. Uncle Sam Co., 1 Nev., 188; Clark v. Commonwealth, 29 Pa. St., 129; Laver v. McGlachlin, 28 Wis., 364; *In re Griffin*, 2 Am. Law Times, 93.

² Tucker v. Aiken, 7 N. H., 113; Smith v. Messer, 17 N. H., 420; Hall v. Cushing, 2 Greenl., 218; Adams v. Jackson, 2 Aiken, 145; Spear v. Ditty, 8 Vt., 419; Downer v. Woodbury, 19 Vt., 329; Sheldon v. Coates, 10 Ohio, 278; Washington v. Miller, 14 Ia., 584; Allen v. Armstrong, 16 Ia., 515; Scott v. Watkins, 22 Ark., 556; Twombly v. Kimbrough, 24 Ark., 459, 474; Ronkendorf v. Taylor, 4 Pet., 349; Ray v. Murdock, 36 Miss., 692; Jones v. Scanland, 6 Humph., 195; Watkins v. Inge, 24 Kan., 612. In *Greene v. Walker*, 63 Me., 311, it is held to be no defense to a tax sale that the treasurer was only officer *de facto* when the tax was laid.

³ Johnson v. Wilson, 2 N. H., 202, 206; Horn v. Whittaker, 6 N. H., 88; Sandwich v. Fish, 2 Gray, 298, 301; Barrington v. Austin, 8 Gray, 444; Wendell v. Fleming, 8 Gray, 613; Cheshire v. Howland, 13 Gray, 321; Williamstown v. Willis, 15 Gray, 427; Borden v. Houston, 2 Texas, 594; Billingsley v. State, 14 Md., 369; Lincoln v. Chapin, 132 Mass., 470. In *Jones v. Scanland*, 6 Humph., 195, it appeared that a defaulter had been chosen sheriff. By law such a choice was absolutely void. He nevertheless gave bond and acted in the collection of taxes. On motion, judgment

proceed farther in official action, and if he should do so, he could not be held responsible as for a neglect of duty in such refusal; but it is doubtful if one under any circumstances, even though he be a mere usurper, who has collected revenue for the government under claim of right, can be permitted to protect himself against an accounting, by showing that he was an intruder without any just pretense to the place. To the extent that he has acted, the government may properly adopt his agency, and require him to give to tax payers, who have recognized his authority, the benefit of their payments.¹

Action by official boards. In some cases, under the tax laws, official action is required to be taken by a board composed of several persons. It may then appear that there has been an impossibility to secure concurrence, or that, through neglect or inadvertence, less than the whole board has acted; and it sometimes becomes necessary to determine whether, in any such case, the action can be supported. The rules of law on this subject are well settled. The law contemplates that all the members of a board, who are to exercise a joint public authority, shall meet to consider the subject of their authority,

was entered on his official bond for failure to pay over. *Reese, J.*: "The election of sheriff was void, and he did not thereby become sheriff *de jure*; but thus intruding himself into office, and assuming its duties, he became sheriff *de facto*, and those who voluntarily bound themselves for the faithful performance of his duties cannot absolve themselves from their obligation by insisting that he was no sheriff. They will be held to their undertaking till the proper public authority has produced his amotion from the office which he in point of fact fills."

¹See *United States v. Maurice*, 2 Brock., 96; *Bell v. Railroad Co.*, 4 Wall., 598; *State v. Cunningham*, 8 Blackf., 339; *Church v. Sterling*, 16 Conn., 397; *Commonwealth v. Philadelphia*, 27 Pa. St., 497; *Wentworth v. Gove*, 45 N. H., 160; *Trescott v. Moan*, 50 Me., 347. A sheriff who has collected taxes without having the proper lists is nevertheless liable to account. *The Governor v. Montgomery*, 2 Swan, 613. See *Lincoln v. Chapin*, 132 Mass., 470. Cases of sale of the office of collector and the effect thereof are found in *Meredith v. Ladd*, 2 N. H., 517; *Carleton v. Whitcher*, 5 N. H., 196; *Tucker v. Aiken*, 7 N. H., 113; *Alvord v. Collin*, 20 Pick., 418; *Howard v. Proctor*, 7 Gray, 128; *Spencer v. Jones*, 6 Gray, 502. Where the fact of an official oath is in question it may be shown by parol that the oath was taken though the law requires a record. *Briggs v. Murdock*, 13 Pick., 305; *Pease v. Smith*, 24 Pick., 122; *Hall v. Cushing*, 2 Greenl., 218; and see *Scott v. Watkins*, 22 Ark., 586. And as to the right of a collector to contest the validity of a tax he has collected, see *People v. Brown*, 55 N. Y., 180.

and that the whole board shall have the benefit of the judgment and advice of each of the members.¹ In revenue cases, especially, and in others in which the official action may eventuate in divesting the citizen of his estate, it is to be supposed the law intended that this joint deliberation and action should be for the benefit of the citizen also. If, therefore, no such meeting is held, and no opportunity had for joint consultation and action, the joint authority is not well executed, even though all acting separately may have signed such a document as would have been sufficient were it the result of a proper meeting. Such action is not the action of the board, but of individuals. It is always presumable that it might have been different had there been a meeting and comparison of views, such as the law contemplated. At any rate, there can be no conclusive or satisfactory evidence of what would have been the joint judgment, when it has never been exercised; and the members of the board have no discretion to substitute individual action when the law has required the action of the organized body.² No custom of the locality, or long continued practice, can sanction a dispensation of this rule of law. The members of the board are officers of law, and must obey the rules that presumably, for beneficial purposes, have been prescribed for them.³ But the law does not require impossibility,

¹See *post*, ch. XII.

²See *Downing v. Rugar*, 21 Wend., 178, 182, per *Cowen, J.*; *Lee v. Parry*, 4 Denio, 125; *Powell v. Tuttle*, 3 N. Y., 396; *People v. Supervisors of Chenango*, 11 N. Y., 563; *Fuller v. Gould*, 20 Vt., 643; *Columbus, etc., R. Co. v. Grant County*, 65 Ind., 427.

If only two of a board of three qualify and act, there is no board, and the action is void. *Schenck v. Peay*, 1 Dill., 267; S. C., 1 Woolw., 175. So, if only two of the three are chosen, the two cannot act. *Williamsburg v. Lord*, 51 Me., 590. And see *Downing v. Rugar*, 21 Wend., 178, 182.

In the absence of any showing it will be presumed that a board met on the appointed day, and that they had before them the books, etc., necessary to enable them to perform their duties. *Snell v. Fort Dodge*, 45 Ia., 564.

³In *Middleton v. Berlin*, 18 Conn., 180, a tax list was signed by one only of a board of five assessors. An attempt was made to support it by showing a usage of the town to divide the town into districts, in each of which one of the assessors acted separately; but the court said, "assessors are the officers of the law, and must obey the law, and no direction of the town, or long continued usage, can justify a departure from the law." See, also, *Belfast Savings Bank v. Kennebec, etc., Land Co.*, 73 Me., 404; *People v. Supervisors of Chenango*, 11 N. Y., 563. In *Kinney v. Doe*, 8 Blackf..

and it may be found impossible for the members to agree in joint action. In such a case, it is to be presumed that the intent was that the law should not fail of execution, but that the action of the majority should be sufficient. And, where a majority have acted, the legal intendment in favor of the correctness of official action requires us to conclude that such action is the result of due meeting and consultation, or at least of a meeting duly called, at which all had the opportunity to attend, and a majority did attend. It is therefore *prima facie* valid, though the legal presumption in its favor may be overcome by evidence that no such meeting was called or had.¹

350, the list was made by the official lister, but it was not shown that two householders acted with him as the law required, and it was held void.

¹ In support of the general principle, that the action of a majority is sufficient, see *Wadham College, Cowp.*, 377; *Grindley v. Barker*, 1 B. & P., 236; *The King v. Beeston*, 3 T. R., 592; *Withnell v. Gartham*, 6 T. R., 388; *Cooley v. O'Conner*, 12 Wall., 391, 398; *Commonwealth v. Land Commissioners*, 9 Watts, 466, 471; *Jewett v. Alton*, 7 N. H., 253; *Babcock v. Lamb*, 1 Cow., 238; *Rogers, Ex parte*, 7 Cow., 526; *McCoy v. Curtice*, 9 Wend., 17, 19; *Downing v. Rugar*, 21 Wend., 178; *Crocker v. Crane*, 21 Wend., 211, 218; *Doughty v. Hope*, 3 Denio, 594; *Bank of Chenango v. Brown*, 26 N. Y., 467; *Caldwell v. Harrison*, 11 Ala., 755; *Soens v. Racine*, 10 Wis., 271; *Sprague v. Bailey*, 19 Pick., 436; *Williams v. School District*, 21 Pick., 75; *Fire District v. County Commissioners*, 108 Mass., 142; *People v. Coghill*, 47 Cal., 361; *Johnson v. Goodridge*, 15 Me., 29; *Bangor v. Lancey*, 21 Me., 472; *Lowe v. Weld*, 52 Me., 588; *Petition of Merriam*, 84 N. Y., 596; *People v. Lothrop*, 3^d Col., 428; *Hill v. Vanderpool*, 15 Fla., 128; *Billings v. Starke*, 15 Fla., 297.

This is on the ground that all are presumed to have met and consulted, a presumption that may be overcome by proof. *Doughty v. Hope*, 3 Denio, 594, 598, per *Bronson, J.*; *Ex parte Baltimore Turnpike Co.*, 5 Binn., 481; *Blackwell on Tax Titles*, 111. Under the decisions which are above cited, it is difficult to understand how a case like *Howard v. Proctor*, 7 Gray, 128, can be supported. There, one who was selectman and also assessor was chosen collector, and it was decided that the choice was valid, though his bond was to be approved by the selectmen, and the assessors, in certain cases, had authority to remove him. The decision was put on the ground that these boards might act by majorities, but the very nature of the action was such as to preclude one member of the board from consultation and action with the rest, or if he could act, made him interested adversely to the public. See, also, *Fox v. Fox*, 24 Ohio St., 335. *Kinyon v. Duchene*, 21 Mich., 498, is *contra*.

Where a drainage law provides that the commissioners shall jointly view and assess, etc., this requires the presence of all, both in viewing and assessing. *People v. Coghill*, 47 Cal., 361. Compare *Palmer v. Doney*, 2 Johns. Cas., 346.

Official returns and certificates. It is a general rule that the returns and certificates required of an officer in the performance of official duty are to be taken, in the proceeding in which they are made, as of unquestionable verity. They are not to be attacked, and proof entered into in a collateral proceeding, to which the officer is not a party, to show that they are false.¹ The rule is not universal; and the case of a return by a collector of the non-payment of a tax to him is an important exception. It is generally held that the tax payer may show, in opposition to the return, that the tax was paid in fact,

¹ Com. Dig., Return, G.; *Flud v. Pennington*, Cro. Eliz., 872; *Harrington v. Taylor*, 17 East, 378; *Rex v. Elkins*, 4 Burr., 2129; *Andrews v. Linton*, 1 Salk., 265; *Wheeler v. Lampman*, 14 Johns., 481, 482; *Putnam v. Man*, 3 Wend., 202; *Case v. Redfield*, 7 Wend., 398; *Boomer v. Laine*, 10 Wend., 525; *Baker v. McDuffie*, 23 Wend., 289; *Sperling v. Levy*, 1 Daly, 95, 98; *McArthur v. Pease*, 46 Barb., 423; *Livermore v. Bagley*, 3 Mass., 487, 512; *Slayton v. Chester*, 4 Mass., 478; *Gardner v. Hosmer*, 6 Mass., 324, 327; *Bott v. Burnell*, 9 Mass., 96; *Estabrook v. Hapgood*, 10 Mass., 313, 314; *Bott v. Burnell*, 11 Mass., 163; *Saxton v. Nimms*, 14 Mass., 318, 320; *Bean v. Parker*, 17 Mass., 591, 601; *Lawrence v. Pond*, 17 Mass., 433; *Thayer v. Stearns*, 1 Pick., 109, 112; *Whittaker v. Sumner*, 7 Pick., 551, 555; *Boynton v. Willard*, 10 Pick., 165, 169; *Bruce v. Holden*, 21 Pick., 187, 189; *Pullen v. Haynes*, 11 Gray, 379; *Campbell v. Webster*, 15 Gray, 28; *McGough v. Wellington*, 6 Allen, 505; *Hathaway v. Phelps*, 2 Aiken, 84; *Stevens v. Brown*, 3 Vt., 420; *Eastman v. Curtis*, 4 Vt., 616; *Barret v. Copeland*, 18 Vt., 67, 69; *White River Bank v. Downer*, 29 Vt., 332; *Lewis v. Blair*, 1 N. H., 68; *Whiting v. Bradley*, 2 N. H., 79, 81; *Sias v. Badger*, 6 N. H., 393; *Brown v. Davis*, 9 N. H., 76; *Angier v. Ash*, 26 N. H., 99; *Clough v. Monroe*, 34 N. H., 381; *Ladd v. Wiggins*, 35 N. H., 421; *Bolles v. Bowen*, 45 N. H., 124; *Morse v. Smith*, 47 N. H., 474; *Phillips v. Elwell*, 14 Ohio St., 240; *Eastman v. Bennett*, 6 Wis., 232; *Carr v. Commercial Bank*, 16 Wis., 50; *Castner v. Symonds*, 1 Minn., 427; *Tullis v. Brawley*, 3 Minn., 277; *Folsom v. Carli*, 5 Minn., 333; *Delenger v. Higgins*, 26 Mo., 180; *McDonald v. Leewright*, 31 Mo., 29; *Reeves v. Reeves*, 33 Mo., 28; *Stewart v. Stringer*, 44 Mo., 400; *Washington, etc., Co. v. Kinnear*, 1 Wash. Ter., 116; *Tillman v. Davis*, 28 Ga., 494; *Brown v. Way*, 28 Ga., 531; *Allender v. Riston*, 2 Gill & J., 86; *Tribble v. Frame*, 3 T. B. Monr., 51; *Caldwells v. Harlan*, 3 T. B. Monr., 349; *McConnel v. Bowdry's Heirs*, 4 T. B. Monr., 392; *Smith v. Hornback*, 3 A. K. Marsh., 378; *Small v. Hagden*, 1 Litt., 16; *Trigg v. Lewis' Ex'rs*, 3 Litt., 129, 132; *Hunter v. Kirk*, 4 Hawks, 277; *Stinson v. Snow*, 1 Fairf., 263; *Wilson v. Hurst's Ex'rs*, 1 Pet. C. C., 441; *Hawks v. Baldwin*, Brayt., 85; *Welsh v. Bell*, 32 Pa. St., 12; *Paxon's Appeal*, 49 Pa. St., 195; *Hill v. Grant*, 49 Pa. St., 200; *Rice v. Groff*, 58 Pa. St., 116; *Ayres v. Duprey*, 27 Texas, 593; *Angell v. Bowler*, 3 R. I., 77; *Castner v. Styer*, 23 N. J., 236; *State v. Clerk of Bergen*, 25 N. J., 209; *Martin v. Barney*, 20 Ala., 369; *Crow v. Hudson*, 21 Ala., 560; *Hinckley v. Buchanan*, 5 Cal., 53.

and that he may make this showing in any proceeding against him or his property upon it.¹ And in any case if a false official return is prejudicial to a party, he has his remedy by action against the officer.²

In general it is believed that these rules have been held to be applicable in tax cases.³ In a number of cases the courts have gone so far as to hold that where, as a condition to a sale of land for taxes, the officer must show by his return that he was unable to find goods or chattels from which to make the tax, his return to that effect might be disproved, and the subsequent proceedings for a sale of the land defeated by such

¹See ch. XIV.

²*Wheeler v. Lampman*, 14 Johns., 481; *Putnam v. Man*, 3 Wend., 202; *Case v. Redfield*, 7 Wend., 398; *Baker v. McDuffie*, 28 Wend., 289; *McArthur v. Pease*, 46 Barb., 423; *Livermore v. Bagley*, 3 Mass., 487, 512; *Slayton v. Chester*, 4 Mass., 478; *Gardner v. Hosmer*, 6 Mass., 324, 327; *Whitaker v. Sumner*, 7 Pick., 551; *Boynton v. Willard*, 10 Pick., 165, 169; *Bruce v. Holden*, 21 Pick., 187, 189; *Pullen v. Haynes*, 11 Gray, 379; *Campbell v. Webster*, 15 Gray, 28; *McGough v. Wellington*, 6 Allen, 505; *Clough v. Monroe*, 34 N. H., 381; *Lewis v. Blair*, 1 N. H., 68; *Sias v. Badger*, 6 N. H., 393; *Angier v. Ash*, 26 N. H., 99; *Bolles v. Bowen*, 45 N. H., 124; *Tomlinson v. Long*, 8 Jones, L., 469; *Albright v. Tapscott*, 8 Jones, L., 473; *McBee v. State*, 1 Meigs, 122; *Castner v. Symonds*, 1 Minn., 427; *Folsom v. Carli*, 5 Minn., 333; *Goodal v. Stuart*, 2 Hen. & Munf., 105, 112; *Trigg v. Lewis' Ex'rs*, 3 Litt., 129, 132; *Hunter v. Kirk*, 4 Hawks, 277; *Stinson v. Snow*, 1 Fairf., 263; *Philips v. Ewell*, 14 Ohio St., 240; *McDonald v. Leewright*, 31 Mo., 29; *Stewart v. Stringer*, 41 Mo., 400; *State v. Clerk of Bergen*, 25 N. J., 209; *Mentz v. Hamman*, 5 Whart., 150; *Paxon's Appeal*, 49 Pa. St., 195; *Eastman v. Bennett*, 6 Wis., 232; *Blanchard v. Powers*, 42 Mich., 619; *Gamble v. East Saginaw*, 43 Mich., 367.

³There are cases which hold official returns of ministerial officers to be only *prima facie* evidence of facts recited: *Cockrell v. Smith*, 1 La. An., 1; *Waddell v. Judson*, 12 La. An., 13; *Leverich v. Adams*, 15 La. An., 310; *Wallis v. Bourg*, 16 La. An., 176; *Newton v. Prather*, 1 Duv., 100; *Fleece v. Goodrum*, 1 Duv., 306; *Kingsbury v. Buchanan*, 11 Ia., 387; *Pomeroy v. Parmelee*, 9 Ia., 140, 150; *Owens v. Ranstead*, 22 Ill., 161, 167; *Rivard v. Gardner*, 39 Ill., 125, 129; *Gregg v. Strange*, 3 Ind., 366; *Doe v. Attica*, 7 Ind., 641; *Butler v. State*, 20 Ind., 169; *Tucker v. Bond*, 23 Ark., 268; *Ingraham v. McGraw*, 3 Kan., 521.

In *Lothrop v. Ide*, 18 Gray, 98, a collector sued for arresting a person on a tax warrant relied upon his return as showing that the party had no goods on which to levy. The plaintiff was allowed to give evidence that he offered to turn out goods in satisfaction of the tax. On exceptions the decision was sustained, the cases of *Pickard v. Howe*, 12 Met., 207; *Bruce v. Holden*, 21 Pick., 187, and *Barnard v. Graves*, 13 Met., 85, being cited.

showing.¹ The point is one of no little difficulty, and there is ground for difference of opinion upon it.

¹ *Scales v. Alvis*, 12 Ala., 617, citing *Jackson v. Shepard*, 7 Cow., 88; *Andrews v. People*, 75 Ill., 605. The report held to be *prima facie* evidence only. *Chiniquy v. People*, 78 Ill., 570; *Mix v. People*, 81 Ill., 118; *Pike v. People*, 84 Ill., 80. In Indiana it is said the personal property must be first levied on and exhausted, provided it is of such a nature and so situated that the treasurer, by the exercise of reasonable diligence, can levy upon it and make the amount of the taxes. *Volger v. Sidener*, 86 Ind., 545; *Logansport v. Carroll*, 95 Ind., 156; see *Bowen v. Donovan*, 32 Ind., 379. That a sale of land is illegal if the owner has personalty in the county from which the taxes can be made. *Schrodt v. Deputy*, 88 Ind., 90; *Sharp v. Dillman*, 77 Ind., 280; *McWhinney v. Brinker*, 64 Ind., 360; *Hannah v. Collins*, 94 Ind., 201. And it would seem that the tax purchaser must take the affirmative of showing there were no goods subject to distress. *Earle v. Simonds*, 94 Ind., 573. But if suit is brought against the officer for selling real estate when personalty was within reach, the complaint must show the character of the personalty, and that it was subject to seizure and sale. *Bunnell v. Farris*, 82 Ind., 393. In Nebraska it has been held that a sale of land for taxes where there was sufficient personal property of the delinquent in the county out of which to make the tax was absolutely void. *Wilhelm v. Russell*, 8 Neb., 120; *Pettit v. Black*, 8 Neb., 59; *Miller v. Hurford*, 12 N. W. Rep., 833. This seems to have been changed by statute in 1877. See 8 Neb., 120, note. In Mississippi it is held that a tax deed cannot be invalidated by showing that there was personalty from which the tax might have been made, or that no demand was made for payment. *Bell v. Coats*, 54 Miss., 538; *Virden v. Bowers*, 55 Miss., 1.

CHAPTER IX.

THE CONSTRUCTION OF TAX LAWS.

In the administration of the laws for the collection of the public revenue, it is in the first instance necessary that we ascertain the legislative intent in their several provisions, and next that we give effect to that intent in applying it to the subject-matter with which we have to deal. In doing this we may sometimes make profitable use of certain rules of construction which we may find applied in adjudicated cases.

Rules of construction in general. Artificial rules of construction have probably found more favor with the courts than they have ever deserved. Their application in legal controversies has oftentimes been pushed to an extreme which has defeated the plain and manifest purpose in enacting the laws. Penal laws have sometimes had all their meaning construed away, and in remedial laws remedies have been found which the legislature never intended to give. Something akin to this has befallen the revenue laws. In some of the earlier cases they seem to have been looked upon as things which, like the obligations entered into with a usurer, were to be confined to the very letter of the bond, if enforced at all; and every indictment was made against them and against the proceedings under them. This is an evil which the legislature has endeavored to remedy, but in doing so it has often gone to the opposite extreme. It has passed statutes from time to time in the supposed exercise of a control over rules of evidence which, if literally construed and enforced, would be in the nature of judicial decrees, and would determine conclusively, against the person whose property has been seized for taxes, all such questions of law or right as he might raise in support of his inheritance. It is difficult to determine which is more unreasonable — the old strictness of some of the courts in dealing with tax proceedings, or the new strictness of some of the legislation which has been aimed at those who have had the misfortune to have their property seized under tax laws.

The intent to govern. The underlying principle of all construction is that the intent of the legislature should be sought in the words employed to express it, and that when found it should be made to govern, not only in all proceedings which are had under the law, but in all judicial controversies which bring those proceedings under review. Beyond the words employed, if the meaning is plain and intelligible, neither officer nor court is to go in search of the legislative intent; but the legislature must be understood to intend what is plainly expressed, and nothing then remains but to give the intent effect.¹ If the words of the law seem to be of doubtful import, it may then perhaps become necessary to look beyond them in order to ascertain what was in the legislative mind at the time the law was enacted; what the circumstances were, under which the action was taken; what evil, if any, was meant to be redressed; what was the leading object of the law, and what the subordinate and relatively unimportant objects. And where the law has contemporaneously been put into operation, and in doing so a construction has necessarily been put upon it, this construction, especially if followed for some considerable period, is entitled to great respect, as being very probably a true expression of the legislative purpose, and is not lightly to be overruled.²

¹ *United States v. Fisher*, 2 Cranch, 358, 399; *Sturgis v. Crowninshield*, 4 Wheat., 122, 202; *People v. Purdy*, 2 Hill, 31, 35; S. C., 4 Hill, 384; *Newell v. People*, 7 N. Y., 9, 83; *McClusky v. Cromwell*, 11 N. Y., 593; *People v. N. Y. Central R. R. Co.*, 24 N. Y., 485, 492; *Alexander v. Worthington*, 5 Md., 471; *Cantwell v. Owens*, 14 Md., 215; *Case v. Wildridge*, 4 Ind., 51; *Spencer v. State*, 5 Ind., 41, 49; *Ludlow's Heirs v. Johnson*, 3 Ohio, 553; *Ezekiel v. Dixon*, Kelly, 146; *In re Murphy*, 23 N. J., 180; *State v. Blasdel*, 4 Nev., 241; *Patterson v. Yuba*, 13 Cal., 175; *District Township v. Dubuque*, 7 Iowa, 262; *Bidwell v. Whittaker*, 1 Mich., 479; *Bartlett v. Morris*, 9 Port., 266; *McAdoo v. Benbow*, 63 N. C., 461, 464; *Beardstown v. Virginia*, 76 Ill., 34; *Hawkins v. Carroll*, 50 Miss., 735; *Smith v. Thursby*, 28 Md., 244; *St. Louis, etc., R. R. Co. v. Clark*, 53 Mo., 214; *Mundt v. Railroad Co.*, 31 Wis., 451; *Slack v. Jacob*, 8 W. Va., 612; *Gold v. Fite*, 2 Bax., 237; *Cornwall v. Todd*, 38 Conn., 443.

Where a statute providing for the summary arrest of a defaulting collector authorized him to be released on giving bond after he had been committed to prison after his arrest, it was held that a bond taken without committing him to prison was unauthorized. *Daggett v. Everett*, 19 Me., 373.

² *Cooley*, Const. Lim. (5th ed.), p. 81. It is not conclusive. *Petition of Manhattan Sav. Inst.*, 82 N. Y., 142.

When extraneous facts and circumstances are thus resorted to with the object of ascertaining the true legislative meaning, rules of interpretation are very properly made use of, because these are supposed to be based in reason, and to have stood the tests of experience. Such rules are discussed with more or less fullness in law treatises.¹ But rules of interpretation are not imperative like the mandatory provisions of law; they are rather in the nature of suggestions, leading up to the probable meaning where it has been carelessly or inartificially expressed; and where the words are susceptible of more than one interpretation, they may possibly guide us to the one intended. When, however, the intent is plain without them, they are worse than useless, because their tendency would then be to introduce doubts where none should exist.²

Construction of revenue laws. In the construction of the revenue laws,³ special consideration is of course to be had of the purpose for which they are enacted. That purpose is to supply the government with a revenue. But in the proceedings to obtain this it is also intended that no unnecessary injury shall be inflicted upon the individual taxed. While this is secondary to the main object—the impelling occasion of the law—it is none the less a sacred duty. Care is taken in constitutions to insert provisions to secure the citizen against injustice in taxation, and all legislative action is entitled to the presumption that this has been intended. We are therefore at liberty to suppose that the two main objects had in view in framing the provisions of any tax law were, *first*, the providing a public revenue, and *second*, the securing of individuals against extortion and plunder under cover of the proceedings to collect the revenue. The provisions for these purposes are the

¹ See especially Blackstone's Commentaries; the Treatises of Sedgwick and Smith; Dwarris on Statutes, with Potter's additions; Bishop on Statutory Crimes; Story on the Constitution; Cooley, Const. Lim., chapter IV.

² See *Henshaw v. Foster*, 9 Pick., 312, 316; *Woodson v. Murdock*, 22 Wall., 351, 381.

³ As to what are revenue laws, see *Peyton v. Bliss*, 1 Woolw., 170; *Perry Co. v. Selma, etc.*, R. Co., 58 Ala., 546; *Opinions of Justices*, 126 Mass., 547; *Curryer v. Merrill*, 25 Minn., 1; *The Nashville*, 4 Biss., 188. No law is to be considered a revenue law which undertakes to impose a burden not warranted by the general rules which underlie taxation. *Phila. Association v. Wood*, 39 Pa. St., 73.

important provisions of the law. Other provisions may be made for subordinate purposes; to encourage order, regularity and promptitude in the proceedings, and to give to the government a security against losses and frauds beyond what might be had in the integrity of officers.

The question regarding the revenue laws has generally been whether or not they should be construed strictly. To express it in somewhat different language, the question is whether, when a question of doubt arises in the application of a statute to its subject-matter or supposed subject-matter, the doubt is not to be solved in favor of the citizen, rather than in favor of the state upon whose legislation the doubt arises, and whether such solution is not most in accord with the general principles applied in other cases. Strict construction is the general rule in the case of statutes which may divest one of his freehold by proceedings not in the ordinary sense judicial, and to which he is only an enforced party. It is thought to be only reasonable to intend that the legislature, in making provision for such proceedings, would take unusual care to make use of terms which would plainly express its meaning, in order that ministerial officers might not be left in doubt in the exercise of unusual powers, and that the citizen might know exactly what were his duties and liabilities. A strict construction in such cases seems reasonable, because presumptively the legislature has given in plain terms all the power it has intended should be exercised. It has been very generally supposed that the like strict construction was reasonable in the case of tax laws.

"Statutes," says a learned and able writer, "made for the advancement of trade and commerce, and to regulate the conduct of merchants, ought to be perfectly clear and intelligible to persons of their description. By the use of ambiguous clauses in laws of that sort, the legislature would be laying a snare for the subject, and a construction which conveys such an imputation ought never to be adopted. Judges, therefore, where clauses are obscure, will lean against forfeitures, leaving it to the legislature to correct the evil, if there be any. With this view, the ship registry acts, so far as they apply to defeat titles and to create forfeitures, are to be construed strictly as penal, and not liberally as remedial laws. In like manner in the revenue laws, where clauses inflicting pains and penalties

are ambiguously or obscurely worded, the interpretation is ever in favor of the subject; 'for this plain reason,' said *Heath*, J., in *Hubbard v. Johnstone*, 'that the legislature is ever at hand to explain its own meaning, and to express more clearly what has been obscurely expressed.' " The same author on another page says: "It is a well settled rule of law that every charge upon the subject must be imposed by clear and unambiguous language. Acts of parliament which impose a duty upon the public will be critically construed with reference to the particular language in which they are expressed. When there is any ambiguity found, the construction must be in favor of the public; because it is a general rule that when the public are to be charged with a burden, the intention of the legislature to impose that burden must be explicitly and distinctly shown."¹ This statement of the general rule expresses the view which it is believed has always prevailed in England.² It is also that

¹ *Dwarris on Statutes*, 742, 749. See *Gomer v. Chaffee*, 6 Col., 314.

²Quotations from a few cases may be here given. In *Warrington v. Furber*, 8 East, 242, 245 (case of a stamp tax), Lord *Ellenborough*, Ch. J., says: "Where the subject is to be charged with a duty, the cases in which it is to attach ought to be fairly marked out, and we should give a liberal construction to words of exception confining the operation of the duty." In *Williams v. Sangar*, 10 East, 66, 69 (case of turnpike tolls), Lord *Ellenborough* says: "In the construction of these tax acts we must look at the strict words, however we may sometimes lament the generality of the expression used in them; but we must construe those words according to their plain meaning with reference to the subject-matter." In *Denn v. Diamond*, 4 B. & C., 244 (case of an *ad valorem* duty on sales), *Bayley*, J., says: "It is a well settled rule of law that every charge upon the subject must be imposed by clear and unambiguous language." It was therefore held that a conveyance in consideration of natural love and affection was not taxable as a "sale." In *Tompkins v. Ashby*, 6 B. & C., 541, 543 (case of a stamp duty), Lord *Tenterden*, Ch. J., says: "Acts of parliament imposing duties are so to be construed as not to make any instruments liable to them unless manifestly within the intention of the legislature." In *Doe v. Snaith*, 8 Bing., 147, 152 (case of a stamp duty), *Tindal*, Ch. J., says: "As all stamp acts, being a burden on the subject, must be clearly expressed, wherever they impose the burden, I should say that even if there were doubt, we should take the smaller sum." In *Wroughton v. Turtle*, 11 Mees. & W., 561, 567, *Park*, B., says: "It is a well settled rule of law that every charge on the subject must be imposed by clear and unambiguous words." In *Marquis of Chandos v. Commissioners of Inland Revenue*, 6 Exch., 464, 479, *Pollock*, C. B., says: "It is a well established rule in the construction of revenue acts that a duty cannot be imposed on the subject except by clear words. The meaning of the legislature must be distinctly made out from the terms of the

which has been adopted in the several states.¹ Like views have been frequently expressed by the federal courts. Thus, Mr. Justice Story, in giving reasons for holding that the revenue act of 1841 did not intend to levy a certain permanent duty on indigo, says: "My reasons for this conclusion are these: In the first place, it is, as I conceive, a general rule in the interpretation of all statutes levying taxes or duties upon subjects or citizens, not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operation so as to embrace matters not specifically pointed out, although standing upon a close analogy. In every case, therefore, of doubt, such statutes are construed most strongly against the government, and in favor of the subjects or citizens, because burdens are not to be imposed, nor presumed to be imposed, beyond what the statutes expressly

statute." In *Gurr v. Scudds*, 11 Exch., 190, 192, *Pollock*, C. B., says: "If there is any doubt as to the meaning of the stamp act, it ought to be construed in favor of the subject, because a tax cannot be imposed without clear and express words for that purpose."

The English cases are cited, and their doctrine approved, in *Green v. Holway*, 101 Mass., 243, 248.

¹ "Statutes which impose restrictions upon trade or common occupations, or which levy an excise or tax upon them, must be construed strictly." *Parker*, Ch. J., in *Sewell v. Jones*, 9 Pick., 412, 414. "A statute conferring authority to impose taxes must be construed strictly." *Anderson*, Ch. J., in *Moseley v. Tift*, 4 Fla., 402, 403. "A strict construction of the [tax] law is fully authorized by the nature and consequences of the proceeding." *Stuart*, J., in *Barnes v. Doe*, 4 Ind., 132, 133, quoting *Williams v. State*, 6 Blackf., 36. "It is a well settled rule that every charge under a stamp act must be imposed by clear and unambiguous words." *Ray*, J., in *Smith v. Waters*, 25 Ind., 397, 399. See *Savannah v. Hartridge*, 8 Ga., 23; *Williamsburg v. Lord*, 51 Me., 599; *Boyd v. Hood*, 57 Pa. St., 98. The rule of strict construction is very strongly expressed in *Cahoon v. Coe*, 57 N. H., 557, and it is said to be "founded so firmly upon principles of equity and natural justice as not to admit of reasonable doubt." See *Alton v. Aetna Ins. Co.*, 82 Ill., 45, where it was held that authority to tax insurance companies to procure fire extinguishing apparatus and build reservoirs would not warrant a tax for the support of the fire department. The rule of strict construction will be applied as against a county in favor of the state if the effect of a different construction would unjustly burden the state to the relief of the county. *State v. Brewer*, 64 Ala., 287. See, further, *Bowling Green, etc., v. Warren Co.*, 10 Bush, 711; *Mankato v. Fowler*, 32 Minn., 364. Where a telephone company is required to pay a certain specific state tax in lieu of all taxes for any purposes authorized by the laws of the state, a city cannot impose a license tax for revenue. *Wis. Tel. Co. v. Oshkosh*, 62 Wis., 82.

and clearly import. Revenue statutes are in no just sense remedial laws, or laws founded upon any permanent public policy, and therefore are not to be liberally construed. Hence, in the present case, if it be a matter of real doubt whether the intention of the act of 1841 was to levy a permanent duty on indigo, that doubt will absolve the importer from paying the duty beyond the period when it would otherwise be free."¹ Duties, it is said by Mr. Justice *Nelson*, "are never imposed upon the citizen upon vague or doubtful interpretations."² "The revenue laws," it is said in another case, "are not to be so construed as to extend their meaning beyond the clear import of the words used."³ In another case remarks are made by an able circuit judge, which apply with great force to nearly all the federal revenue laws. "In construing a severe statute, declaring a heavy forfeiture (and according to one construction claimed, for small offenses), it is just to say that those who are called upon to conduct their business affairs in view of all its provisions ought to be fairly apprised of its requirements and its penalties, of whatever kind. They are bound to know the law, but law makers owe to them the duty to make the law intelligible; and those whose business it is to construe or expound a law which is of doubtful or double meaning should not incline to the harshest possible meaning when it is obvious that those to whom it is to be applied may well have been led to trust in another, which is less severe, but equally satisfying its terms. This is not saying that laws of the kind in question are to be strictly construed in favor of the subject and against the state, but only that they should be construed with reasonable fairness to the citizen."⁴ There are some cases, however, from which, if the expressions made use of in the opinions are taken literally, a different rule might be deduced. Thus it is said in one case: "A revenue law is not to be strictly construed, but *rather the contrary*, so as to attain the ends for which it was enacted."⁵ In other cases it is said that

¹ *United States v. Wigglesworth*, 2 Story, 369, 373.

² *Powers v. Barney*, 5 Blatch., 202, 203.

³ *United States v. Watts*, 1 Bond, 580, 583, per *Leavitt*, J.

⁴ *Woodruff, J.*, in *United States v. Distilled Spirits*, 10 Blatch., 428, 433.

⁵ *Deady, J.*, in *United States v. Olney*, 1 Abb., U. S., 275, 282. See *Twenty-eight Cases*, 2 Ben., 63.

"the penalties annexed to violations of general revenue laws do not make them penal, in the sense which requires them to be construed strictly."¹ And in the decision of a recent case in the United States Supreme Court, a similar view seems to be taken. "Revenue statutes," it is said, "are not to be regarded as penal, and therefore to be construed strictly. *They are remedial in their character* and to be construed *liberally*, to carry out the purposes of their enactment."²

It seems highly probable that the word *remedial* has been employed by the learned judge delivering the opinion in this case in a sense differing from that in which it is commonly used in the law. A remedial law, as the term is generally employed, is something quite different from the revenue laws. An author of accepted authority expresses the ordinary understanding when he defines a remedial statute to be "one which supplies such defects and abridges such superfluities of the common law as may have been discovered;³ such as may arise either from the imperfection of all human laws, from change of time and circumstances, from mistakes and unadvised determinations of unlearned (or even learned) judges, or from any other cause whatever; and this being done either by enlarging the common law where it was too narrow and circumscribed, or by restraining it where it was too lax and luxuriant, has occasioned another subordinate division of remedial acts into *enlarging* and *restraining* statutes. So it seems that a remedial statute may also have its application to, and effect upon, other existing statutes, and give the party injured a remedy; and for a more general definition, 'it is a statute giving a party a mode of remedy for a wrong where he had none or a different one before.'"⁴

¹ *United States v. Barrels of Spirits*, 2 Abb., U. S., 305, 314, per *Dillon*, J. And see *United States v. Cases of Cloth*, *Crabbe*, 356.

² *United States v. Hodson*, 10 Wall., 395, 406, citing *Cliquot's Champagne*, 3 Wall., 114, 115. In *New Orleans v. Railroad Co.*, 35 La. An., 679, a statute for the assessment of property which had been omitted from the rolls for preceding years was said to be a remedial statute, and not repugnant to a constitutional provision against retroactive legislation. The statute was certainly in furtherance of right and justice as between the party taxed and the rest of the community. See *Jacksonville v. Basnett*, 20 Fla., 525.

³ 1 Bl. Com., 86.

⁴ *Potter's Dwaris on Statutes*, 73, citing *Chitty's note* to 1 Bl. Com., 86. The definition in *Bouvier's Law Dictionary* is the same.

Mr. Justice Blackstone speaks of statutes against frauds as remedial, but the context shows he is speaking of statutes giving parties a remedy against frauds; and he adds: "when the statute acts upon the offender and inflicts a penalty, as the pillory or a fine, it is then to be taken strictly, but when the statute acts upon the offense by setting aside the fraudulent transaction, here it is to be construed liberally."¹ Another author, in pointing out the distinction between penal and remedial laws, remarks that "the remedy for breach of a remedial statute is by an action for damages, sustained from such a breach, at the suit of the party grieved; that for breach of a penal statute, by an action of debt for the penalty; or, in more concise terms, the legal distinction between remedial and penal statutes is, that the former gives relief to the party grieved; the latter imposes penalties for offenses committed."² These considerations would seem to justify the conclusion that the learned judge, in applying the word remedial to tax laws, has used in it some political or special, rather than in the strict legal, sense, and that it was not the intention of the court to overrule the opinion of Mr. Justice Story in *Wigglesworth's case*.³

There may and doubtless should be a distinction taken in the construction of those provisions of revenue laws which point out the subjects to be taxed, and indicate the time, circumstances and manner of assessment and collection, and those

¹ 1 Bl. Com., 88.

² 13 Pet. Abr., 297, note. And see *Cummings v. Frye*, Dudley, 182; *Carey v. Giles*, 9 Ga., 253. Also the instance of remedial statutes in *Potter's Dwarris on Stat.*, 231, 245.

³ The opinion in *United States v. Hodson*, 10 Wall., 395, refers to *Cliquot's Champagne*, 4 Wall., 114, which in turn refers to *Taylor v. United States*, 3 How., 193. The opinion in this last case was given by Mr. Justice Story, and the language made use of, which consists largely in a quotation from the opinion given in the lower court, does not express his own views so clearly as was customary with that learned judge. What is manifest in his opinion is, that the point was not regarded as of importance in that case, the meaning of the statute being plain; and while the distinction pointed out by the lower court between penal and remedial laws is approved and shown to be in accordance with the authorities, it is not clear that the general remarks of the judge were intended to go further. It would have been a remarkable circumstance if Mr. Justice Story had overruled his own opinion, delivered so recently that, at that time, his son (and reporter) had not issued the volume containing it.

which impose penalties for obstructions and evasions. There is no reason for peculiar strictness in construing the former. Neither is there reason for liberality. The difference in some cases is exceedingly important. The one method squeezes everything out of the statute which the unyielding words do not perforce retain; the other reaches out by intendment, and brings within the statute whatever can fairly be held embraced in its beneficent purpose. The one narrows the statute as it is studied; the other expands it. Every lawyer knows how much easier it is to find a remedy in a statute than an offense. There must surely be a just and safe medium between a view of the revenue laws which treats them as harsh enactments to be circumvented and defeated if possible, and a view under which they acquire an expansive quality in the hands of the court, and may be made to reach out and bring within their grasp, and under the discipline of their severe provisions, subjects and cases, which it is only conjectured may have been within their intent. Revenue laws are not to be construed from the standpoint of the tax payer alone, nor of the government alone.¹ Construction is not to assume either that the tax payer, who raises the legal question of his liability under the laws, is necessarily seeking to avoid a duty to the state which protects him, nor, on the other hand, that the government, in demanding its dues, is a tyrant, which, while too powerful to be resisted, may justifiably be obstructed and defeated by any subtle device or ingenious sophism whatsoever. There is no legal presumption either that the citizen will, if possible, evade his duties, or, on the other hand, that the government will exact unjustly or beyond its needs. All construction, therefore, which assumes either the one or the other, is likely to be mischievous, and to take one-sided views, not only of the laws, but of personal and official conduct. The government in its tax legislation is not assuming a hostile position towards the citizen, but, as we have elsewhere said, is apportioning, for and as the agent of all, a duty among them; and the citizen, it is to be presumed, will perform that duty when it is clearly made known to him, and when the time of performance has

¹ A construction will not be put upon a tax law which would enable a party for whom no purpose of exemption is expressed to escape taxation altogether. *Philadelphia v. Ridge Av. R. Co.*, 102 Pa. St., 190.

arrived. Unjust exactions, if such are made, must be attributed to human imperfection, not to intent; and frauds and evasions are to be supposed exceptional.¹ A recent decision of the supreme court of Connecticut lays down a rule, which, as applied to those provisions of the revenue laws which apportion the taxes and give ordinary remedies for their collection, seems not objectionable, though more liberal than is recognized by the authorities generally. The case was a revenue case, and the question was whether a statute for imposing a personal tax on "persons who are residents" of the taxing districts could be applied to the personalty belonging to the estate of a deceased person. In support of such a construction it is said: "The greatest, and perhaps the only, objection that can be urged against this rule is, that we cannot say in strictness that the deceased or his estate is a resident of the district. This objection assumes that the statute is to be strictly construed. But we do not think that the doctrine of strict construction should apply to it. Statutes relating to taxes are not penal statutes, nor are they in derogation of natural rights. Although taxes are regarded by many as burdens, and many look upon them even as money arbitrarily and unjustly extorted from them by government, and hence justify themselves and quiet their consciences in resorting to questionable means for the purpose of avoiding taxation, yet, in point of fact, no money paid returns so good and valuable a consideration as money paid for taxes laid for legitimate purposes. They are just as essential and important as government itself; for without them, in some form, government could not exist. The small pittance we thus pay is the price we pay for the preservation of all our property, and the protection of all our rights. But there is not only a necessity for taxation, but it is eminently just and equitable that it should be as nearly equal as possible. Hence it is the policy of the law to require all property, except such as is specially exempted, to bear its proportion of the public burdens. Not only so, but the law manifestly contemplates that property rated in the list shall be liable for all taxes — town

¹ A tax law is not to be held void simply because in its operation it is unjust. *Porter v. Rockford, etc., R. Co.*, 76 Ill., 563. See *Kirby v. Shaw*, 19 Pa. St., 258; *Commonwealth v. Savings Bank*, 5 Allen, 428; *People v. Whyler*, 41 Cal., 351.

and school district taxes alike. This is evident from the provision that district taxes shall be laid on the town list, with special provision for certain changes rendered necessary in order to tax all the real estate situated within the district, and none situated without, and also to assess the tax in each instance upon the right person. In construing statutes relating to taxes, therefore, we ought, where the language will permit, so to construe them as to give effect to the obvious intention and meaning of the legislature, rather than to defeat that intention by a too strict adherence to the letter."¹

If there should be any leaning in such cases it would seem that it should be in the direction of the presumption that everything is expressed in the tax laws which was intended to be expressed. The laws are framed by the government for its own needs, and if imperfections are found to exist, the legislature, in the language of Mr. Dwarries, "is at hand to explain its own meaning, and to express more clearly what has been

¹*Cornwall v. Todd*, 38 Conn., 443, 447, per *Carpenter*, J. So it is said in *Hubbard v. Brainard*, 35 Conn., 563, 568, by *Butler*, J.: "A law imposing a tax is not to be construed strictly because it takes money or property *in invitum* (although its provisions are for that reason to be strictly executed), for it is taken as a share of a necessary public burden; nor liberally, like laws intended to effect directly some great public object, but fairly for the government and justly for the citizen; so as to carry out the intention of the legislature, gathered from the language used, read in connection with the general purpose of the law, and the nature of the property on which the tax is imposed, and the legal relation of the tax payer to it." And in *Rein v. Lane*, Law R., 2 Q. B., 144, 150, *Blackburn*, J., says: "We must construe the words of the statute imposing the duty according to the intention which those words express when used in such a statute for such a purpose." And in *Lord Foley v. Commissioners of Revenue*, Law R., 3 Exch., 263, 268, *Kelley*, C. B., justly remarks that "it is better for the subjects and the state that the ordinary rules of construction should be applied." Prof. Parsons, in his *Treatise on Contracts*, vol. 3, p. 287, states the proper rule very clearly and concisely: "It is a well settled principle that every charge upon the subject must be imposed by clear and unambiguous words. . . . But it is equally certain that no interpretation will be adopted which must defeat the purpose of the law, provided the language of the statute admit fairly and rationally of an interpretation which sustains that purpose." It is altogether reasonable to construe revenue laws as intended to reach all the subjects of taxation coming within their reasons. *Big Black Creek Imp. Co. v. Commonwealth*, 94 Pa. St., 450; *Cornwall v. Todd*, 38 Conn., 443. See *Higgins v. Rinker*, 47 Tex., 393; *Philadelphia v. Ridge Av. R. Co.*, 102 Pa. St., 190.

obscurely expressed." But there can be no propriety in construing such a law either with exceptional strictness amounting to hostility, or with exceptional favor beyond that accorded to other general laws. It is as unreasonable to sound a charge upon it as an enemy to individual and popular rights, as it is to seek for sophistical reasons for grasping and holding by its authority every subject of taxation which the drag-net of the official force has brought within its supposed compass. The construction, without bias or prejudice, should seek the real intent of the law; and if the leaning is to strictness, it is only because it is fairly and justly presumable that the legislature, which was unrestrained in its authority over the subject, has so shaped the law as, without ambiguity or doubt, to bring within it everything it was meant should be embraced.

In the state revenue laws the penal provisions are few and by no means severe. In the federal revenue laws, some of them are of a severity very seldom to be met with in penal statutes, and only to be justified by the supposed impossibility of collecting the revenue without them. In illustration of what is here said, reference need only be made to the case of forfeiture of property for the mere indulgence of a fraudulent intent never carried into effect; a forfeiture, too, which may be visited upon a purchaser who has bought in good faith, and without suspicion of the intended fraud.¹ If such provisions are to be construed with liberality, there is no reason why any other penal provisions whatsoever should not be.

Local powers to tax. The fact that the state creates municipal governments does not by implication clothe them with the power to levy taxes. That power must be conferred in terms, or must result by necessary implication from the language made use of in the law.² But it is not requisite that any par-

¹ Henderson's Distilled Spirits, 14 Wall., 44.

² See the following cases which have laid down and will serve to illustrate this rule: *Sharp v. Spier*, 4 Hill, 76; *Doughty v. Hope*, 3 Denio, 574; *Tallman v. White*, 2 N. Y., 66; *Manice v. White*, 8 N. Y., 120; *Cruger v. Dougherty*, 43 N. Y., 107; *Litchfield v. Vernon*, 41 N. Y., 123; *Mays v. Cincinnati*, 1 Ohio St., 268; *Cincinnati v. Bryson*, 15 Ohio St., 625; *Reed v. Toledo*, 18 Ohio St., 161; *Jonas v. Cincinnati*, 18 Ohio St., 318; *Savannah v. Hartridge*, 8 Ga., 23; *Augusta v. Walton*, 37 Ga., 620; *Sanders v. Butler*, 30 Ga., 679; *Vanover v. The Justices*, 27 Ga., 354; *Richmond v. Daniel*, 14 Grat., 385.

tioular technical or legal terms shall be made use of in giving the power; it is enough that the purpose is apparent, and that on a fair construction of the language employed the legislature must be deemed to have intended that the power should exist.¹

Construction of local power. When the power is found to have been conferred, if any question arises upon its extent or application, the rule is that the power must be strictly construed. It is a reasonable presumption that the state, which is the depositary and source of all authority on the subject, has granted in unmistakable terms all it has intended to grant at all. Municipal authorities, therefore, when they assume to tax, must be able to show warrant therefor in the words of the

Orange & Alexandria R. R. Co. v. Alexandria, 17 Grat., 176; *Holland v. Baltimore*, 11 Md., 186; *Bouldin v. Baltimore*, 15 Md., 18; *Harmony v. Osborne*, 9 Ind., 458; *Kyle v. Malin*, 8 Ind., 34; *Indianapolis v. Mansur*, 15 Ind., 112; *Carron v. Den*, 26 N. J., 594; *Leavenworth v. Norton*, 1 Kan., 432; *Snyder v. North Lawrence*, 8 Kan., 82; *Shawnee County v. Carter*, 2 Kan., 115; *Chicago v. Chicago*, etc., R. R. Co., 20 Ill., 286; *Drake v. Phillips*, 40 Ill., 388; *Douglass v. Placerville*, 18 Cal., 643; *Hewes v. Reis*, 40 Cal., 255; *Kniper v. Louisville*, 7 Bush, 599; *Campbell County Court v. Taylor*, 8 Bush, 206; *Broadway Baptist Church v. McAtee*, 8 Bush, 508; *Bullock v. Curry*, 2 Met. (Ky.), 171; *Boston v. Schaffer*, 9 Pick., 415; *Nichol v. Nashville*, 9 Humph., 252; *Philadelphia v. Tryon*, 35 Pa. St., 401; *Bennett v. Birmingham*, 31 Pa. St., 15; *St. Louis v. Laughlin*, 49 Mo., 559; *St. Charles v. Nolle*, 51 Mo., 122; *Lott v. Ross*, 38 Ala., 156; *Montgomery v. State*, 38 Ala., 162; *Henry v. Chester*, 15 Vt., 460; *Municipality v. Pance*, 6 La. An., 515; *Asheville v. Means*, 7 Ired., 406; *Dean v. Charlton*, 27 Wis., 522; *Clark v. Davenport*, 14 Ia., 494; *Fairfield v. Ratcliffe*, 20 Ia., 396; *Oregon Steam, etc., Co. v. Portland*, 2 Or., 81; *United States v. Burlington*, 2 Am. L. Reg., N. S., 394; *Leonard v. Canton*, 35 Miss., 189; *English v. Oliver*, 28 Ark., 317; *Wallis v. Smith*, 29 Ark., 354.

¹ See *Fisher v. People*, 84 Ill., 491, where, in creating a school district for the building and supporting of a high school, it was held a power to tax had been given though it was not in terms mentioned.

A provision abolishing previous exemptions from taxation will not of its own force give municipalities the power to tax; they must show express authority to tax, and not merely a negation of the privilege of exemption. *Savannah v. Railroad Co.*, 3 Woods, 432.

Authority to lay a school tax of a certain per cent. does not warrant the laying of a poll tax. Board, etc., of *Indianapolis v. Magner*, 84 Ind., 67. Authority to lay a road tax for future expenses will not justify a tax for prior indebtedness. *Commissioners of Highways v. Newell*, 80 Ill., 587. See for a like point *Appeal of Conner*, 103 Pa. St., 356. Power to raise bridge money by tax or loan does not warrant a resort to both methods. *Loomis v. Rogers*, 53 Mich., 135.

grant, which alone can justify their action. They are to assume that they can tax only as the state in its wisdom has thought proper to permit, and if the state has erred in the direction of strictness, the legislature alone can correct the evil.¹

Construction as to Objects of Taxation. This rule of construction limits municipalities, in the levy of taxes, strictly to the ordinary purposes for which such municipalities are accustomed to make levies. The customary grant does not go a step beyond this, because it cannot be supposed that in giving the customary authority the legislature had any but the usual and ordinary objects of local taxation in view. If, therefore, it becomes important that a municipality should raise revenue by taxation, to be devoted to unusual and extraordinary purposes, the authority cannot be found in the general grant and must be conferred specially. This is not only in accordance with the general rule that construes sovereign grants with strictness, but it is also obviously wise. The mischief of a strict construction is easily obviated by the legislature; but the mischief of a liberal construction may be irremediable before it can be reached.² It is in accordance with this rule that the authority conferred upon a county to levy a tax "for county purposes" was held, in Georgia, not to warrant a tax for the construction of public buildings; county purposes, as understood in that state, being the support of the poor, public education,

¹See *Clark v. Davenport*, 14 Ia., 494; *Burlington v. Kellar*, 18 Ia., 59; *Campbell Co. Court v. Taylor*, 8 Bush, 206; *Wallis v. Smith*, 29 Ark., 354; *Tallman v. White*, 2 N. Y., 66; *Litchfield v. Vernon*, 41 N. Y., 123; *Richmond v. Daniel*, 14 Grat., 385; *Ham v. Sawyer*, 38 Me., 37; *Bouldin v. Baltimore*, 15 Md., 18; *Wheeler v. Plattsmouth*, 7 Neb., 274; *Daily v. Swope*, 47 Miss., 337; *Vance v. Little Rock*, 30 Ark., 435; *State v. Maysville*, 12 S. C., 76; *Webster v. People*, 98 Ill., 843; *Oregon Steam Nav. Co. v. Portland*, 2 Or., 81; *Loomis v. Rogers*, 53 Mich., 135; *Stanley v. Mining Co.*, 6 Col., 415; *Appeal of Connors*, 103 Pa. St., 356; *Com'rs of Highways v. Newell*, 80 Ill., 587; *Schoolfield's Ex. v. Lynchburg*, 8 Am. & Eng. Corp. Cas., 488.

In Louisiana, under a constitutional provision that "No political corporation shall impose a greater license tax than is imposed by the general assembly for state purposes," the failure of the state to impose any license tax on a particular business is held to be an implied prohibition to all municipal corporations levying such a tax. *New Orleans v. Graves*, 34 La. An., 840.

²*Stetson v. Kempton*, 13 Mass., 272; *Alley v. Edgecomb*, 53 Me., 446.

and the like.¹ In Maine, it was held that a general power in a town to tax for corporate purposes would not include the right to tax in order to make a toll bridge free.² Whatever doubt might be raised as to this last decision, there can be none, we should suppose, of the correctness of those which have held that a power to tax for necessary town charges would not warrant a tax to raise military forces or to pay military bounties. This is clearly no part of the corporate duty of a town, and could not be supposed within the intent of the legislature in providing for necessary town charges.³ The same may be said

¹ *Vanover v. The Justices*, 27 Ga., 354. See *Alton v. Aetna Ins. Co.*, 83 Ill., 45. As to what are "county purposes" in Minnesota, see *McCormic v. Fitch*, 14 Minn., 252. In North Carolina it is held that county authorities who are authorized without a popular vote to lay taxes for "necessary expenses" of the county may tax for the construction of a free bridge (*Evans v. Commissioners*, 89 N. C., 154, citing *Broadnax v. Groom*, 64 N. C., 244), and for a court-house. *Holcombe v. Commissioners*, 89 N. C., 346.

² *Bussy v. Gilmore*, 3 Me., 191. Where a city has authority to levy taxes only to a certain percentage on the assessment, the power to levy more is not to be implied from the fact that, by the charter, it is made the duty of the city to erect hospitals, poor-houses, etc., and more would be needed for those purposes. *Leavenworth v. Norton*, 1 Kan., 432.

³ The leading case on this point is *Stetson v. Kempton*, 13 Mass., 272, 278, in which *Parker*, Ch. J., gives his idea of what constitutes town charges, as follows: "The phrase *necessary charges* is indeed general; but the very generality of the expression shows that it must have a reasonable limitation. For none will suppose that, under this form of expression, every tax would be legal which the town should choose to sanction. The proper construction of the terms must be that, in addition to the money to be raised for the poor, schools, etc., towns might raise such sums as should be necessary to meet the ordinary expenses of the year; such as the payment of such municipal officers as they should be obliged to employ, the support and defense of such actions as they might be parties to, and the expenses they would incur in performing such duties as the laws imposed, as the erection of powder houses, providing ammunition, making and repairing highways and town roads, and other things of a like nature; which are necessary charges, because the effect of a legal discharge of their corporate duty. The erection of public buildings for the accommodation of the inhabitants, such as town houses to assemble in, and market houses for the sale of provisions, may also be a proper town charge, and may come within the fair meaning of the term *necessary*; for these may be essential to the comfort and convenience of the citizens. But it cannot be supposed that the building of a theater, a circus, or any other place of mere amusement, at the expense of the town, could be justified under the term *necessary town charges*. Nor could the inhabitants be lawfully taxed for the purpose of raising a statue or monument, these being matters of taste and not of necessity, unless, in

of a power to vote aid to a railroad enterprise, or to a corporation organized to construct any work of a similar nature, not wholly local in construction or in advantages; the power to give the aid must be conferred in terms and must be strictly observed in the proceedings taken under it.¹

Construction as to Taxables. A like rule applies as regards the subjects upon which the power to tax may be employed. It does not follow that, because the state has conferred the authority, it has intended it should be exercised to the same unlimited extent that it might be by the state itself; on the contrary, the discretion to select subjects of taxation rests with the state, and is supposed to have been exercised in granting municipal powers. On this ground it has been held that a power conferred by a city charter to tax "property within the city" would authorize the taxing of visible property only, and not credits.² The power to impose license or privilege taxes is not contained in a grant of general local legislation.³ And it has been held that a power to tax personal property would not, without further specification, authorize the taxation of corporate stocks.⁴

populous and wealthy towns, they should be thought suitable ornaments to buildings or squares, the raising and maintenance of which are within the duty and care of the governors or officers of such towns." See *Alley v. Edgecomb*, 53 Me., 446. Compare *Lisbon v. Bath*, 21 N. H., 319; *Bangs v. Snow*, 1 Mass., 181; *Cruikshanks v. Charleston*, 1 McCord, 360; *State v. Charleston*, 2 Speers, 623; *Simmons v. Wilson*, 66 N. C., 336.

¹See *Cooley*, Const. Lim. (5th ed.), 215, and cases cited, *ante*, p. 182; *Campbell Co. Court v. Taylor*, 8 Bush, 206; *State v. Macon Co. Court*, 63 Mo., 29; *Winston v. Railroad Co.*, 1 Bax., 61. See for construction of a charter which was held to give power to construct water-works, *Frederick v. Augusta*, 5 Ga., 561.

²*Johnson v. Lexington*, 14 B. Monr., 521; *Covington v. Powell*, 2 Met. (Ky.), 226; *Louisville v. Henning*, 1 Bush, 381. Compare *Augusta v. National Bank*, 47 Ga., 562, where a general power to tax property was held to justify taxing bank shares.

³*Sanders v. Butler*, 30 Ga., 679; *Augusta v. Walton*, 37 Ga., 620.

⁴*Richmond v. Daniel*, 14 Grat., 385. Compare *Augusta v. National Bank*, 47 Ga., 562. A statute authorizing a tax on dividends over a certain per cent. on capital means capital actually paid in, and not merely authorized capital. *Street Railway Co. v. Philadelphia*, 51 Pa. St., 465; *Philadelphia v. Ferry Railway Co.*, 52 Pa. St., 177. See *City Bank v. Bogel*, 51 Tex., 355. An interpretation of a statute for the assessment of a special tax which will interfere with the general tax law is not to be adopted unless there is the

Liability of power to abuse. The liability of the taxing power to abuse is often assigned as a reason why, in particular cases, it should be held not to have been conferred. But this is illogical and unreasonable. "Every authority, however indispensable, may be abused, and if it might not, it would be powerless for good."¹ The point is forcibly put by the supreme court of Ohio. "It has been strongly urged that this power is peculiarly liable to abuse. It is liable to be abused; perhaps peculiarly so. But so is all government, and all governmental powers. Yet government is nevertheless a necessity among men. It is a very bad government indeed which is not better than the inevitable anarchy and outrage which follow the absence of all government. And the fact that a power is liable to be abused affords no conclusive argument against it."² It is only a reason for caution in construction, in order to be certain that the power is intended to be given, and for holding the donee of the power to a strict execution of the authority.

Directory and mandatory provisions. Much use is made in the law of taxation of the words *directory* and *mandatory*, as words of classification of the various provisions of tax laws, as regards the imperative nature of the obligation they impose on the revenue officers to obey them strictly. All the provisions of a statute not on their face merely permissive or discretionary are intended to be obeyed, or they would not be

clearest language to justify it. *State v. Douglass*, 33 N. J., 363; *Smith v. Vicksburg*, 54 Miss., 615. In *Pearce v. Augusta*, 37 Ga., 597, it was held that a general power in a city to tax "all chattels, moneys, goods, wares and merchandise, capital invested in shipping or tonnage, or capital otherwise invested," would support a tax on factors, measured by the amount of sales.

The constitution exempted from taxation mines, except the net proceeds. A statute reiterated the permissive language of the constitution in respect to the taxation of such net proceeds, but contained no mandatory provisions on the subject. Held that it did not clearly appear that the legislature intended the net proceeds of mines should be taxed. *Stanley v. Mining Co.*, 6 Col., 415.

¹ *Gibson*, Ch. J., in *Kirby v. Shaw*, 19 Pa. St., 258, 260. In Virginia, where a license tax was contested as unjust and unequal, a similar idea is expressed. *Ould v. Richmond*, 23 Grat., 464.

² *Brinkerhoof*, J., in *Reeves v. Treasurer of Wood County*, 8 Ohio St., 333. See *Breevort v. Detroit*, 24 Mich., 322, 325; *Bridgeport v. Nichols*, 23 Conn., 189, 203; *Kneedler v. Lane*, 45 Pa. St., 238; *State v. Kinkead*, 14 Nev., 117.

enacted at all; and therefore they come to the several officers who are to act under them, as commands. But the negligence of officers, their mistakes of fact or of law, and many other causes, will sometimes prevent a strict obedience, and when the provisions which have been disregarded constitute parts of an important and perhaps complicated system, it becomes of the highest importance to ascertain the effect the failure to obey them shall have on the other proceedings with which they are associated in the law. The form the question most commonly assumes is this: Some official act which the law provides for, and which constitutes one step to be followed by others in reaching a specified result, having failed to be taken, does the authority to proceed toward the intended result terminate when that particular step has been neglected, or may the proceeding go on to a conclusion, treating the neglect as immaterial? If the proceeding fails at that point, the requirement of the official act which has been neglected is said to be mandatory, but if it may still proceed, the requirement is directory only; that is to say, the law directs that particular act to be performed, but does not imperatively command it as a condition precedent to anything further.¹

In some cases the question assumes a different form. The municipalities, it has been seen, levy and collect taxes not only for their own purposes, but also under state apportionment for the state at large. The power to levy taxes for local uses is usually conferred upon them in merely permissive terms; terms implying a discretion to levy them or not at the will of the local majority or the local board. These terms may sometimes be open to the question whether they are intended to confer a discretionary authority merely, or, on the other hand, whether they are not meant to impose a duty and put the municipality under an imperative obligation.

A solution of this question will commonly depend upon the

¹ See, in general, *Young v. Joslin*, 13 R. I., 675; *Wiley v. Flournoy*, 30 Ark., 609; *Lane v. James*, 25 Vt., 481; *Rubey v. Huntsman*, 32 Mo., 501; *Milner v. Clarke*, 61 Ala., 258; *State Auditor v. Jackson Co.*, 65 Ala., 142; *Silsbee v. Stockle*, 44 Mich., 561; *Kelsey v. Abbott*, 13 Cal., 609; *Hoffman v. Bell*, 61 Pa. St., 444; *State v. Washoe Co.*, 14 Nev., 140; *Life Association v. Assessors*, 49 Mo., 512; *Morrill v. Taylor*, 6 Neb., 236; *Adams v. Seymour*, 30 Conn., 402; *Houghton Co. v. Auditor-General*, 41 Mich., 28; *Davis v. Farnes*, 26 Tex., 296.

purpose of the tax for which authority is given. If the tax is for purely local purposes, the permission to levy it can seldom be regarded as anything more than an enabling authority, of which advantage may be taken or not, at discretion; but if it is for general purposes, the law must be regarded as imposing a duty. Thus, in whatever terms the authority is conferred upon a county to levy its proportion of the state tax, the levy is imperative; and permissive words in the statute may be construed as commands, and a reluctant local authority may be coerced into a performance of the duty.¹ The rule is the same where what is authorized is for the purpose of meeting some legal obligation of the municipality; for the state has an interest in such obligations being performed; and "where a statute directs the doing of a thing for the sake of justice or the public good, the word *may* is the same as the word *shall*," and imports a duty equally imperative.² In most cases, however, the question whether any particular provision of a tax law is mandatory or not will arise between the government and its officers, or some one claiming under their proceedings, on the one side, and the person taxed on the other; and the form it will take will be, whether the person taxed is entitled to defeat the proceeding which is being taken adversely to him, by reason of the failure on the part of the officers to observe some direction of the statute under which they derive their authority. If he may, it is because the direction was mandatory, and obedience to it a condition precedent to any further adverse proceedings.

¹ A provision of law that commissioners *may* levy a tax for school purposes is mandatory. *Jones v. Board of Public Instruction*, 17 Fla., 411.

² *Rex v. Barlow*, 2 Salk., 609. See *Rex v. Inhab. of Derby*, Skinner, 370; *Virginia v. The Justices*, 2 Virg. Cas., 9; *Justices of Clark County v. Railroad Co.*, 11 B. Monr., 143; *Coy v. Lyons City*, 17 Ia., 1; *State v. Harris*, 17 Ohio St., 608; *Baltimore v. Marriott*, 9 Md., 160, 174; *New York v. Furz*, 3 Hill, 612; *Minor v. Mechanics' Bank*, 1 Pet., 46; *Mason v. Fearson*, 9 How., 248; *Supervisors v. United States*, 4 Wall., 435; *Galena v. Amy*, 5 Wall., 705.

Where a statute clothes a public body or officer with power to refund taxes illegally collected, it will be deemed mandatory though the words are only permissive. So held of a statute which authorized supervisors to refund taxes levied and collected on government securities. *People v. Sup'rs of Otsego*, 51 N. Y., 401. See to the same effect, *Indianapolis v. McAvoy*, 86 Ind., 587; *Jones v. Board of Public Instruction*, 17 Fla., 411. A

The phraseology of the statute may sometimes settle this question very conclusively. If by the use of negative words it requires a particular proceeding to be taken in a particular time or manner, and makes it void if not so done,¹ or gives it effect, provided it is so done,² or declares that, unless it is taken, subsequent proceedings shall not be had,³ or prohibits its being done except at the time the statute prescribes,⁴ or if any terms plainly imperative are employed, the intent is clear, and no discretion can be permitted in construction. It is not often, however, that these or similar words are met with in the statutes which define official duties under the revenue laws, and the construction of particular provisions must be left for determination in such light as the obvious purpose they were intended to accomplish may afford. And that purpose, it would seem, ought generally to be conclusive. No one should be at liberty to plant himself upon the non-feasances or misfeasances of officers, under the revenue laws, which in no way concern himself, and make them the excuse for a failure on his part to perform his own duty.⁵ On the other hand he ought always to be at liberty to insist that directions which the law has given to its officers for his benefit shall be observed. Many eminent judges have endeavored to lay down a general rule on this subject, by which the difficulties in tax cases may in general be solved. In one of the most recent cases in which this has been attempted, the general doctrine is stated as follows: "There are undoubtedly many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them, which do not limit their power, or render its exercise in disregard of the requisitions ineffectual. Such generally are regulations designed to secure order, system and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected. Provisions of this character are not usually regarded as mandatory, unless accompanied by negative words, importing that the act

statute giving power to levy a real estate tax if a capitation tax would probably be insufficient held mandatory. *Bate v. Speed*, 10 Bush, 644.

¹ *The King v. Hepswell*, 8 B. & C., 466.

² *The King v. Inhab. of St. Gregory*, 2 Ad. & El., 99.

³ *Stayton v. Hulings*, 7 Ind., 144.

⁴ *In re Douglass*, 46 N. Y., 42.

⁵ *Stockle v. Silsbee*, 41 Mich., 615. See *Adams v. Seymour*, 30 Conn., 402.

required shall not be done in any other manner or time than that designated. But when the requisitions prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, they are not directory but mandatory. They must be followed, or the acts done will be invalid. The power of the officer in all such cases is limited by the measure and conditions prescribed for its exercise."¹

The same rule in nearly the same terms has been laid down in other cases,² and it seems a sound and just rule, and may reasonably be believed to be in accord with the legislative will in the cases to which it is applicable. All legislation must be supposed to take into account the possible, if not probable, mistakes and irregularities of officers in executing the provisions of the law, and it is hardly reasonable to infer an intent, on the part of a legislative body, that a failure of administrative officers to comply with any provision made for the benefit of the state exclusively, or merely as a guide in orderly proceedings, should deprive the state of all benefit to be derived from a compliance with other provisions that embody the main pur-

¹ *Field, J.*, in *French v. Edwards*, 13 Wall., 506, 511. See *State Auditor v. Jackson County*, 65 Ala., 142.

² See especially, *Torrey v. Milbury*, 21 Pick., 64, per *Shaw, Ch. J.*, approved and followed in *State v. Jersey City*, 35 N. J., 381, 386; *Westhampton v. Searle*, 127 Mass., 502; *Clark v. Crane*, 5 Mich., 151, 154, per *Manning, J.*; *O'Neal v. Va. & Md. Bridge Co.*, 18 Md., 1, per *Tuck, J.*; *McDonough v. Gravier*, 9 La. An., 546; *Spear v. Ditty*, 8 Vt., 419; *Shawnee County v. Carter*, 2 Kan., 115; *Wheeler v. Chicago*, 24 Ill., 105, 108; *Walker v. Chapman*, 22 Ala., 116; *Kelly v. Craig*, 5 Ired., 129; *Magee v. Commonwealth*, 46 Pa. St., 358; *Bird v. Perkins*, 33 Mich., 21; *Flint, etc., R. Co. v. Auditor-General*, 41 Mich., 635. All acts required by the statute in order to make the tax chargeable are conditions precedent and must be strictly complied with, or the tax cannot be collected. *Hewes v. Reis*, 40 Cal., 255.

See, for a somewhat peculiar case, *Wheatly v. Covington*, 11 Bush, 18. In Iowa it is said if through negligence or mistake a tax is not levied at the proper time, it may be levied at the time fixed for the succeeding tax levy. *Perrin v. Benson*, 49 Ia., 325. See as to a tax prematurely levied, *Easton v. Savery*, 44 Ia., 654. And as to directory requirements in general, *Kipp v. Dawson*, 31 Minn., 373.

The form of orders of commissioners made for the guidance of the county auditor in entering the tax levies is not important if the substance is right and by it the auditor is not misled. *Bittinger v. Bell*, 65 Ind., 445.

pose and object of the law. Nor, on the other hand, is it to be supposed the legislature intended its own securities for the protection of individual rights and property should be disregarded with impunity.¹

Instances of mandatory provisions. What, then, are the provisions of tax laws which are made for the benefit and protection of the individual tax payer? In many cases this question, as applied to particular provisions, is easily solved; in others there is more difficulty. That the tax payer shall be entitled to such protection as the official responsibility of officers can give him; that the tax shall be voted by the competent authority and under any conditions which the law has prescribed; that there shall be official warrant for any compulsory proceedings;² all these are manifestly conditions prece-

¹See *Corbett v. Bradley*, 7 Nev., 106, 108, per *Lewis*, Ch. J.; *Briggs v. Georgia*, 15 Vt., 61, 72, per *Hubbard*, J.; *Dryfuss v. Bridges*, 45 Miss., 247; *Wiley v. Flournoy*, 80 Ark., 609; *State v. Lean*, 9 Wis., 279, 292. In *Sandwich v. Fish*, 2 Gray, 298, 301, *Shaw*, Ch. J., in answering an objection made on behalf of a defaulting collector, that certain provisions regarding the authority to collect had not been complied with, says: "The provisions of the statutes as to the form of warrants and tax lists, and the place where the lists shall be deposited, are intended for the benefit of the tax payers. As to all other persons they are directory merely, and not conditions precedent. Defects in the warrant or tax list might be a good excuse for not executing the warrant. But to say that a collector who has collected the money without objection by the tax payers is not liable to account therefor would be as contrary to the rules of law as to justice. He can only avail himself of such defects as have prevented his performance of his duty."

A provision that a receiver of taxes shall attend at the county seat until a given date to receive taxes from persons wishing to pay is mandatory. *Hare v. Carnall*, 39 Ark., 196. A law requiring publication of the estimates of necessary parish expenditures is mandatory. *Wilson v. Anderson*, 28 La. An., 261. A provision that real estate shall be assessed to the owner and in separate parcels is for the benefit of tax payers and mandatory. *Young v. Joslin*, 13 R. I., 675.

²Where the statute provided that a tax voted at an annual town meeting in March should be assessed on the tax list of the May following, it was held mandatory, and the town incompetent by vote to authorize the selectmen to assess it on the list of the previous year. *Alger v. Curry*, 38 Vt., 382. Where the statute requires the tax list to be verified by an oath "made and subscribed," this means an oath duly certified in writing, and the absence of it is fatal to the proceedings. "Applying to the case the rules which have governed the courts in passing upon this class of titles, the objection must

dent to any lawful demand whatever upon the citizen. They are of the highest importance, because it is only by means of the requirement of official action in an orderly manner and at periodical times, that he can be protected against arbitrary and capricious action. Moreover, they go to make up the power which the law gives to its agents over the property and persons of the people, and without the power to act all attempted action is a trespass upon individual rights.¹ There must be a voting of the tax by the proper authority; there must be an assessment and an apportionment. So far all is clear.²

be held fatal. The assessor acts under a special and limited authority, conferred by the law and not by the owner of the estate. He is the mere instrument to pass the title. The proceeding is construed strictly, and the power must be strictly pursued in every particular. The law requires that every prerequisite to the exercise of the power to sell the estate must precede its exercise. The agent must pursue the power or his act will not be sustained by it. These principles have been recognized by this court in their application to tax titles in repeated decisions. *Yenda v. Wheeler*, 9 Texas, 408; *Robson v. Osborn*, 13 Texas, 298; *Wafford v. McKinna*, 23 Texas, 36." *Wheeler*, Ch. J., in *Davis v. Farnes*, 26 Texas, 296, 297.

¹ See chapter VIII. Where an act providing for local improvements required the certificate of the commissioners of public works, as to the amount of expense paid or actually incurred by the city, as the basis of the assessment, it was held that nothing could be the substitute for this. The affidavit of the surveyor will not be received. *Petition of Cameron*, 50 N. Y., 502.

A tax voted by supervisors at a time when no meeting is authorized for the purpose is illegal. *Beard v. Supervisors*, 51 Miss., 542; *Gamble v. Witty*, 55 Miss., 26. A provision is mandatory by which the board of equalization is to meet at a certain time and remain in session six days. The board cannot empower two of its members to continue longer in session, and if at such session they increase the valuation of property, their act is void. *Wiley v. Flournoy*, 30 Ark., 609. Where in taxing a railroad the value is apportioned among the counties through which it runs, a provision that the auditor shall not thus apportion it until the equalization shall have been made is mandatory. *State Auditor v. Jackson County*, 65 Ala., 142; *Perry County v. Railroad Co.*, 65 Ala., 391. So is one that the board of equalization shall keep a record of their proceedings, which shall be signed by the members present. *Ibid.*

² "Many of the provisions of our statute regulating the imposition of taxes must be considered directory merely. Some are doubtless conditions; such as those which are intended to secure an equality of taxation or burdens among the citizens, that is, that the citizen may know for what he is taxed, know his valuation, and have notice of the time and place of appeal." *Coulter, J.*, in *Insurance Co. v. Yard*, 17 Pa. St., 331, 338. In *O'Neal v. Va. & Md. Bridge Co.*, 18 Md., 1, 23, *Tuck, J.*, explains the distinction between

So all provisions designed to give him the opportunity of a review of the assessment, whether by the assessors themselves or on an appeal from their conclusions, are exclusively in his interest. Every notice which the statute provides for to that end, whether by publication or otherwise, must be given with scrupulous observance of all its requisites. The notice cannot be shortened a single day without rendering it ineffectual; the presumption being that the law has made it as short as was deemed consistent with due protection.¹ A published notice cannot be received as the substitute for a notice to be personally delivered to the party concerned.²

directory and mandatory provisions in tax laws, and refers to *Youngs v. State*, 7 G. & J., 253, and other Maryland cases. Where the statute required the county judge, in case of default of a tax collector to collect and pay over, on his own knowledge or on complaint of the treasurer, to hold a court within twenty days to try such delinquent collector, this was held to be in point of time directory merely, the time not being prescribed for the benefit of the collector, "but rather to quicken the diligence of the judge, so that justice may be promptly administered and the greater certainty of collections insured." *Stickney v. Huggins*, 10 Ala., 106. A requirement that taxation shall be by value is mandatory. *Life Association v. Board of Assessors*, 49 Mo., 512. Where a lot omitted from the assessment of the preceding year is to be placed upon the roll with the valuation of the last year when it was assessed, if the lot was never on the roll, it cannot be put on under the provision. *People v. Goff*, 52 N. Y., 434. *Hall, J.*, in *Chandler v. Spear*, 23 Vt., 388, 398, says, "when the statute under which the sale is made directs a thing to be done, or prescribes the form, time and manner of doing anything, such thing must be done, and in the form, time and manner prescribed, or the title is invalid; and in this respect the statute must strictly, if not literally, be complied with. *Spear v. Ditty*, 9 Vt., 283; *Bellows v. Elliott*, 12 Vt., 569, 574; *Sumner v. Sherman*, 13 Vt., 609, 612; *Carpenter v. Sawyer*, 17 Vt., 122, 124. But in determining what is required to be done, the statute must receive a reasonable construction; and when no particular form or manner of doing a thing is pointed out, any mode which effects the object with reasonable certainty is sufficient; and in judging of these matters the court is to be governed by such rational rules of construction as direct them in other cases. *Spear v. Ditty*, 8 Vt., 419, 421; *Bellows v. Elliott*, 13 Vt., 569, 574; *Isaacs v. Shattuck*, 12 Vt., 668."

An ordinance requiring that street improvements shall be ordered by resolution is mandatory, for by such resolution the city acquires jurisdiction to act. *Starr v. Burlington*, 45 Ia., 87.

¹ See cases cited in chapter XV.

² *Moulton v. Blaisdell*, 24 Me., 283; *Lovejoy v. Lunt*, 48 Me., 377. And see *Roche v. Dubuque*, 42 Ia., 250; *Lagroue v. Rains*, 48 Mo., 536. Where the notice is to be given personally and also by publication, a failure in either is fatal. *Appeal of Powers*, 29 Mich., 504.

A legislature has no power to provide that the omission of steps which are

The same rules apply to any notice required of subsequent proceedings; if required to be given within a certain time, or in any prescribed mode,¹ it must be so given. A statute declaring that all resolutions, etc., involving an appropriation of money, or taxation, shall be published "in all the newspapers employed by the corporation," and not be passed until after notice has been published at least two days, is plainly intended to be imperative.² Whatever tends to make the right to redeem more valuable to him must be observed; and here time may be of the very highest importance; and at no stage of the proceedings should the requisites of notice be more strictly observed. These are illustrations of mandatory requirements. Many others are noticed in other chapters.³

required to be taken by mandatory provisions of statute shall not affect the tax. This is an invasion of the judicial province. *Plumer v. Supervisors*, 46 Wis., 163.

¹ The statute required the sheriff, at the next term of the county court preceding a tax sale, to return a list of the lands on which taxes were unpaid, with the names of the owners if known, and other particulars, and this was to be read aloud, recorded in the minutes, and posted in the room. *Held* to be mandatory. *Kelly v. Craig*, 5 Ired., 129. Compare *Weir v. Kitchens*, 53 Miss., 74. In *Sprague v. Bailey*, 19 Pick., 436, a provision that notice of abatement to those who should pay their taxes promptly should be posted in public places was regarded directory merely. The point was not reasoned. All provisions regarding notice of sale and the place of sale are mandatory. *State v. Rollins*, 29 Mo., 267; *Rubey v. Huntsman*, 82 Mo., 501; *McNair v. Jensen*, 33 Mo., 312. A tax was assessed to the owner of the equity of redemption and lands sold therefor. The statute then in force provided that no sale of real estate for taxes should affect the rights of any person not taxable therefor, unless a written demand was first made upon said person by the collector for the payment of said taxes. No demand in this case was made upon the mortgagee before the sale. *Held*, that a repeal of this statute did not leave him liable for the tax. *Tinslar v. Davis*, 12 Allen, 79.

² *Petition of Douglass*, 46 N. Y., 42; *Petition of Smith*, 52 N. Y., 526. In California it has been held that a statute requiring the notice inviting proposals for a public work to be conspicuously posted for five days was not complied with unless the notice was kept posted for that time. *Himmelman v. Cahn*, 49 Cal., 285; *Brooks v. Satterlee*, 49 Cal., 289. Where public notice is required for five days, Sundays and non-judicial days excepted, publication for four week days and one Sunday is bad. *San Francisco v. McCain*, 50 Cal., 210; *People v. McCain*, 51 Cal., 360; *Alameda, etc., Co. v. Huff*, 57 Cal., 331.

³ See in general, in addition to the cases already cited regarding mandatory provisions, *Hoffman v. Bell*, 61 Pa. St., 444; *Kniper v. Louisville*, 7 Bush, 599; *First Presb. Ch. v. Fort Wayne*, 36 Ind., 338; *Sibley v. Smith*, 2 Mich., 486; *Rayner v. Lee*, 20 Mich., 384; *People v. Clark*, 47 Cal., 456; *Richardson v. Heydenfeldt*, 46 Cal., 68; *Culver v. Hayden*, 1 Vt., 359; *Richard-*

Instances of directory provisions. On the other hand, the requirement of an official bond or oath from an officer is for the protection of the public, and not of the tax payer.¹

So in general the fixing of an exact time for the doing of an act is only directory where it is not fixed for the purpose of giving the party a hearing, or for any other purpose important to him.² So the requirement of a warrant to the town assessors, requiring them to assess the state tax, is directory, as this becomes of no moment if they act without it.³ A provision that the true value and the equalized value of lands shall appear in distinct columns on the roll is directory only, as the failure to obey it in no way affects the person taxed.⁴ So

son v. Dorr, 5 Vt., 9; *Brown v. Wright*, 17 Vt., 97; *Judevine v. Jackson*, 18 Vt., 470; *Taylor v. French*, 19 Vt., 49; *Langdon v. Poor*, 20 Vt., 13; *Lane v. James*, 25 Vt., 481; *Sorchan v. Brooklyn*, 62 N. Y., 339; *Silsbee v. Stockle*, 44 Mich., 561; *Currie v. Van Horn*, 40 N. J., 143; *Painter v. Hall*, 75 Ind., 309. See, also, *post*, chapter XV.

¹See *Hale v. Cushing*, 2 Greenl., 28; *Scarborough v. Parker*, 53 Me., 252; *ante*, chapter VIII. In Vermont the decisions are that if the collector appointed to collect any tax assessed on lands for roads and bridges shall fail to give the required bond, any sale made by him is void. See *Oatman v. Barney*, 46 Vt., 594, and cases cited. This is hardly in harmony with the current of authority.

A provision that there shall be added to the next year's township taxes the amount of loss sustained by the county through the town treasurer's delinquency is so far directory that a failure to act at once does not cancel the debt, as the amount may be raised in a subsequent year. *Oceana Co. v. Hart*, 48 Mich., 319.

Where an affidavit to the delinquent list is required for the purposes of record, the requirement will be held only directory if the record is made without it. *Succession of Edwards*, 32 La. An., 457.

²*Hart v. Plum*, 14 Cal., 148. As where an assessment was to be filed within twenty days, but this was only to make it a lien. *Magee v. Commonwealth*, 46 Pa. St., 358. See *Supervisors v. Rees*, 34 Mich., 481. A provision that a delinquent list shall be filed for judicial proceedings five days before the commencement of the term of court is directory. *Leindecker v. People*, 98 Ill., 21. So is one fixing a time for completing the assessment roll. *State v. Mining Co.*, 15 Nev., 385. See *Bradley v. Ward*, 58 N. Y., 401; *Perry County v. Railroad Co.*, 58 Ala., 456.

³*Alvord v. Collin*, 20 Pick., 418. In this case it was decided that a levy which was excessive as to the school tax, but not excessive in the aggregate, was valid.

⁴*Torrey v. Milbury*, 21 Pick., 64. The failure of the clerk to enter the word *sold* in the book opposite the description of the land, as required by the statute, does not defeat the sale. *Playter v. Cockran*, 37 Ia., 258. See

putting a special tax in a column by itself on the roll when it should be put with the town tax is equally harmless, and therefore cannot affect the proceedings.¹ And manifestly the tax payer has nothing to do with any accounting by the officer, or with any report or document to be made by him for the security of the public or for the information of superiors only, and which is not to be warrant for, or to affect in any manner, subsequent proceedings for enforcing the tax.² In the margin many other cases are referred to in which statutory provisions have been decided to be merely directory.³

for similar rulings, *Railroad Co. v. Carroll Co.*, 41 Ia., 153; *Gamble v. Withy*, 55 Miss., 26. The neglect of the county boards of supervisors to direct the amounts of township or school taxes, when nothing is submitted to their discretion, cannot deprive the township authorities of the right to levy such as have been duly voted. *Robbins v. Barron*, 33 Mich., 124; *Upton v. Kennedy*, 36 Mich., 215; *Hunt v. Chapin*, 42 Mich., 24. See *Union Trust Co. v. Weber*, 96 Ill., 346.

¹ *Wall v. Trumbull*, 16 Mich., 228. Compare *Case v. Dean*, 16 Mich., 12; *Silsbee v. Stockle*, 44 Mich., 561. A statute required that a school district tax should be assessed within thirty days after the clerk of the district should certify to the assessors the sum to be raised. This is only directory. *Pond v. Negus*, 8 Mass., 230; *Williams v. School District*, 21 Pick., 75; similar ruling in *Gale v. Mead*, 2 Denio, 160; *Gearhart v. Dixon*, 1 Pa. St., 224; *Smith v. Crittenden*, 16 Mich., 152; *Harrison Co. Commissioners v. McCarty*, 27 Ind., 475. For somewhat similar provisions held to be mandatory, see *Mix v. People*, 72 Ill., 241; *Cowgill v. Long*, 15 Ill., 202. Compare *Eames v. Johnson*, 4 Allen, 382.

² *Tweed v. Metcalf*, 4 Mich., 578. The clause in the tax warrant, "and you are hereby directed to settle with the selectmen by the 20th day of September next," is merely directory, and does not limit the collector's power to that time. *Picket v. Allen*, 10 Conn., 145. The requirement of the filing of a certificate of approval of a local work will be held directory where it does not appear to be intended as a prerequisite to a valid assessment. *Brady v. Bartlett*, 56 Cal., 350.

³ *Craig v. Bradford*, 3 Wheat., 594; *U. S. v. Kirkpatrick*, 9 Wheat., 720; *U. S. v. Dandridge*, 12 Wheat., 64; *Hale v. Cushing*, 2 Greenl., 218; *Muzzy v. White*, 3 Greenl., 290; *Scarborough v. Parker*, 53 Me., 252; *Holland v. Osgood*, 8 Vt., 276, 280; *Corliss v. Corliss*, 8 Vt., 373, 390; *Allen v. Parish*, 3 Ohio, 187; *Fry v. Booth*, 19 Ohio St., 25; *Vance v. Schuyler*, 1 Gilm., 160; *Webster v. French*, 12 Ill., 302; *State v. McGinly*, 4 Ind., 7; *Stayton v. Hulings*, 7 Ind., 144; *Noland v. Busby*, 29 Ind., 154; *New Orleans v. St. Romes*, 9 La. An., 573; *Edwards v. James*, 13 Tex., 52; *Lawrence v. Speed*, 2 Bibb, 401; *Hayden v. Dunlap*, 3 Bibb, 216; *People v. Allen*, 6 Wend., 486; *Ex parte Heath*, 3 Hill, 43; *Jackson v. Young*, 5 Cow., 269; *People v. Holley*, 12 Wend., 481; *Striker v. Kelley*, 7 Hill, 9; *Gale v. Mead*, 2 Denio, 160; *People v. Peck*, 11 Wend., 604; *Doughty v. Hope*, 3 Denio, 252; *Elmendorf v. New York*, 25

Retrospective taxation. The basis of an apportionment of taxes may as lawfully be retrospective as the reverse; that is to say, it may as well have regard to benefits theretofore received as to those which may be received thereafter.¹ It has therefore been very properly held that there is no constitutional or other legal objection to the levy of taxes to pay for municipal improvements which had been previously made.² Nor in apportioning the tax as between individuals is there any valid objection to making it on consideration of a state of things that may now have come to an end; as where a tax is imposed on the extent of one's business for the preceding year, instead of upon an estimate of the business for the year to come.³ Where taxes are levied for a series of years upon

Wend., 693, 696; *People v. Cook*, 8 N. Y., 67; *Pond v. Negus*, 3 Mass., 286; *Lowell v. Hadley*, 8 Met., 180; *People v. Doe*, 1 Mich., 451; *Parks v. Goodwin*, 1 Doug. (Mich.), 56; *Hickey v. Hinsdale*, 8 Mich., 267; *People v. Hartwell*, 12 Mich., 508; *State v. Click*, 2 Ala., 25, 26; *Savage v. Walsh*, 26 Ala., 620; *McKune v. Weller*, 11 Cal., 49; *State v. County Commissioners*, 29 Md., 516; *Huey v. Van Wie*, 23 Wis., 613; *Adams v. Seymour*, 30 Conn., 402; *Coombs v. Steere*, 8 Ill. App., 147; *Burlington, etc., R. R. Co. v. Saline County*, 12 Neb., 396. The omission of the collector to enter upon his warrant the true day and year when he received it does not invalidate his proceedings under it. *Goodwin v. Perkins*, 39 Vt., 598. The right of the commonwealth to levy a tax on the market value of the capital stock of a corporation is not defeated by the neglect of the city assessors to make return of the corporation to the treasurer of the commonwealth as required by statute. *Commonwealth v. New England Slate & Tile Co.*, 18 Allen, 391.

Where the apportionment of a tax between city and county is a mere ministerial act, if the proper officer fails to act the true amounts may be ascertained in some other way. *Logan County v. Lincoln*, 81 Ill., 156.

¹ *New Orleans v. Rhenish Westphalian Lloyds*, 31 La. An., 781; *People v. Gold Co.*, 92 N. Y., 383; *Locke v. New Orleans*, 4 Wall., 172; *State v. Graham*, 8 Am. & Eng. Corp. Cas., 500.

² *Cleveland v. Tripp*, 13 R. I., 50.

³ *Drexel v. Commonwealth*, 46 Pa. St., 31; *People v. Gold Co.*, 92 N. Y., 383.

A provision for making inquiries in aid of taxation extend over the four preceding years is not legally objectionable. *Sturges v. Carter*, 114 U. S., 511. A statute that, when a tax sale shall be set aside and the money refunded thereon by a county, the school district shall reimburse the county its share of the expense, held to apply to a tax laid before the enactment of the statute, but set aside afterwards. *School District v. Allen Co.*, 22 Kan., 568. Where a twenty-year exemption expired in March, and an assessment was made in April for the current year, the party assessed was held entitled to no abatement in respect to the time that had already run. *McClel-*

the same valuation of property, they are necessarily retrospective, but not therefore incompetent,¹ though one may be taxed upon property which he has long ceased to own when the tax is levied. But there is commonly a presumption that any new tax law was not intended to reach back and take for its standard of apportionment a state of things that may no longer be in existence. "New burdens," it is very justly said, "ought always to be prospective,"² and it is reasonable to suppose the legislature has intended that they should be. Such a supposition is in harmony with the general rule of law which requires the courts to "always construe statutes as prospective and not retrospective, unless constrained to the contrary course by the rigor of the phraseology."³ This is the rule not only

Ian v. Railroad Co., 11 Lea, 336. An act legalizing the previous levy of a tax is not to be deemed retrospective legislation. *Jacksonville v. Basnett*, 20 Fla., 525; *Vaughan v. Swayzie*, 56 Miss., 704.

¹ See *Wolfe v. New Orleans*, 4 Wall., 172.

² *Commonwealth v. Pennsylvania Ins. Co.*, 13 Pa. St., 165. In that case it was decided that a tax measured by dividends "from and after January 1, 1841," would not apply to a dividend declared by the proper committee December 30, 1840, but not passed upon by the directors until January 4, 1841.

The rule that statutes are to be so construed as to have prospective operation only, applies to constitutional provisions. *New Orleans v. Vergnole*, 33 La. An., 35; *Same v. Meister*, 33 La. An., 646; *Same v. Eclipse, etc., Co.*, 33 La. An., 647. Exemptions by constitution are not retroactive. *New Orleans v. L'Hote*, 35 La. An., 1177.

A tax imposed on property retrospectively for years when there was no law for taxing it will be invalid as against one who has become *bona fide* purchaser of it in the mean time. *State v. St. Louis, etc., R. R. Co.*, 77 Mo., 202.

³ *Woodward, J.*, in *Price v. Mott*, 52 Pa. St., 315, 316. And see *Philadelphia v. Ferry Railway Co.*, 52 Pa. St., 177; *Marsh v. Chestnut*, 14 Ill., 223; *Thames Manuf. Co. v. Lathrop*, 7 Conn., 550; *Warren R. R. Co. v. Belvidere*, 35 N. J., 584; *Clark v. Hall*, 19 Mich., 356; *Gerry v. Stoneham*, 1 Allen, 319; *Caruthers v. McLaren*, 56 Miss., 371; *People v. Thatcher*, 95 Ill., 109; *People v. Peacock*, 98 Ill., 172; *McPhail v. Burris*, 42 Tex., 142; *People v. Albany Ins. Co.*, 92 N. Y., 458; *State v. Newark*, 40 N. J., 92; *Fuller v. Grand Rapids*, 40 Mich., 395; *Peters v. Auditor*, 33 Grat., 368. A law declaring that certain defenses shall not be made to tax deeds until the redemption money is paid will not apply to prior sales. *Conway v. Cable*, 37 Ill., 82. Where taxes are levied under a law which is repealed by a subsequent act, unless it appears clearly that the legislature intended the repeal to work retrospectively, it will be assumed that it intended the taxes to be collected according to the law in force when they were levied. *Oakland v.*

as a construction of the grant of power, but also as to all the incidents;¹ though a remedial provision may well be presumed to have been intended to reach back for the purposes of justice. And in cases where a tax is levied to meet expenses previously incurred, or to pay the cost of something of which the persons to be taxed have already had the benefit, any presumption against an intent to give the law retroactive operation may be overcome by the apparent justice of such a construction.²

Whipple, 44 Cal., 808. In *Allen v. Drew*, 44 Vt., 174, an act was construed so as to govern the proceedings by one subsequently approved, the two having been pending together, and the one first approved expressly in terms referring to the other. A statute making mortgagees personally liable for taxes on the land after taking possession, held applicable to mortgages given before but under which the mortgagees took possession after the statute was passed. *Andrews v. Worcester, etc., Ins. Co.*, 5 Allen, 85. An amendment to a tax law making a county guarantor to the state of the validity of the tax and the value of the security is to have prospective operation only. *Auditor-General v. Supervisors*, 86 Mich., 70. A provision in a statute giving superiority to tax process over liens and mortgages will not be applied to those previously in existence. *Finn v. Haynes*, 37 Mich., 68. Retroactive effect will not be given to a statute when the words in it can be construed as designed to make it prospective only. *Citizens' Gas Light Co. v. Alden*, 44 N. J., 648, citing *Williamson v. Railroad Co.*, 29 N. J. Eq., 311. See *Selden v. Coffee*, 55 Miss., 41; *Richey v. Shute*, 43 N. J., 414; *Vaughan v. Swayzie*, 56 Miss., 704.

¹ In *Gerry v. Stoneham*, 1 Allen, 319, a statute providing that where a party was assessed more than his due and legal proportion, the tax and assessment should be void only for the excess, and a recovery by suit should be limited to the excess, was held not applicable to pending actions. See *Slocum v. Fayette County*, 61 Ia., 169, for a case in which a statute shortening the time for taking appeal from assessments was held applicable to those previously made. It has been held not giving a retroactive effect to a law providing for judicial proceedings in tax cases, when it is applied to unpaid taxes which had been levied before its passage. *Hosmer v. People*, 96 Ill., 58. A law for the raising of taxes is not retroactive merely because of its fixing the amount to be raised by the business of the preceding year. *People v. Gold Co.*, 92 N. Y., 388.

² An act provided for the reassessment of the property of certain companies for certain years, and the collection of taxes thereon which should have been collected for those years, deducting what may already have been paid under former erroneous assessments. Held, that such an act was not invalid because it taxed retrospectively. It does not undertake to impose new burdens upon the companies, but to charge the taxable property which has escaped its share of common burdens. Held further, that it was not void for lapse of time. The tax as a specific debt does not become due until the

Repeals by implication. A revenue law, like any other statute, may be repealed by implication. But there is always a presumption, more or less strong according to circumstances, that a statute is not intended to repeal a prior statute on the same subject unless it does so in express terms. Without a repealing clause, the two may stand and have effect together, unless they are inconsistent; and in that case to the extent of the inconsistency the later will repeal the earlier; but even then the two must be given effect so far as practicable.¹ In the case of grants of power to tax—or indeed for other purposes—to municipal bodies, the presumption that it was not intended to modify or repeal these by subsequent general legislation is so strong as to be almost conclusive. It is not usual to modify or take away special powers by general laws; and if it is intended to do so in any particular case, it is reasonable to suppose the legislature would do so in unequivocal language.² When this is not done, the general law will be read as intending to leave the special powers in force.³

taxable property is listed and valued and a definite percentum affixed to such valuation. Nor does the state forfeit rights by its officers' inertness. *North Car. R. R. Co. v. Com'rs of Alamance*, 82 N. C., 259.

¹ See cases collected in *Cooley, Const. Lim.* (5th ed.), 188, and note. Also *United States v. Taylor*, 104 U. S., 216; *Pons v. State*, 49 Miss., 1; *Appeal Tax Court v. Western, etc., R. Co.*, 50 Md., 274; *State v. Severance*, 55 Mo., 878.

² *Sparland v. Barnes*, 98 Ill., 595; *Weber v. Traubel*, 95 Ill., 427; *Binkert v. Jansen*, 94 Ill., 283; *Oleson v. Railway Co.*, 36 Wis., 388; *Fire Department v. Tuttle*, 48 Wis., 91; *Williamsport v. Brown*, 84 Pa. St., 438.

A provision in a village charter that the village taxes shall be assessed upon the freeholders and inhabitants "according to law," means, unless otherwise explained, according to the general law of the state. *Ontario Bank v. Bunnell*, 10 Wend., 186, 194, per *Nelson*, Ch. J. Whenever a tax is authorized by law, and no special provision is made as to the source from which the revenue is to be derived, the law implies that the tax shall be levied upon all property subject to general taxation, and collected as other taxes. *Hale v. Kenosha*, 29 Wis., 599; *State v. Bremond*, 88 Tex., 116. As to the effect of general legislation upon special charters, see *House v. State*, 41 Miss., 737; *S. C.*, 2 *Withrow's Corp. Cas.*, 563; *Morris, etc., R. Co. v. Commissioners*, 37 N. J., 228; *Board of Education v. Aberdeen*, 56 Miss., 518.

³ *Cass v. Dillon*, 2 Ohio St., 607; *Fosdick v. Perrysburg*, 14 Ohio St., 472; *People v. Quigg*, 59 N. Y., 83; *Oleson v. Green Bay, etc., R. Co.*, 36 Wis., 383; *Covington v. East St. Louis*, 78 Ill., 548; *Chesapeake, etc., Co. v. Hoard*, 16 W. Va., 270; *Clark v. Davenport*, 14 Ia., 494; *Rounds v. Waymart*, 81

On the other hand, special legislation giving powers of taxation to a municipality by name, or to a class of municipalities, will control, *pro tanto*, the existing general law.¹

General revisions of tax laws. A tax law manifestly intended to embrace and include all legislation on that subject will repeal all provisions of former laws not re-enacted and embraced in it without regard to their consistency or inconsistency.² The repeal, however, cannot affect rights which have become vested under the repealed law;³ and it is common to insert in tax revisions, and in any change of tax laws, a provis-

Pa. St., 895; *State v. Severance*, 55 Mo., 878; *Williamsport v. Brown*, 84 Pa. St., 498; *Sheridan v. Stevenson*, 44 N. J., 371. A constitutional provision requiring all taxes to be levied by general law does not repeal charter provisions for taxation. *Kansas v. Johnson*, 78 Mo., 661.

But in New Jersey it is held that a constitutional provision that "property shall be assessed for taxes under general laws and by uniform rules" puts an end *proprio vigore* to existing special legislation for the assessment of taxes. *State v. Newark*, 40 N. J., 558. See, also, *Cobb v. Elizabeth City*, 75 N. C., 1. Compare *Dodd v. Thomas*, 8 Mo. Ap., 589; *Lehigh Iron Co. v. Lower Macungie*, 81 Pa. St., 482.

¹*Potwin v. Johnson*, 108 Ill., 70. In Iowa it was held that where a special law limits the power of a municipal corporation to levy taxes, a subsequent general law will not give power beyond the prior limitation. *Clarke v. Davenport*, 14 Iowa, 494. *Contra*, *Butz v. Muscatine*, 8 Wall., 575. A grant of power to a municipal corporation to lay a tax for a particular purpose is a repeal, *pro tanto*, of all prior statutory restrictions on the power of taxation. *Commonwealth v. Common Council of Pittsburgh*, 84 Pa. St., 496. A tax which can be referred to a law which will support it will not be referred to one which would make it void. *Lima v. McBride*, 84 Ohio St., 338.

A statute which provides for the taxation of railroads as entireties, and for distributing the assessment among the various counties, repeals previous laws for assessing in the counties locally. *Union Pac. R. Co. v. Cheyenne*, 113 U. S., 516.

²*Fox v. Commonwealth*, 16 Grat., 1.

³*Thompson v. Commonwealth*, 81 Pa. St., 814. The repeal of a law under which a tax is levied, after it is laid, does not discharge the lien of the tax. *Gardenhire v. Mitchell*, 21 Kan., 83; *State v. Waterville Sav. Bank*, 68 Me., 515. In Indiana it is said the repeal of a statute under which taxes are levied puts an end to the right to collect them unless the repealing statute contains a provision preserving the taxes and the right to collect them. *Gorley v. Sewall*, 77 Ind., 316, citing *McQuilken v. Doe*, 8 Blackf., 581; *Mount v. State*, 6 Blackf., 25; *Blaiden v. Abel*, 6 Ia., 5; *Bryan's Adm'r v. Harvey's Adm'r*, 11 Tex., 811.

ion saving pending proceedings wherever it is deemed advisable to do so.¹

A general revision of the laws for railroad taxation, which provides a general scheme for assessing and taxing the property as a whole, and for distributing it ratably among the counties and their several precincts according to the length of line in each, necessarily repeals as to such property the power previously existing in a city to tax it on a different plan.²

¹As to what is a "proceeding" within the meaning of a saving clause of a repealing statute, see *Raymond v. Cleveland*, 43 Ohio St., 522. When a statute became operative, the assessment under a former law was completed, but certain appeals were pending. Held that the passage of the new law with no express retroactive terms did not destroy or affect the proceedings already taken. *Appeal Tax Court v. Railroad Co.*, 50 Md., 274.

When the Michigan tax laws have been revised, it has been held that stringent provisions therein designed to favor tax titles must be understood to apply to cases originating under the revision. *Clark v. Hall*, 19 Mich., 356; *Smith v. Auditor-General*, 20 Mich., 398. That revision, however, contained a section which required every person redeeming from the tax sale to pay, not only the redemption money with heavy interest to the purchaser, but also a penalty of twenty-five per cent. to the state. Now there was no more reason and no more justice in the state exacting a penalty for the privilege to one party to redeem from the tax purchase of another, than there would be for demanding a like penalty for the privilege of redeeming from an execution sale, or for voluntarily paying an honest debt; the exaction, if legal — which may well be questioned — was unjust and impolitic, for it tended to bring about the forfeiture of estates, and every state is interested that this shall not happen to its citizens. It was, therefore, held to be a reasonable presumption, when this provision was repealed, that the state intended the repeal to apply to past as well as to future sales. *People v. County Treasurer*, 32 Mich., 260. Compare *Tinslar v. Davis*, 12 Allen, 79, which was a strong case for the application of the opposite presumption. The repeal of a tax law which makes deeds on tax sales *prima facie* evidence of title, where it is done by a new tax law which contains a similar provision, will not prevent deeds given under the repealed law being *prima facie* evidence of title; the fair presumption being that the legislature intended that rule to be continuous. *Blackwood v. Van Vleet*, 30 Mich., 118.

²*Union Pac. R. Co. v. Cheyenne*, 113 U. S., 516.

CHAPTER X.

CURING DEFECTS IN TAX PROCEEDINGS.

Intimately connected with the construction of tax laws is the question how far the legislature by other enactments has power to dispense with strict obedience to the regulations prescribed by itself, and which have had for their manifest purpose the protection of the interests of those who are taxed. This is a subject presenting many intrinsic difficulties, and which has given rise to much contrariety in judicial decisions.

Curative laws. An act of dispensation may assume any one of several forms:

1. It may assume the form of a rule of conclusive evidence intended to preclude a departure from the law being proved.
2. It may take the form of a mandate to officers, commanding them to give effect to proceedings that have been taken, and to disregard in doing so any irregularities or other defects.
3. It may be a special curative statute to heal defects in certain specified proceedings which have been before taken.
4. It may be a general curative statute to heal irregularities or defects in any proceedings whatsoever previously taken.
5. It may be a general statute for future cases, which, while marking out a course for the officers to pursue, shall at the same time declare that irregularities shall not vitiate any proceedings that shall be had under the statute.
6. Besides these, there may be either a special or a general law for reassessing the tax when the proceedings for its collection have proved ineffectual.

Legislation coming under each of these heads is to be met with in the statutes of the several states, and some attention to each seems therefore requisite.

1. *Conclusive Rules of Evidence.* It is within the province of the legislature to prescribe what rules shall be observed in the production of evidence in court. In the exercise of its authority over this subject, it has sometimes provided that the burden of proof should be upon one party to a suit rather

than the other, and that a particular showing by a party shall make out in his favor a *prima facie* case. This it has full power to do, and it may make the rules which it prescribes apply to controversies previously in existence, even though retrospective legislation be forbidden by the state constitution.¹ Relying upon this undoubted principle of constitutional law, the legislature has in many cases adopted enactments that certain reports, papers or other documents should be *prima facie* evidence of their own verity, and perhaps that certain proceedings which should have been taken before the report or other document was made were taken in fact, leaving the party who denies the truth of what is thus *prima facie* evidenced, to make out his case affirmatively. Of the power to do this there is no question on the authorities.² But the legislature cannot pass conclusive rules of evidence; that is to say, it cannot make the showing by one party to a controversy conclusive of the truth of the facts shown, thus in effect denying to the other party a hearing. Its power over the rules of evidence is a power to shape and mould, for the purposes of justice, the rules under which parties are to make a showing of their rights, and not a power to preclude their showing them. "The most formal conveyance may be a fraud or a forgery; public officers may connive with rogues to rob the citizen of his property; witnesses may testify or officers certify falsely, and records may be collusively manufactured for dishonest purposes; and that legislation which would preclude the fraud or wrong being shown, and deprive the party wronged of all remedy, has no justification in the principles of natural justice or of constitutional law. A statute, therefore, which should make a tax deed conclusive evidence of a complete title, and preclude the owner of the original title from showing its invalidity, would be void, because not a law regulating evidence, but an uncon-

¹ Rich v. Flanders, 89 N. H., 304; Southwick v. Southwick, 49 N. Y., 510; Gibbs v. Gale, 7 Md., 76; Cowen v. McOutcheon, 43 Miss., 207; Fales v. Wadsworth, 23 Me., 553.

² See chapter XV. A statute making the collector's certificate *prima facie* evidence of the facts recited does not violate the constitutional right to jury trial. State v. Van Every, 75 Mo., 530. An assessment, even though invalid, may be made *prima facie* evidence of the amount justly due. Olmsted Co. v. Barber, 31 Minn., 256.

stitutional confiscation of property."¹ The case supposed is but an illustration of the general rule, which applies as well to all the necessary and jurisdictional steps leading up to the deed.² The law of the land requires that every party should have an opportunity for a trial of such rights as he claims; and there can be no trial if only one party is suffered to produce his proofs.³ We may say in general, therefore, that it is not in the power of the legislature to lay down conclusive rules of evidence by way of obviating defects in tax proceedings.

2. *Legislative Mandates.* A mandate to officers commanding them to give effect to invalid proceedings would be ineffectual for reasons equally conclusive. If such an act proceeds without an inquiry into the facts, it is a naked attempt to transfer one man's property to another by mere legislation, and this is not an authority which belongs to any legitimate government.⁴ If it assumes to proceed upon evidence, then it

¹ *McCready v. Sexton*, 29 Ia., 356. And see *Groesbeck v. Seeley*, 18 Mich., 329; *Case v. Dean*, 16 Mich., 12; *White v. Flynn*, 23 Ind., 46; *Corbin v. Hill*, 21 Ia., 70; *Abbott v. Lindenbower*, 42 Mo., 162; S. C., 46 Mo., 291; *Wright v. Cradlebaugh*, 3 Nev., 341, 349; *Young v. Beardsley*, 11 Paige, 98; *East Kingston v. Towle*, 48 N. H., 57; S. C., 2 Am. Rep., 174; *Taylor v. Miles*, 5 Kan., 498; S. C., 7 Am. Rep., 558; *Powers v. Fuller*, 30 Ia., 476; *Little Rock, etc., R. Co. v. Payne*, 38 Ark., 816; S. C., 34 Am. Rep., 55.

² The case of *Smith v. Cleveland*, 17 Wis., 556, contains some very general and unqualified language on this subject. That a deed may be made conclusive that the mere sale was according to law has been held in Iowa. *McCready v. Sexton*, 29 Ia., 356; *Ware v. Little*, 35 Ia., 234; *Jeffrey v. Brokaw*, 35 Ia., 505; *Sibley v. Bullis*, 40 Ia., 429. Whether these decisions would be generally followed may be a question; but where the sale does not conclude the tax payer, and leaves him a right of payment, there is room to urge that it is a mere formal proceeding. Under a provision that, before issuing a warrant for collection of a local assessment, the assessment shall be examined and certified as correct by street commissioners and the attorney and counselor of the city, which certificate shall be conclusive evidence of regularity of the proceedings, it has been decided that the certificate would only cover the formal proceedings. It does not determine the fact that the assessment is made against the proper persons. *Newell v. Wheeler*, 48 N. Y., 486. A tax deed cannot be made evidence of title when the land does not lie within the taxing district. *Smith v. Sherry*, 54 Wis., 114.

³ *Cooley, Const. Lim.*, 5th ed., 454. In this connection it is hardly necessary to say that no reference is had to cases under statutes of limitation, nor to cases resting on principles of equitable estoppel.

⁴ *Bowman v. Middleton*, 1 Bay, 252; *Wilkinson v. Leland*, 2 Pet., 627, 657; *Terrett v. Taylor*, 9 Cranch, 43; *Ervine's Appeal*, 16 Pa. St., 256, 266; *Lambertson v. Hogan*, 2 Pa. St., 22, 24.

is usurpation of judicial authority, and for that reason void.¹ The legislature must prescribe rules, but when questions arise between parties whether rules have been complied with, the judiciary is the appointed arbiter.

3. *Special Curative Acts.* That acts to cure defects in tax proceedings previously had may be passed under some circumstances, has been affirmed in a great number of cases, some of which are referred to in the margin.² The power may, therefore, be taken as satisfactorily established, and the questions to be considered relate to the limitations upon it. First, however, may be mentioned some cautions that should attend the exercise of the power, but which rest in policy only, and therefore address themselves to the legislative judgment and

¹ An act requiring the board of supervisors of a county to proceed to the apportionment and assessment of drain taxes, some portion of which had already been adjudged void, and the others palpably were so, was adjudged void on this ground in *Butler v. Supervisors of Saginaw*, 26 Mich., 22. The cases of *Lewis v. Webb*, 3 Me., 326; *Lane v. Gorman*, 3 Scam., 238, 242; *Campbell v. Union Bank*, 6 How. (Miss.), 625, 661; *Ervine's Appeal*, 16 Pa. St., 256, 266; *Cash*, appellant, 6 Mich., 193; *McDaniel v. Correll*, 19 Ill., 226; *Denny v. Mattoon*, 2 Allen, 361; *Budd v. State*, 3 Humph., 483; *Wally's Heirs v. Kennedy*, 2 Yerg., 554, and *Piquet*, appellant, 5 Pick., 64, are referred to as illustrating under different circumstances the distinction between legislative and judicial authority. See, also, *Lambertson v. Hogan*, 2 Pa. St., 22; *Greenough v. Greenough*, 11 Pa. St., 489, 494; *Haley v. Philadelphia*, 68 Pa. St., 45; S. C., 8 Am. Rep., 153, 155; *Calhoun v. McLendon*, 42 Ga., 405; *Trustees v. Bailey*, 10 Fla., 238; *People v. Frisbie*, 26 Cal., 185; *Sydnor v. Palmer*, 33 Wis., 406, 409; *Plumer v. Supervisors*, 46 Wis., 163; *Wall v. Wall*, 124 Mass., 65; *Forster v. Forster*, 129 Mass., 559.

² *Kearney v. Taylor*, 15 How., 494; *Strauch v. Shoemaker*, 1 W. & S., 166, 175; *McCoy v. Michew*, 7 W. & S., 386; *Williston v. Colkett*, 9 Pa. St., 38; *Montgomery v. Meredith*, 17 Pa. St., 42; *Dunden v. Snodgrass*, 18 Pa. St., 151; *Schenley v. Commonwealth*, 36 Pa. St., 29; *State v. Union*, 33 N. J., 350; *State v. Newark*, 34 N. J., 236; *Walter v. Bacon*, 8 Mass., 468, 472; *Patterson v. Philbrook*, 9 Mass., 151, 153; *Locke v. Dane*, 9 Mass., 360; *Trustees v. McCaughey*, 2 Ohio St., 152; *Butler v. Toledo*, 5 Ohio St., 225; *Cowgill v. Long*, 15 Ill., 202; *Mitchell v. Deeds*, 49 Ill., 416; *Boardman v. Beckwith*, 18 Ia., 292; *Allen v. Archer*, 49 Me., 346; *People v. Seymour*, 16 Cal., 332; *People v. Todd*, 23 Cal., 181; *Boyce v. Sinclair*, 3 Bush, 261; *Davis v. State Bank*, 7 Ind., 316; *Lucas v. Tucker*, 17 Ind., 41; *Musselman v. Logansport*, 29 Ind., 533; *Brevoort v. Detroit*, 24 Mich., 322; *Pillsbury v. Auditor-General*, 26 Mich., 245; *Tucker v. Justices, etc.*, 34 Ga., 370; *Bel lows v. Weeks*, 41 Vt., 590. The legislature may validate a city ordinance so as to save the lien of a tax levied under it. *Schenley v. Commonwealth*, 36 Pa. St., 29. Where local laws for taxation are forbidden, a curative law for a local levy is incompetent. *Kimball v. Rosendale*, 42 Wis., 407.

sense of right, but do not constitute limitations upon legislative power. One of these concerns the retroactive character of such legislation; there being a special liability to abuse in retrospective legislation. The people in some states have felt this so strongly, that, by their constitutions, retrospective laws have been expressly forbidden;¹ but in the absence of any such express restriction, there is nothing in the fact that curative statutes operate retrospectively which can preclude their passage.² Then it is an obvious objection to such laws that they may be invidious and inspired by favoritism, since they select for confirmation certain proceedings — those of a single district, for instance — leaving all others untouched. But the defects may be in a single district only, or the circumstances such that the need of legislation is exclusively confined to it. Moreover, in different districts different regulations may have been politic originally; and if so, there can be no very conclusive reason why they may not in effect be made by a retrospective sanction of the regulations actually applied. Cities always have regulations in respect to taxation differing in some particulars from those which prevail in towns; and, as in the case of police regulations, such rules must be allowed to vary, because in some cases there may be the most conclusive reasons why they should. But we should think the very limit of such

¹ Provisions of this nature will be found in the constitutions of Louisiana, New Hampshire, Missouri, Tennessee and Texas. In North Carolina retrospective taxation of sales, purchases and other acts done, is forbidden. Legislation for the enforcement of back taxes is not precluded by such a constitutional provision, where no new obligation is imposed. *State v. Heman*, 70 Mo., 441. See *Wellshear v. Kelly*, 69 Mo., 343.

² *State v. Newark*, 27 N. J., 185; *People v. Supervisors of Ingham*, 20 Mich., 95. A statute which is but a mode of continuing or reviving a tax which might be supposed to have expired, and is in this sense retrospective, but which does not give a judicial construction to a former statute, is not unconstitutional. *Stockdale v. The Insurance Co.*, 20 Wall., 323; *Railroad Co. v. Rose*, 95 U. S., 78. The legislature may cure irregularities in an assessment, though a *certiorari* has been sued out in respect of them. *People v. McDonald*, 69 N. Y., 362. A right given by statute to recover for taxes paid may be taken away, even though suits are pending. *St. Joseph Co. Com'rs v. Ruckman*, 57 Ind., 96.

In New Jersey it is held that where a town has made an unauthorized levy, the people have no power at a subsequent meeting to validate the levy — their powers being altogether statutory. *Banta v. Richards*, 42 N. J., 497.

legislation would be reached, when a particular assessment and the proceedings under it, in their operation throughout the district, were confirmed. To discriminate in such proceedings, and say they shall be valid as to a particular purchaser, or against a particular person or estate taxed, would not be legislation, because it would establish no rule. Its purpose would be, while leaving in force the rule which defeats the assessment, to exempt from its operation the case of a favored party. No department of the government possesses this authority. And all special confirmations of assessments and other proceedings are forbidden in some states, either by an express constitutional provision to that effect, or by the requirement that laws on the subject shall be general.¹

One very precise limit to the power to cure these proceedings is this: They cannot be cured when there was a lack of jurisdiction to take them. This is a rule applicable to every species of legal proceedings. Curative laws may heal irregularities in action, but they cannot cure a want of authority to act at all.² And in this regard the rules which apply to retrospective and to prospective healing acts are the same.

What is to be deemed a want of jurisdiction may in some cases be a question of no little nicety, especially in the case of local taxation. The local authorities take their powers from the state, and their acts are void when unauthorized by previous law. But if a town without authority were to contract a debt for a town purpose, the debt might undoubtedly be val

¹The power of the legislature to pass curative acts to legalize defective proceedings under previous statutes is dependent on its continued or present power to authorize proceedings like those sought to be so legalized. A special act to cure defects in certain tax proceedings cannot be passed where under the constitution the legislature has no power to pass special laws for the assessment and collection of taxes. *Kimball v. Rosendale*, 43 Wis., 407.

²*Denny v. Mattoon*, 2 Allen, 361; *Nelson v. Rountree*, 23 Wis., 367; *Daniel v. McCorrell*, 19 Ill., 226, 228; *Richards v. Rote*, 68 Pa. St., 248; *State v. Doherty*, 60 Me., 504; *Griffin's Ex'r v. Cunningham*, 20 Grat., 81, 109, per *Joyes, J.*; *Atchison, etc., R. R. Co. v. Maquilkin*, 12 Kan., 301; *People v. Goldtree*, 44 Cal., 323; *People v. Lynch*, 51 Cal., 15; *Brady v. King*, 53 Cal., 44; *Harper v. Rowe*, 53 Cal., 233; *People v. McCune*, 57 Cal., 153; *Abbott v. Lindenbower*, 42 Mo., 162; *Vaughan v. Swayzie*, 56 Miss., 704; *Wall v. Wall*, 124 Mass., 65; *Forster v. Forster*, 129 Mass., 559; *Blake v. People*, 109 Ill., 504; *Stephan v. Daniels*, 27 Ohio St., 527; *Petition of Hearn*, 96 N. Y., 378.

idated by retrospective legislation.¹ But in such cases there is commonly a general power to incur town liabilities, and the particular debt is not void for want of power to act upon the subject, but because the power conferred is so restricted as not to embrace it. There is room for saying, therefore, that the case is rather one of irregularity than of want of jurisdiction. What is more important is, that in such a case there is no adversary or respondent party; the town is acting for itself exclusively, and against no one. Where, however, the town proceeds to levy a tax without authority, the case is different: it is then proceeding *in invitum* against individuals who would be entitled, if the proceedings were legal, to have notice and be heard in various stages. If the proceedings are unauthorized by law, no one is legally or morally bound to take notice of them, or can have a legal hearing in respect to them, and a retrospective affirmance would, in effect, establish valid claims without opportunity to be heard. It is not believed this is competent.²

If the local authorities were to assume in any case to levy a tax for a purpose for which taxation is not permissible, there would be an evident want of power to confirm it, because the legislature could not have authorized it originally. The unauthorized acts of individuals cannot confer upon the state a

¹See *Booth v. Woodbury*, 83 Conn., 118; *Crowell v. Hopkinson*, 45 N. H., 9; *Lowell v. Oliver*, 8 Allen, 247; *Comer v. Folsom*, 18 Minn., 219; *Board of Commissioners v. Bearss*, 25 Ind., 110; *Taylor v. Thompson*, 42 Ill., 9. The legislature may sanction an improvement it might have authorized, and may order an assessment for its cost. *Matter of Sackett, Douglass and DeGraw Streets*, 74 N. Y., 95.

²See *Commissioners of Shawnee v. Carter*, 2 Kan., 115; *Tunbridge v. Smith*, 48 Vt., 648; *Richmond, etc., R. Co. v. Commissioners*, 84 N. C., 504. In *Grim v. School District*, 57 Pa. St., 433, *Sharswood, J.*, speaking of a bounty tax, says: "It has not been pretended, and could not be, that the legislature had not the power antecedent to authorize it. If so, they could cure any irregularity or want of authority in levying it by a retroactive law, even though thereby a right of action, which had been vested in an individual, should be divested. It is within the principle of all the decisions of admitted authority." But the bounty tax in this case was not the sole tax levied: it was additional to other levies, and the tax payer had all legal opportunities to be heard. The same may be said of *Tucker v. Justices*, 34 Ga., 370. See *Boardman v. Beckwith*, 18 Ia., 292, for a more doubtful case.

power it did not before possess.¹ But the want of power to confirm is the same in all cases where an element in legal taxation is wanting; and therefore taxation without an assessment must be incapable of confirmation, because apportionment is indispensable.² So if the party has been illegally deprived of

¹ *National Bank of Cleveland v. Iola*, 9 Kan., 689, 696, per *Dillon, J.*; *Conway v. Cable*, 87 Ill., 82; *Hart v. Henderson*, 17 Mich., 218; *Dean v. Borchsenius*, 30 Wis., 235.

² The Pennsylvania statute of 1815 declared that "no inequality in the assessment, or in the process or otherwise, shall be construed or taken to affect the title of the purchaser, but the same shall be declared to be good and legal." Also that only "when the owner or owners of lands sold for taxes shall have paid the taxes due on them previously to the sale, or within two years thereafter shall have tendered the amount of the taxes and costs with twenty-five per centum additional, and the tender has been refused, shall he or they be entitled to recover the lands by due course of law, and that in no other case and on no other plea shall an action be sustained." Notwithstanding this act it was decided that if an unseated lot was put on the seated list, and then transferred to the unseated without notice to the owner, a sale on this assessment would be void. *Milliken v. Benedict*, 8 Pa. St., 169, reviewing and approving *Larimer v. McCall*, 4 W. & S., 133; and *Harper v. Mechanics' Bank*, 7 W. & S., 204. In *Commercial Bank v. Woodside*, 14 Pa. St., 404, 409, *Bell, J.*, says: "It is essential to the validity of every tax sale of lands that the subject of it should be assessed and returned, by some competent authority, as unseated, or, where it has been rated as a seated tract or lot, that it be transferred to the unseated list, by the commissioners of the county, or their authorized agents, with notice to the owner, if that be possible. This is the doctrine of all the cases in which the subject has been treated. They settle indisputably, that an omission, in this particular, is uncured by the act of 1815, which applies only to irregularities in the proceeding. It is the assessment, says *Larimer v. McCall*, 4 W., 351; S. C., 4 W. & S., 133, which confers the power to sell in the same manner as a judgment on which an execution is issued. Without this, there is no authority to divest the title of the owner, and if a tract be returned as seated it cannot be sold for taxes. To the same effect are the other adjudications, down to *Milliken v. Benedict*, 8 Pa. St., 169." To the same effect is *Stewart v. Trevor*, 56 Pa. St., 374. That the want of an assessment is not an irregularity capable of being thus cured, see *Steward v. Shoenfelt*, 13 S. & R., 360; *Bratton v. Mitchell*, 1 W. & S., 310; *Miller v. Hale*, 26 Pa. St., 432; *McReynolds v. Longenberger*, 57 Pa. St., 13. That the want of a notice required by the constitution is an incurable defect, see *Wilson v. McKenna*, 52 Ill., 43. An assessment so defective as to be totally void cannot be cured by legislation. *People v. Holliday*, 25 Cal., 300. So with a want of valuation. *People v. Savings Union*, 31 Cal., 132. The confirmation by a city council of a void assessment cannot make it good. *Doughty v. Hope*, 3 Denio, 594. See *Hodgdon v. Burleigh*, 4 Fed. Rep., 111.

Where a levy is made under an act which is void under the constitution

the opportunity to be heard in opposition to the assessment, the defect is jurisdictional.¹

A tax discriminating against an individual could not be affirmed; but a merely excessive levy for lawful purposes, apportioned through the district, might be, for this would only be an enlargement of the original authority, and tax payers have had their opportunity to be heard on all questions of equality and apportionment.² But a tax sale that was made after a tax had been paid would be void and incapable of confirmation, the officer losing all jurisdiction to proceed when payment has been made.³

The general rule has often been declared, that the legislature

because it fails to state the object of the tax, an act to legalize the levy is also void. *Atchison, etc., R. Co. v. Woodcock*, 18 Kan., 20. See for a similar principle, *Harper v. Rowe*, 53 Cal., 238.

¹See *Thames Manufacturing Co. v. Lothrop*, 7 Conn., 550, which, however, is not an adjudication upon the point. *Marsh v. Chestnut*, 14 Ill., 223; *Billings v. Detten*, 15 Ill., 218, are decisions which support the text. And see *Tunbridge v. Smith*, 48 Vt., 648; *Richmond, etc., R. Co. v. Commissioners*, 84 N. C., 504. If one man's land is taxed to another and sold, the sale is void and cannot be made otherwise by legislation. *Abbott v. Lindentower*, 42 Mo., 162. And see *Hume v. Wainscott*, 46 Mo., 145. If land which is not within a city is taxed by it, the tax cannot be validated, though it is afterwards brought in. *Atchison, etc., R. R. Co. v. Maquilkin*, 12 Kan., 301.

²See *Iowa R. R. Land Co. v. Soper*, 39 Ia., 112.

³*Reading v. Finney*, 73 Pa. St., 467. Penalties cannot be imposed in respect of the non-payment of taxes which the legislature assumes are irregular and authorizes the correction of. *Trowbridge v. Horan*, 78 N. Y., 439.

It is not an objection to a curative statute that it is passed while suits are pending, and was designed to defeat the proceedings cured. The court must apply the statute in the pending suits. See *Cowgill v. Long*, 15 Ill., 202; *Miller v. Graham*, 17 Ohio St., 1; *State v. Squires*, 26 Ia., 340; *State v. Norwood*, 12 Md., 195; *Hepburn v. Curts*, 7 Watts, 300; *Grim v. School District*, 51 Pa. St., 219. *Certiorari* dismissed where a defect in the assessment was cured by special act after it was sued out. *State v. Apgar*, 31 N. J., 358. And see *Newark v. State*, 32 N. J., 453; *Bristol v. Supervisors of Ingham*, 20 Mich., 95; *Ex parte McCardle*, 7 Wall., 506; *United States v. Tynen*, 11 Wall., 88. But such a statute cannot affect cases already passed into judgment. *Lambertson v. Hogan*, 2 Pa. St., 22; *People v. Supervisors of Saginaw*, 26 Mich., 22. The legislature has no authority to reverse judgments directly or indirectly, and a legislative act legalizing a tax roll and healing defects therein will be so construed as not to affect an existing judgment for trespass against the collector for seizing and selling property to satisfy the illegal tax. *Moser v. White*, 29 Mich., 59.

may validate retrospectively, the proceedings which they might have authorized in advance.¹ Therefore, if any directions of the statute fail of observance, which are not so far of the essence of the thing to be done that they must be provided for in any statute on the subject, the legislature may retrospectively cure the defect. But there are probably some exceptions to this general rule. If the law has afforded the party an opportunity to be heard, when it might have been dispensed with, he has a right to rely upon this for his protection, and we should doubt the right of the legislature to take it away by retroactive law. There are some cases which, we think, recognize this right to a hearing which the law has given, as constituting an exception to the general right of the legislature to cure defects. And the reason of the exception will apply to all cases in which notice to the party, by publication or otherwise, has been provided for his protection. If this can be dispensed with by a healing act, the very provision for a notice for the party's protection becomes a trap for his destruction.²

¹ See *Mattingly v. Dist. of Col.*, 97 U. S., 687; *Vaughan v. Swayzie*, 56 Miss., 705.

² In *Miller v. Hale*, 26 Pa. St., 432, in which it was decided that a sale of unseated lands, made before the expiration of a year from the time when the tax was due and unpaid, could not be validated by the statute curing irregularities, the following remarks are made by *Woodward, J.*: "If it be granted that this was a regular assessment, or that its irregularities were such as the curative provisions of the act of 1815 would remedy, it cannot be claimed that the taxes were 'due and unpaid for the space of one year before' the sale—a condition on which the jurisdiction of the treasurer is expressly limited by the first section of the act of 1815. It was said with great truth, by Judge *Huston*, in *McCall v. Larimer*, 4 Watts, 351, 352, that taxes cannot be due unless they have been assessed. It is, indeed, the assessment that makes the tax. It is the duty of all owners of unseated lands to return them for taxation, and to pay the taxes when assessed; but how is he to pay before they are assessed? It is not for him to fix the valuation or the rate, but for the county commissioners; and, until they have performed their duty, he has no duty to perform. But, when the assessment has been made and the tax ascertained, there is no authority for proceeding to sell the land until the tax shall have remained unpaid a year. A sale short of that period is simply void. It is like a sale where there has been no assessment, which has often been declared insufficient to pass the title. Nor does the curative provision of the fourth section of the act of 1815 apply to such a sale, for that was intended to remedy irregularities in proceedings where jurisdiction had attached, not to confer jurisdiction in cases that

4. *General Curative Laws.* On the subject of general curative acts to operate retrospectively, little need be added here, as what has already been said in respect to special acts is entirely applicable. Indeed the general acts are commonly less

were beyond the purview of the act. A system was provided by the legislature for enforcing the payment of taxes upon unseated lands, but until a tract has been assessed and the tax remained due and unpaid a year, it is not within the system nor subject to any of its provisions. If such were not the rule of decision, titles could be divested, without notice to the owner, whenever it suited the interest or caprice of the county officers to expose them to sale. A law, intending to promote public objects without a wanton sacrifice of private rights, would thus become an instrument of intolerable mischief, and the doubts of its constitutionality, which, with all its checks and balances, attended its enactment and early history, would grow into a conviction that would sweep it from the statute book." See as somewhat analogous, *Wall v. Wall*, 124 Mass., 65; *Forster v. Forster*, 129 Mass., 559. That a void sale cannot be confirmed, see, further, *Harper v. Rowe*, 53 Cal., 333; *Clementi v. Jackson*, 92 N. Y., 591. That an assessment which is void because a part of the taxable property has been omitted cannot be validated, see *People v. Lynch*, 51 Cal., 15.

Where the enforcement of a lien depends upon an act validating it, the lien cannot be enforced in an action begun before the act took effect. See *Reis v. Graff*, 51 Cal., 86; *People v. McCain*, 51 Cal., 360.

The legislature may legalize an assessment irregular in the mode of procedure, when the municipality had jurisdiction of the subject-matter. *Tift v. Buffalo*, 82 N. Y., 204, citing *Schenley v. Commonwealth*, 36 Pa. St., 29; *Matter of Sackett St.*, 74 N. Y., 95. It is justly said in that case that a party has no vested right to a defense based on mere informalities. The want of a certificate to an assessment roll may be cured retrospectively. *Sinclair v. Learned*, 51 Mich., 335. See *Clementi v. Jackson*, 92 N. Y., 591. So may defects in the election of tax officers, even though a suit is pending to take advantage of them. *Millikin v. Bloomington*, 49 Ind., 62. Even the failure to give opportunity to be heard has been held curable. *Exchange Bank Tax Cases*, 21 Fed. Rep., 99. The cases of *Milliken v. Benedict*, 8 Pa. St., 169, and *Commercial Bank v. Woodside*, 14 Pa. St., 404, turn upon a failure to give a notice which, in advance, might have been dispensed with. See, also, *Prindle v. Campbell*, 9 Minn., 212; *Dubuque v. Wooton*, 28 Ia., 571. But see *People v. Seymour*, 16 Cal., 332.

As to what will be held a legislative ratification of an irregular assessment, see *Mattingly v. Dist. of Columbia*, 97 U. S., 687.

A general act validating "all assessments heretofore laid in said city" will not validate one which was laid without any authority or jurisdiction. *People v. Brooklyn*, 71 N. Y., 495. And assessments without any valuation, where by statute the power to lay one is limited to one-half the value of the land, is laid without authority of law, and therefore not cured by a statute which provides that irregularities, defects, etc., shall not defeat. *Matter of Second M. E. Church*, 66 N. Y., 395.

objectionable than the special, because they are enacted on general considerations, and are not partial or invidious.

5. *Prospective Curative Laws.* Laws which undertake to provide that in future proceedings errors or irregularities shall not be fatal, come also under the same restrictions upon legislative authority,¹ though such laws would seem entitled to lib-

¹ A Minnesota tax law came under review in *Prindle v. Campbell*, 9 Minn., 212. Among other things it provided that "all the instructions and directions herein given for the assessing of lands and personal property, and the levying and collecting of taxes and assessments, shall be deemed only directory, and no error or informality in the proceedings of any of the officers intrusted with the same, not affecting the substantial justice of the tax itself, shall vitiate, or in any wise affect, the validity of the tax or assessment, or of the title conveyed under the sale for taxes under this chapter." *Held*, that this does not embrace such errors and informalities as go to the jurisdiction of the officers charged with the performance of the duties imposed by the chapter, or the validity of their acts, but only such as do not substantially affect the material steps in the proceedings. *Held*, further, that a defective notice of sale was not cured by the act. An assessment in which the lands of two persons were assessed together under one aggregate assessment was in *Hamilton v. Fond du Lac*, 25 Wis., 490, 495, held void, and the defect not corrected by a statute that an assessment shall be valid, "notwithstanding any omission, defect or irregularity" in the proceedings. *Paine, J.*, says, "it would be clearly going beyond the scope and intent of this act to say that it made valid an assessment against one person of a tax upon another person's lots. That is something more than a mere omission, defect or irregularity in the proceedings."

Under the Pennsylvania statute the following irregularities held to be cured: A failure of the assessor to sign his roll. *Townsen v. Wilson*, 9 Pa. St., 270. A sale of seated land with unseated; the sale being good as to the proportion of the tax for which the unseated was chargeable, and the title passing after redemption expired. *Mitchell v. Bratton*, 5 W. & S., 451; *Campbell v. Wilson*, 1 Watts, 503; *Harper v. McKeehan*, 3 W. & S., 238; *McCord v. Bergautz*, 7 Watts, 487; *Dietrick v. Mason*, 57 Pa. St., 40. Paying over surplus moneys instead of giving a surplus bond. *Rogers v. Johnson*, 67 Pa. St., 43, citing and relying upon *Ash v. Ashton*, 3 W. & S., 510, and *Iddings v. Cairns*, 2 Grant's Cas., 88. The statute does not cure the want of a deed. *Hoffman v. Bell*, 61 Pa. St., 444. As to curing irregularities in general, see *Laird v. Heister*, 24 Pa. St., 452; *Cuttle v. Brockway*, 24 Pa. St., 145; *Heft v. Gephart*, 65 Pa. St., 510, 518; *Witherspoon v. Duncan*, 4 Wall., 210, 217. A Massachusetts statute provided that "if, in the assessors' list, or their warrant and list, committed to the collector, there shall be any error in the name of any person taxed, the tax assessed to him may, notwithstanding such error, be collected of the person intended to be taxed; provided he is taxable, and can be identified by the assessors." This applied to the case of one taxed by his surname only. *Tyler v. Hard-*

eral consideration, since the parties concerned would be apprised in advance that they were not to rely upon an exact compliance with the law, and would be under greater obligation to watch the proceedings.

6. *Reassessments.* The method of curing defects by reassessment of the tax is less open to abuse than any that has hitherto been mentioned. Whether this be done by general law, which shall provide for all cases in which tax proceedings prove invalid, and authorize the same tax to be imposed on the persons or property that ought to be charged therewith, by proceedings

wick, 6 Met., 470. And to the case of land assessed to J. S. & Son, when J. S. owned it. *Westhampton v. Searle*, 127 Mass., 502. See *Sargent v. Bean*, 7 Gray, 125, where this statute was further considered. And for cases under a law for like purpose in Ohio, see *Welker v. Potter*, 18 Ohio St., 85; *Upington v. Oviatt*, 24 Ohio St., 232. The cases under the Iowa statute go farther, we think, than any others in sanctioning broad powers in the legislature to cure defects. The following are referred to: *Eldridge v. Kuehl*, 27 Ia., 160; *McCready v. Sexton*, 29 Ia., 356; *Hurley v. Powell*, 31 Ia., 64; *Rima v. Cowan*, 31 Ia., 125; *Thomas v. Stickle*, 32 Ia., 71; *Henderson v. Oliver*, 32 Ia., 512; *Bulkley v. Callanan*, 32 Ia., 461; *Ware v. Little*, 35 Ia., 234; *Jeffrey v. Brokaw*, 35 Ia., 505; *Genther v. Fuller*, 36 Ia., 604; *Sibley v. Bullis*, 40 Ia., 429; *Railroad Co. v. Carroll County*, 41 Ia., 153.

As to the errors that will be fatal under a statute which declares street assessments collectible, notwithstanding "any error, irregularity or defect" in the proceedings, see *Burlington v. Quick*, 47 Ia., 222, and cases cited.

A statute which provided that a mistake in the name of the owner of the land should not invalidate a tax, sustained. *State v. Vanderbilt*, 33 N. J., 38. And see *Farnsworth Co. v. Rand*, 65 Me., 19, which was also a case of mistake in a name. Also, *Shoup v. Railroad Co.*, 24 Kan., 547. An act which provides that no tax shall be set aside for any irregularity or defect in form, or illegality in assessing, laying or levying such tax, if the person against whom, or the property upon which, such tax is levied, assessed or laid is in fact liable to taxation, and giving the court power to amend and correct all irregularities and defects in the form or manner of assessment, should be liberally construed, and the provisions made to apply to taxes assessed before the act was passed. Such a law was applied to a railroad company which had succeeded to the rights of another where a tax had erroneously been assessed to the old instead of new company. *State v. Montclair, etc., R.*, 43 N. J., 524.

The following irregularities held not to vitiate under a statute which provided that "no irregularity in the assessment roll, nor omission from the same, nor mere irregularities of any kind, in any of the proceedings, shall invalidate any such proceeding or the title conveyed by the tax deed." The omission of the official title of the assessor after his signature to the verifi-

begun *de novo*, or, on the other hand, shall assume the form of a special law providing for the like reassessment in any particular case, it is scarcely possible that it should cause serious injustice beyond what is incident to all tax legislation. In the new proceedings the party concerned will have the opportunity to watch the various steps, and to be heard in review of them, that he has in any case, and he will be precluded by nothing that has taken place in the proceedings which have proved abortive. The reassessment will be for the purpose merely of enforcing against him a duty which he was likely to evade, by reason of the non-feasances or misfeasances of the officers who ought to have enforced it; and as the new proceeding will give him the same opportunity of being heard that is given in other cases, and will be conducted on principles that operate gener-

cation of the assessment, and the omission of the county clerk's seal to the jurat to the assessor's oath and other affidavits. *Shoup v. Railroad Co.*, 24 Kan., 547. So of an error in the notice as to the amount required to redeem. *Watkins v. Inge*, 24 Kan., 612.

There is in Illinois a very comprehensive prospective curative law for tax cases; as to which see *Thatcher v. People*, 79 Ill., 597; *Buck v. People*, 78 Ill., 560; *Chiniquy v. People*, 78 Ill., 570; *Purrington v. People*, 79 Ill., 11; *Eurigh v. People*, 79 Ill., 214; *Pacific, etc., Co. v. Lieb*, 83 Ill., 602; *Andrews v. People*, 84 Ill., 28; *Halsey v. People*, 84 Ill., 89; *Fisher v. People*, 84 Ill., 491; *Law v. People*, 87 Ill., 385; *Edwards v. People*, 88 Ill., 340; *Lyle v. Jacques*, 101 Ill., 644; *Gage v. Bailey*, 102 Ill., 11. In *Beers v. People*, 83 Ill., 488, it is said: "These enactments were no doubt designed to dispense with the strictness of the common law in the summary proceeding for the levy and collection of taxes; to remove and wipe out all mere technical objections in the raising of the revenue, thus placing the tax payer who honestly owes his tax to the government which affords him protection on precisely the same footing as any other person who owes an honest debt. Nor should the courts interpose objections to thwart the legislative will."

For further illustrations of such laws, see *Bolton v. Cleveland*, 35 Ohio St., 319; *Eno v. New York*, 68 N. Y., 214; *State v. Wise*, 12 Neb., 313; *Astor v. New York*, 62 N. Y., 580.

But such laws cannot cure a total want of power to lay a tax. *Stephan v. Daniels*, 27 Ohio St., 527. A statute declared that an assessment for a local improvement should not be vacated for any defect, omission or irregularity. The jurisdiction of the board of supervisors to order such an assessment depended upon a prior apportionment of the expense by the commissioner of public works. The commissioner merely certified that the improvement had been completed and accepted, and that "the apportionment of the assessment may be made." Held, that the assessment was not validated. *Petition of Hearn*, 96 N. Y., 378, citing *In re Second Av. Church*, 66 N. Y., 395.

ally, he has no reasonable ground of complaint.¹ The only cases in which hardship is likely to be inflicted by such legislation are those in which a tax is reassessed upon an estate which has changed hands since the tax should have been collected from it; but a proper examination of the records will, in most cases, lead the purchaser to a discovery of the liability, and enable him to provide against it.² Where the tax itself

¹ A statute which, in case of an invalid or irregular tax, provides that it may be assessed by the assessors for the time being, "to the just amount to which, and upon the estate or to the person to whom, such tax ought at first to have been assessed," may be used to correct an error which extends to the entire list. *Goodrich v. Lunenburg*, 9 Gray, 38. It justifies a reassessment, to the wife, of a tax wrongfully put to the husband and abated the preceding year. *Hubbard v. Garfield*, 102 Mass., 72; and see *Overing v. Foote*, 48 N. Y., 290.

As to reassessments to cure irregularities, see *Byram v. Detroit*, 50 Mich., 56; *Kaehler v. Dobberpuhl*, 56 Wis., 480; *Emporia v. Norton*, 13 Kan., 569. It is no objection that the officer making it has come into office since the original assessment was made. *Trustees v. Guenther*, 19 Fed. Rep., 395. They may be made in order to reach property before omitted. *Harwood v. North Brookfield*, 130 Mass., 561; *Wheeling v. Hawley*, 18 W. Va., 472; *People v. Brooklyn Assessors*, 92 N. Y., 430. But only under express legislative authority. *Perry County v. Railroad Co.*, 58 Ala., 546.

It is no objection to a reassessment, that on the first assessment some persons paid under a stipulation that the payments should be allowed on reassessment. *Petty v. Myers*, 49 Ind., 1; *Fairfield v. People*, 94 Ill., 244. An injunction against the collection of a tax is inoperative as against a reassessment. *Emporia v. Bates*, 16 Kan., 495.

Where a tax upon a parcel of land is reassessed upon a part of it, the reassessment is void. *Scheiber v. Kaehler*, 49 Wis., 291. When a tax with penalties is swept away by statute, it is not competent on reassessment to add the penalties. *State v. Jersey City*, 37 N. J., 39. A tax should be reassessed on the valuation of the year when it was originally laid. *Davis v. Boston*, 129 Mass., 377. The reassessment is not to be considered a new tax. *Harwood v. North Brookfield*, 130 Mass., 561; *Fairfield v. People*, 94 Ill., 244. See *Mattingly v. Dist. of Col.*, 97 U. S., 687; *Fox v. New Orleans*, 4 Wall., 172.

A town vote for an assessment "on the original appraisal of the school property" has been held a sufficient reappraisal in Massachusetts. *Sutton Manuf. Co. v. Sutton*, 108 Mass., 106; *Halleck v. Boylston*, 117 Mass., 469.

² That the tax may be reassessed, notwithstanding such a change of title, see *Tallman v. Janesville*, 17 Wis., 71; *Cross v. Milwaukee*, 19 Wis., 509. That local assessments may be reassessed as well as general taxes, *May v. Holdridge*, 23 Wis., 93; *Brevoort v. Detroit*, 24 Mich., 322. And as to such laws in general, see further, *Tweed v. Metcalf*, 4 Mich., 579, 590; *State v. Newark*, 34 N. J., 236; *In re Van Antwerp*, 56 N. Y., 261. A failure to require the payment of a tax, or the decision of the auditor-general that it is

was originally void by reason of having been levied for an illegal purpose, it is obviously impossible to breathe vitality into it by new proceedings.¹ If it was void because of want of legislation justifying it, it may be reassessed after proper legislation has been had.² If it was void because of a disregard of apportionment, or for any reason affecting a part of the list only, it may be reassessed with the proper corrections, where corrections are practicable.³ And here it may be observed that a judicial decision against the first proceedings, if based upon errors and defects merely, and not upon the vicious nature of the tax itself, is not a bar to a reassessment. Such a decision merely points out the error, and the reassessment may be of all others the most proper and effectual way of correcting it.⁴

not payable, or the receipt of taxes for subsequent years, works no estoppel as against the state. *Delaware Division Canal Co. v. Commonwealth*, 50 Pa. St., 399.

After an erroneous assessment to the holders of the legal title to land, a mortgagee caused the land to be sold and bought it in. Held an alienation within the statute providing that reassessed taxes on real estate shall constitute a lien on the land unless the estate has been alienated between the first and second assessments. *Davis v. Boston*, 129 Mass., 377. It is held in New York that where an officer with competent authority discharges an assessment of record, and one buys and pays for the land in reliance upon it, the lien cannot thereafter be revived to his prejudice on the ground of the discharge having been made by mistake. *Curnen v. New York*, 79 N. Y., 511.

¹ *Dean v. Charlton*, 23 Wis., 590; *Dean v. Borchsenius*, 30 Wis., 236; *Dill v. Roberts*, 30 Wis., 178; *Plumer v. Supervisors*, 46 Wis., 163. In Wisconsin, when a tax is set aside for a defect going to the groundwork of the tax, a reassessment is ordered under judicial supervision. *Bradley v. Lincoln Co.*, 60 Wis., 71; *Woodruff v. Depere*, 60 Wis., 128; *Bass v. Fond du Lac Co.*, 60 Wis., 516.

² *Mills v. Charleton*, 29 Wis., 400. See *In re Van Antwerp*, 56 N. Y., 261. The reassessment may be made to cover the defect of the original levy having been under an unconstitutional statute. *Chattanooga v. Railroad Co.*, 7 Lea, 561; *Trustees v. Guenther*, 19 Fed. Rep., 395.

³ See *Dean v. Charlton*, 27 Wis., 522; *Cook v. Ipswich Local Board of Health, L. R.*, 6 Q. B., 451; *Brevoort v. Detroit*, 24 Mich., 322.

⁴ *Dean v. Charlton*, 23 Wis., 590. Compare *Butler v. Supervisors of Saginaw*, 26 Mich., 22.

In Wisconsin, when a judgment is rendered setting aside taxes, a stay of proceedings is ordered until reassessment can be had. *Single v. Stettin*, 49 Wis., 645; *Monroe v. Fort Howard*, 50 Wis., 228; *Morrow v. Green Bay*, 55 Wis., 112; *Kingsley v. Supervisors*, 49 Wis., 649; *Plumer v. Supervisors*, 46 Wis., 163. The statute for reassessment applies to suits begun before its

Judicial corrections. Still another method of curing defects which may here be noticed is that which is sometimes provided by statutes allowing the parties concerned to have a judicial review of the proceedings on a proper application.¹ We do not refer now to those cases in which proceedings are, under general laws, referred to a court at some stage for confirmation, but to those in which the proceedings are attacked after their conclusion, when they are subjected to a judicial examination with a view to the correction of any errors, if correction shall be found practicable.²

Corrections by amendment. Of the errors that creep into the records of tax proceedings very many are merely clerical, or occur in consequence of a failure to put in proper form the evidence of transactions in themselves correct. Tax proceedings must stand by the record; and a failure to make the proper record may be as fatal as a failure to take the proceeding of which the record should have been made.

passage. *Flanders v. Merrimack*, 48 Wis., 567. See as to reassessment after judgment for taxes has been refused, *Hyde Park v. Waite*, 2 Ill. App., 443.

¹For cases of this nature, see *State v. Jersey City*, 85 N. J., 881; *Miller v. Graham*, 17 Ohio St., 1. The statute under which each of these cases was decided was quite peculiar. That of New Jersey forbade any collateral questioning of the proceedings in the case of certain assessments for local objects, but permitted them to be reviewed *at any time on certiorari*, or other proper proceeding, in the supreme or circuit court.

There is no constitutional objection to a law which provides for the appointment by the circuit judge of commissioners to review the valuations made by the county board. *State v. Myers*, 52 Wis., 628.

Where an appeal from the assessment of a corporation by the proper state officer was authorized to be taken to a court, it was held that the conclusion by the court upon the appeal was in no proper sense a judgment, but only an assessment, and therefore error would not lie upon it. *Auditor-General v. Pullman, etc., Co.*, 34 Mich., 59.

Under a statutory authority to a court to amend the proceedings on a special assessment so as to do justice to all, the court will not, on application of a contractor who has failed to obtain full payment, make amendments which compel any tax payers to do more than justice requires. *Loeser v. Redd*, 14 Bush, 18.

²In New York special assessments were formerly referred to a court for confirmations, and all parties given an opportunity for a hearing. Now, on the other hand, a party objecting to an assessment brings the matter to the attention of the court on petition to vacate.

If, however, the defect in a record is obviously clerical and nothing more; that is to say, if the record on its face sufficiently shows that the proper steps have in fact been taken, but there is some error on the part of the recording officer in putting the evidence upon the record in precise conformity to the law; some omission of a word, or the accidental employment of one word for another, or any similar error which cannot mislead,— the mistake may be overlooked, and the court, when the record becomes the subject of judicial investigation, may by intendment supply what is omitted, and correct what is erroneous, and then sustain the record as though the proper corrections had been made by the recording officer himself.¹ But corrections cannot be made by intendment unless the necessary facts appear, either in the record as actually made, or in the official documents on file from which the record should have been drawn up; the courts cannot imply the existence of facts which are not recited anywhere in the official proceedings.

Where the proceedings are conducted under the supervision of a court of record, or must go before such a court for confirmation, the facts which do not appear of record may be supplied by leave of the court, on a proper showing by affidavit.² The authority of the court to permit such amendments, in order to make the record correspond to the facts, is probably not different from what it is to permit amendments in the exercise of its ordinary jurisdiction.

If the facts to be supplied are such as affect individual cases on the roll, and may prejudice the parties, it would seem to be a matter of right that the persons to be affected should have notice of an application to amend, and an opportunity to meet

¹Mr. Blackwell, speaking of *Atkins v. Hinman*, 7 Ill., 437, 451, says: "Where, in a collateral action, amendments of the tax record were permitted in the circuit court, the supreme court sustained them upon the ground that they were only corrections of clerical mistakes, and could prejudice no person's rights; that they brought no new matter in the case, and gave no additional efficacy to the proceedings, but simply put them in stricter conformity to the provisions of the statute. And it must be remembered that these amendments were of the judgment and precept under the Illinois statute of 1839, and the anterior proceeding on the files of the court furnished the facts whereon the amendments were based." *Blackwell on Tax Titles*, 399

²*Young v. Thompson*, 14 Ill., 380, 381.

the showing. This should certainly be so if the application is made at a stage of the proceedings when the party, if the correction is made, will have no opportunity subsequently to raise any questions regarding the propriety or justice of the amendment. As an illustration, the case may be instanced of a judgment which is erroneous by reason of some defect which it is desired to supply by an amendment; in such case clearly the party against whom the judgment is to be validated should be allowed the privilege to contest the truth of that which it is proposed to put upon the record, and by which it is expected to bind him.¹ And the application ought to be a distinct proceeding for the purpose, and not be made in a suit brought to recover lands which have been sold under the judgment.² On such an application counter affidavits would be admissible, and the court ought to insist upon a very clear showing of the facts, before giving its sanction to the introduction of any changes in a record not originally made under its supervision. There is a manifest difference between such a case and the correction of errors in the record of proceedings which have been taken

¹See *Dunham v. Chicago*, 55 Ill., 357. As to amending records by leave of court, and the staying of proceedings to permit amendments, see *Bishop v. Cone*, 8 N. H., 513; *Allen v. Archer*, 49 Me., 346; *Smith v. Messer*, 17 N. H., 420; *Beam v. Thompson*, 19 N. H., 290; *Cass v. Bellows*, 31 N. H., 501; *Pierce v. Richardson*, 87 N. H., 806; *Taft v. Barrett*, 58 N. H., 447.

²In an action of ejectment, to recover possession of land by virtue of a tax title, motion was made to amend the precept. *Treat*, Ch. J., says: "If such an amendment is allowable, it should only be made upon a distinct application to the court for that purpose. The application should have no connection with any other case. A contrary course would introduce much confusion and inconvenience into judicial proceedings. A court engaged in the trial of a case ought not to be delayed and embarrassed by a motion to amend the record of another proceeding, which is but collaterally in question before it. Such an application might involve the necessity of bringing in other parties and different interests before the court." *Pitkin v. Yaw*, 13 Ill., 251, 253. In another case the same judge, in speaking of a defective judgment on a delinquent tax list, says: "It may be that the circuit court, upon a proper application, will allow the record to be so amended as to show when the judgment was rendered. But until the record is thus perfected no title can be asserted under the proceedings." *Young v. Thompson*, 14 Ill., 380, 381. Where the certificate of publication of the collector's notice of his intended application for judgment for taxes is deficient, it may be amended by order of the court, upon notice being given to the opposite party, even after judgment. *Dunham v. Chicago*, 55 Ill., 357, citing *Coughran v. Gutcheus*, 18 Ill., 390.

in the court itself, and of which the judges themselves may be presumed to have some recollection.

By statute in some states full authority has been conferred upon some statutory board or officer to permit the taxing officers on proper application to make any such correction in their proceedings as may be consistent with justice. Of such statutes it may be said, *first*, that the authority they confer cannot go beyond that which might be exercised by the legislature itself in curing defects in tax proceedings; and *second*, that the authority exercised must be within the permission granted; nothing is to be taken by intendment.¹

There are undoubtedly cases in which ministerial officers may correct errors without judicial permission; and there are also some cases in which it would be apparent they could have no such power. Still other cases may be open to reasonable doubt.

Where the defect consists merely in the failure to copy into a book of records the official document which evidences some legal transaction, the proper recording officer may correct it at any time, by making the required record. This may be done by the officer who should have done it in the first place, or it may be done by his successor in office. But where the document which should go upon record is defective, a case of more difficulty is presented. Many cases involving the right to make amendments have been considered in the state of New Hampshire, and it may be useful to notice them.

In a very early case the validity of a town vote to raise money was in question, and the court, while the cause was on trial, permitted the record to be amended so as to show that the proper vote had been had. The amendment was made by the person who was town clerk at the time the meeting was held; and the case does not show that he was still in office. The authority to make the amendment was not much considered; the judge contenting himself with saying that, "On this point we think that great care must be taken that amendments

¹ A supervisor empowered to make a new roll, where the one already made is defective, cannot under this authority take the old roll, make erasures and changes, and deliver it to the collector for the collection of the tax, and if he should do so, and attempt be made to collect, both officers will be liable in trespass. *Ferton v. Feller*, 33 Mich., 199.

be made only according to the fact; but we have no doubt that a record may be amended to conform to the truth."¹

In the next case in which a like question was raised the point was more fully considered. It was admitted that there were defects in the record of town proceedings which would be fatal to a tax title then under consideration in a case on trial, unless they could be cured. The defects are summed up by the court and the case disposed of as follows: "The return of the posting up of the warrant for the town meeting is insufficient. It does not state when it was posted up. Nor does it show that it was posted at a public place. It does not appear that Thirston, who was chosen collector, took the oath of office prescribed by law. And there are defects in the return of the collector, to which exceptions have been taken.

"The tenants move that these proceedings may be amended. It has been already settled that the records of towns may be amended to conform to the truth of the fact.² The amendment must be made by the person who was in office at the time.³

"It seems probable that, in the prior cases where amendments have been allowed, the officers who were permitted to make them were not in office at the time; if they were, it must have been under subsequent election; and the right to have the amendment made cannot depend upon the question whether the officer has again been elected. The form in which such amendments are to be made has never yet been settled. It would be very dangerous to sanction alterations of the books themselves by erasures and interlineations. And we are of opinion that they should be made only upon evidence showing the truth of the facts, and then by drawing out in form the amendment which the facts authorize. The amendment, with

¹ *Bishop v. Cone*, 8 N. H., 513, 516, per *Richardson*, Ch. J., who cites, as authority, *Welles v. Battelle*, 11 Mass., 477, and *Taylor v. Henry*, 2 Pick., 397. The record as amended is as conclusive of the facts recited as it would have been if made correct at first. *Halleck v. Boylston*, 117 Mass., 469. See *Kansas City, etc., R. Co. v. Tontz*, 29 Kan., 460.

² Citing *Bishop v. Cone*, 8 N. H., 513; *Welles v. Battelle*, 11 Mass., 477; *Cardigan v. Page*, 6 N. H., 182. See, also, *Boston Turnpike Co. v. Pomfret*, 20 Conn., 590; *Chamberlain v. Dover*, 13 Me., 466; *Allen v. Archer*, 49 Me., 346; *Pierce v. Richardson*, 37 N. H., 306.

³ *Taylor v. Henry*, 2 Pick., 397.

the order under which it is made, may then be annexed to the books where the original is recorded, so that the whole matter will appear; and, in furnishing copies, the original and amendment should both be furnished.

"But it is objected, on the part of the demandant, that no amendment ought to be made to her prejudice. That, when she purchased, these defects in the vendue title were apparent, and that she must be presumed to have purchased with knowledge that the title was defective.

"The general rule is that amendments of records are made with saving of the rights of third persons acquired since the existence of the defect.¹

"To apply this rule, however, to all cases of defects in sales of lands for taxes, would, in effect, be very nearly denying a right to amend; as the owner of the land sold would attempt to defeat any amendment by conveying to some friend who would bring a suit in his behalf. It would, at least, be necessary to confine the application of the principle to cases where the land had been actually conveyed *bona fide*.

"But instances might exist when the purchaser, although he might not have found upon the records all that was necessary to make a formal and valid record, might have been well assured, from what he did find, that all that was necessary had in fact been done.

"For instance, in relation to the two first defects in the records in this case — in the return of the warning of the meeting, and in the record of the oath of the collector — although these records are not sufficient in point of law, they lead the mind of any one to the belief that what was requisite was probably done. And in such cases, where the fact appears to be stated, but not in a formal manner, there is no reason why he who purchases should not be subjected to the same liability to have the amendment made, and the record put in form, that his grantor would have been, had he attempted to recover the land.

"There are cases where, although all that is required may not appear of record, it may be left to the jury to presume that all that was required was done. As in *Bishop v. Cone*, — al-

¹ Citing *Chamberlain v. Crane*, 4 N. H., 115; *Bowman v. Stark*, 6 N. H., 459.

though the application of the principle in that case may, perhaps, have been questionable, on account of the transactions having been so recent, that, if the truth would have warranted it, an amendment might have been made. Whether that principle could be applied against a subsequent purchaser, it is not necessary to determine. But where what is necessary is, although not formally stated, so far set down as to lead to a belief that a correct record might have been made, there seems to be no reason why a purchaser, who has access to the records, should not take it subject to a right to have the record put in form, if the truth will warrant it.

"When, on the other hand, nothing appears upon the record in relation to any particular fact necessary to make out a title, nor is anything set down from which it is naturally to be inferred that the fact existed, a subsequent *bona fide* purchaser ought not to have his title defeated by supplying a record instead of amending a record."¹

The subsequent cases in New Hampshire are in accord with these, and fully sustain them in their conclusions.² It is said

¹Gibson v. Bailey, 9 N. H., 168, 176, per Parker, Ch. J. The judge thereupon proceeds to say that "upon these principles, if the facts will warrant it," the various defects which he points out in detail may be amended. But he adds, "we must first have evidence to show that these amendments may be made with truth."

²On the trial of Bean v. Thompson, 19 N. H., 290, involving the validity of a tax voted at a town meeting, it appearing that there was no return upon the warrant calling the meeting, the selectmen who were in office when it was held were permitted, on motion, to make the proper return. Woods, J., says: "Leave is often granted to officers, whose returns of their doings, or records of public transactions, are, by law, made evidence to correct errors or to supply omissions, to conform to the truth. The interest which the public have in the correctness and fullness of the record, and the responsibility of the officer himself for the accuracy of his own doings, are primarily a good cause for granting such indulgences tending to the promotion of reasonable objects. And it has never been deemed an objection to the amendment of a return or record, that proceedings were pending which might be affected by it, except that where rights or claims *bona fide* have intervened, amendments that would entirely defeat them have been in some instances denied." And he refers to Gibson v. Bailey, *supra*, as laying down the proper rule on the subject. In Scammon v. Scammon, 28 N. H., 419, 429, Bishop v. Cone, and Gibson v. Bailey, are again referred to with approval. In Cass v. Bellows, 31 N. H., 501, they also are approved, but the proper person to make the corrections then necessary was dead, and consequently they could not be made. See, further, Prescott v. Hawkins, 12 N.

that "it has never been held that such amendments could be allowed by any other tribunal than one of the superior courts."¹ And yet unless some statute confers upon them the authority, it is not very clear whence they derive it, nor how a township officer, or one who has been such, can, in this collateral way, have authority conferred upon him to do anything which, without such authorization, would be an illegal act.

An early case in Massachusetts, often quoted in New Hampshire, involved the validity of a correction by a town clerk, of his own motion, to cure a defect in an entry made by himself. The amendment was sustained; the court expressing the opinion that the clerk might have made it at any time while he held the office, even though under a subsequent election.² But it is held in the same state that the successor of the clerk can have no authority to make corrections in records of transactions which were had before he came into office.³

In Vermont it has been said that "the practice of amending and altering the records, when a controversy has arisen, to meet a particular case, or in consequence of a decision of the court, cannot be defended."⁴ In a later case the right to amend, under proper restrictions, was asserted. "While it is obvious," say the court, "some limits must be fixed to such amendments, we do not feel prepared to say, as matter of law, that they are never allowable. If the officer making the record were out of office, or were a party to the suit, as in *Hadley v. Chamberlin*, 11 Vt., 618, and in many other cases, it might be improper. . . . But we think in general it must be regarded as the right of the clerk of a town, or other municipal corporation, while having the custody of the records, to make any record accord-

H., 19; *Pierce v. Richardson*, 87 N. H., 306, 309; *Jaquith v. Putney*, 48 N. H., 138.

¹ *Pierce v. Richardson*, 87 N. H., 306, 311, per *Bell, J.*; *Roberts v. Holmes*, 54 N. H., 560.

² *Welles v. Battelle*, 11 Mass., 477, 481, per *Parker, Ch. J.*

³ *Taylor v. Henry*, 2 Pick., 397. The defect consisted in the failure to record the adjournment of the town meeting at which the new clerk was chosen.

⁴ *Williams, Ch. J.*, in *Hadley v. Chamberlin*, 11 Vt., 618. The amendment was made in open court on the trial of a cause involving the sufficiency of the record. One peculiarity of the case was that the officer making the amendment was a party to the suit, and made it for his own protection.

ing to the facts. And we do not perceive that his having been out of office, and restored again, could deprive him of that right. But even the officer could not alter or amend a record upon the testimony of third persons, ordinarily, and ought not to do it upon his own recollection, unless in very obvious cases of omission or error, of which the present might fairly be regarded as one, probably. Such amendments should ordinarily be made by the original documents or minutes.”¹

It is observable of this case that the amendment, which consisted in the signing of the record of warning of a school district meeting, was made by the clerk on the trial of a cause, where the record was in question, and without the permission of the court. From the case it appears that “the court decided that they had no power over the clerk, and could give him no directions, but said that in the opinion of the court the clerk had a right, if he chose to do so, to amend the record in that particular, if such amendment would be according to the truth; but that the clerk must judge for himself whether he would or should make such amendment; and the court added that if such amendment was made, the record, in the opinion of the court, would be admissible.” This remark distinguishes the case broadly from those in New Hampshire, and leaves the responsibility of all amendments with the officer himself.

In New York, in a case in which the affidavit of the assessors, attached to the assessment roll, was found to be defective, the opinion was expressed that it would be competent for the board of supervisors, when in session for the purposes of a review of the rolls, “to send for the assessors of any one town to come before them, and supply omissions and make the necessary affidavits where the omission occurred through accident or mistake.”² This opinion appears entirely reasonable; and it would seem that the officer who, through any carelessness or error, has executed, or even delivered, a defective process or return, ought to be at liberty to correct it at any time afterwards, before any decisive action has been taken, under

¹ *Redfield*, Ch. J., in *Mott v. Reynolds*, 27 Vt., 206, 208.

² *Parish v. Golden*, 35 N. Y., 462, 465, per *Morgan*, J. In Missouri it has been held that a special tax bill may be amended to correct the name of the owner of land, by the officer who issued it, though out of office. *Stadler v. Both*, 59 Mo., 400; *Kiley v. Cranor*, 51 Mo., 541.

the process or document amended, and while, therefore, there is no possibility that the error can have prejudiced any one.

Of course the amendment could not be made by one who was no longer in office, as under such circumstances it would not be an official act.¹ Neither could it be made under circumstances where it could operate unjustly upon the rights of parties. Thus it has been held in Vermont that if a tax sale is fatally defective by reason of the failure of the town clerk to certify in his record that the advertisements were published as required by law, the clerk cannot make it good by amending his record after the time for redeeming from the sale has expired. The reason is, that the owner, relying upon the record, may have omitted to redeem, inasmuch as his land has not been legally sold.² But until the rights of third parties have intervened, or conclusive action has been taken in reliance upon the records or documents, as representing in their imperfect state the actual facts, it is not perceived why a mistake once made should be crystallized and preserved as an instrument for the destruction of all that shall follow, instead of being corrected, that legal proceedings may be supported upon it. The question to some extent is one of public policy; and while undoubtedly it is wise to hold strictly to the rule, that records shall not be tampered with to the injury of parties concerned.

¹ *Shaw*, Ch. J., in *Hartwell v. Littleton*, 13 Pick., 229, 232. "The first question is whether the town clerk of a former year, who does not now hold that office, can be allowed to come in and amend the record of a former year, made whilst he was in that office; and the court are of opinion that he cannot. It has been held in *Welles v. Battelle*, 11 Mass., 477, that where a clerk continues in office several years, by repeated annual elections, he may amend the record of a former year, notwithstanding an election has intervened, and though he does not hold the office under the same appointment. But we think there is an obvious distinction in principle between the two cases. In the latter the clerk not only knows the fact in relation to which the amendment is to be made, which is a circumstance common to both, but he still enjoys the confidence of the town, is by their vote intrusted with the custody of their records, and is held responsible for their purity and correctness under the sanction of his official oath, and all such other guards as the law has thought it necessary to prescribe in the case of a clerk actually in office. The intervening election is substantially a continuance of the clerk in the same office." And see *School District v. Ather-ton*, 12 Met., 105.

² *Judevine v. Jackson*, 18 Vt., 470, approved and followed in *Langdon v. Poor*, 20 Vt., 13. Compare *Jaquith v. Putney*, 48 N. H., 138.

there is no principle or reason of public policy which should preclude the correction of errors before rights have become fixed, but many considerations which support it.

No amendment can make valid a tax sale that was void for want of a proper description of the land in the assessment and subsequent proceedings.¹ And if fatal errors occur in tax conveyances, they can neither be amended by the officer, nor corrected by motion in a court of law.² The proper tribunal for that purpose is a court of equity. A court of law, where the defective conveyance was in question, might order the case continued to give opportunity for relief in equity, but could not do more.³

An officer to whom return has been made by another has no authority to amend such return,⁴ but a correction in an immaterial point can give no one a ground of complaint.⁵

¹ *Roberts v. Chan Tin Pen*, 23 Cal., 259.

² See for an attempt to correct made by an officer six years after the sale, *French v. Edwards*, 5 Sawy, 266. An unauthorized alteration of a special tax bill does not destroy it, but deprives it of its character of *prima facie* evidence. *Kefferstein v. Knox*, 56 Mo., 186.

³ *Annan v. Baker*, 49 N. H., 161, 171, per *Nesmith, J.*, citing *Prescott v. Hawkins*, 12 N. H., 19.

⁴ *Blight v. Banks*, 6 T. B. Monr., 192, 206; *Blight v. Atwell*, 7 T. B. Monr., 264, 268. See *Bellows v. Weeks*, 41 Vt., 590, 600; *Jones v. Tiffin*, 24 Ia., 190.

⁵ *Case v. Dean*, 16 Mich., 12. As to amendments permitted by statute in Iowa, see *Jones v. Tiffin*, 24 Ia., 190; *Conway v. Younkin*, 28 Ia., 295.

CHAPTER XI.

THE LEGISLATIVE DETERMINATION THAT A TAX SHALL BE LAID.

Necessity for legislation. The power to tax being legislative, there must be distinct authority of law for every levy upon the people under that power.¹ The authority may come from the constitution, which, in exceptional cases, will provide for the levy of a specific tax, or for a tax for some defined purpose; but in general the authority will come from the legislature, and must be expressed in statutory form. The rule is one which applies to federal taxation and to taxation in every state in all its phases, whether it be taxation for state purposes and directly by the state itself, or taxation for municipal purposes and by municipal bodies, or taxation in the form of local assessments.² And in the case of local taxation there must commonly be two distinct acts of legislation: first, that by the state giving the power to tax, and second, that by the local legislative or *quasi* legislative authority, laying the tax under the power so given.

The term *levy* will be used in this chapter as meaning the legislative act, whether state or local, which determines that a tax shall be laid.³

¹ *Stetson v. Kempton*, 13 Mass., 272; *Cruikshanks v. Charleston*, 1 McCord, 360; *Virginia, etc., R. Co., v. Washington Co.*, 30 Grat., 471; *Cotton Exchange v. Assessors*, 35 La. An., 1154; *State v. Hagood*, 13 S. C., 46; *Webster v. People*, 98 Ill., 343.

² See *Norris v. Russel*, 5 Cal., 249; *Litchfield v. Vernon*, 41 N. Y., 123; *Allen v. Peoria, etc., R. R. Co.*, 44 Ill., 85; *Bangs v. Snow*, 1 Mass., 181; *Lisbon v. Bath*, 21 N. H., 319; *Daily v. Swope*, 47 Miss., 367; *Columbia v. Guest*, 3 Head, 413; *State v. Charleston*, 2 Speers, 623; *Simmons v. Wilson*, 66 N. C., 336; *Vanover v. Justices*, 27 Ga., 354; *Lott v. Ross*, 38 Ala., 156; *Richmond v. Daniel*, 14 Grat., 385; *Bullock v. Curry*, 2 Met. (Ky.), 171; *Bright v. McCullough*, 27 Ind., 223.

³ *Perry Co. v. Selma, etc., R. Co.*, 58 Ala., 546; *Maguire v. Board of Mobile*, 71 Ala., 401; *State v. McGinnis*, 26 La. An., 558. The term is often used to cover much more than the legislative act. Thus, in *Moore v. Foote*, 32 Miss., 469, 479, it is said that "levy imports the ascertainment of the amount to be raised, and the performance of such acts as would authorize the tax collector to proceed to collect." And see *Bradley v. Lincoln Co.*, 60

A legislative act for the levy of a tax, as much as in any other case, must be passed under the restrictions of the constitution, or it can have no validity. Therefore, when the constitution requires an act to have but one object, which shall be expressed in the title, the requirement must be complied with.¹ And if local or special laws are forbidden by the constitution, they will be void in tax cases.²

Revenue bills: Statement of purpose. It is provided in the constitution of New York that "every law which imposes, continues or revives a tax shall distinctly state the tax and the object to which it is to be applied, and it shall not be sufficient to refer to any other law to fix such tax or object." There are similar provisions in the constitutions of some other states. Where they do not exist it is doubtless competent for a state to levy taxes generally without in the revenue bill giving any specification of object, and, when the taxes are collected, to appropriate them to any purpose which falls within the comprehension of public objects for the purposes of state care.³ And the state may authorize a municipal corporation to levy taxes in the same general way; the just presumption being in such case that the moneys, when raised, will be lawfully ap-

Wis., 71; *Sheldon v. Van Buskirk*, 2 N. Y., 473. On the other hand, the term to levy a tax is sometimes used in the sense to collect. See *Waterman v. Harkness*, 2 Mo. Ap., 494; *Valle v. Fargo*, 1 Mo. Ap., 344.

¹ *Cooley*, Const. Lim., 5th ed., 170-181, and cases cited; *Richards v. Hammer*, 43 N. J., 435; *People v. Home Ins. Co.*, 92 N. Y., 328; *Singer Manuf. Co. v. Graham*, 8 Or., 17; *National Bank v. Barber*, 24 Kan., 534; *International, etc., R. Co. v. Smith Co.*, 54 Tex., 1; *San Francisco, etc., R. Co. v. State Board*, 60 Cal., 12.

² As to what are local or special laws in tax cases, see *Matter of Elevated Railroad Co.*, 70 N. Y., 327; *Matter of Church*, 92 N. Y., 1. A law is not local which provides generally for local government or local taxation. *State v. Franklin Co.*, 35 Ohio St., 458; *Van Riper v. North Plainfield*, 43 N. J., 349. Nor is a law special which, designating subjects of taxation, designates one or more classes only; as, for example, one or more kinds of business or of corporations. *State v. St. Louis, etc., R. Co.*, 9 Mo. Ap., 532. But an act to cure defects in a particular local levy of taxes is void where local laws are forbidden. *Kimball v. Rosendale*, 42 Wis., 407. As are laws specially taking away remedies in tax cases, when special laws are forbidden. *State v. Cal. Mining Co.*, 15 Nev., 234; 16 Nev., 449; *State v. Consol. Mining Co.*, 16 Nev., 432.

³ *Long v. Com'rs of Richmond*, 76 N. C., 273.

propriated.¹ Provisions like the one recited may nevertheless prevent some abuses, and considerable importance has been attached to them. But the purposes of government are so infinite in variety that the specification must for the most part be very general, or the constitution could not be complied with; and in New York it has been held that a statement in a tax law, that the money to be raised is to be paid into the treasury to the credit of the general fund, is a sufficient compliance with the requirement.² The same ruling was made where the statement was that the moneys raised should be applicable to the payment of the ordinary and current expenses of the state.³ But a law does not distinctly state the tax imposed where it provides for a tax of three and a half mills on the dollar of valuation, "or so much thereof as may be necessary;" nor does it comply with the constitution when it refers to another law for the specification of the object.⁴

It is sometimes a serious question whether a constitutional provision is so far complete and specific in itself as to constitute a sufficient law without assistance from legislation. If it is, it must be considered mandatory and self-executing, and effect must be given to it accordingly.⁵ If it is not, it simply lays its mandate upon the legislature, and will fail of effect if

¹ *Halsey v. People*, 84 Ill., 89.

² *People v. Supervisors of Orange*, 17 N. Y., 235. See same case below, 27 Barb., 575.

³ *People v. Home Ins. Co.*, 92 N. Y., 328; *People v. Nat. Fire Ins. Co.*, 27 Hun, 188.

⁴ *People v. Supervisors of Kings*, 52 N. Y., 556. There are in the same case some important rulings upon constitutional requirements respecting the submission to the people of laws for the creation of debts.

The constitutional provision has no application to special local assessments. *Petition of Ford*, 6 Lans., 92; *Guest v. Brooklyn*, 8 Hun, 97. See *People v. Havemeyer*, 47 How. Pr., 494. It is not violated by an act which, in taxing a railroad, appropriates the county taxes to the payment of the bonds voted therein in aid of the road. *Bridges v. Supervisors of Sullivan*, 92 N. Y., 570. It is not violated by a provision in a law for taxing foreign insurance companies which grades the tax by that which is or may be imposed at the place of their domicile on New York insurance companies. *People v. Fire Association*, 92 N. Y., 311. Nor by one which creates a board of estimate and apportionment, and authorizes the supervisors to cause the amount certified to them by such board to be raised by taxation. *Townsend v. New York*, 16 Hun, 362.

⁵ See *Cooley, Const. Lim.*, 5th ed., 98-102.

that body neglect to pass the necessary laws to carry out the will of the people expressed in it. In the case of provisions like the one referred to, there is no doubt of their mandatory and self-executing character. They require conformity to their directions in all legislation of a certain class, and if obedience to the requirement does not appear, the legislation is void.¹ But they have no application to a case in which the constitution itself makes an appropriation of tax moneys, and the legislature merely gives effect to the provision for the purpose.²

Contracting debts. The incurring of a debt by a public corporation is, in a certain sense, the first step in taxation, since debts by such corporations are commonly only to be paid by taxation. Every state has inherent power to contract debts, subject only to such restraints as the people by the constitution may have imposed;³ but any officer assuming to pledge the credit of the state must have authority of law for the purpose. Sometimes the extent of indebtedness is restricted in amount, and any attempt to increase it beyond the restriction would be *ultra vires*. Sometimes the restriction is that a law for the creation of a debt shall only take effect after approval by the people by popular vote. Sometimes it is merely that the law for the purpose shall be passed by two-thirds vote; which means two-thirds of a quorum,⁴ unless the constitution otherwise specifies.⁵

Where the constitution required that every law creating a state debt should levy a tax annually sufficient to pay the annual interest of such debt, the requirement was held complied with by a provision "that an annual tax in addition to all other taxes shall be levied upon the property of the state,

¹ *People v. Supervisors of Kings*, 52 N. Y., 556; *Dean v. Lufkin*, 54 Tex., 266.

² *Wolcott v. People*, 17 Mich., 68.

³ *Harris v. Dubuclet*, 30 La. An., 662.

⁴ *State v. McBride*, 4 Mo., 303; *Southworth v. Palmyra, etc., R. Co.*, 2 Mich., 287; *Bond Debt Cases*, 12 S. C., 200; *Cass Co. v. Johnston*, 95 U. S., 360; *Morton v. Controller*, 4 S. C., 430.

⁵ Where the requirement is a majority of all the members *elected*, all are to be counted, though one is ineligible. *Satterlee v. San Francisco*, 23 Cal., 314.

sufficient to pay the interest on the loan," etc., there being then in force a general law, under which it became the duty of an executive officer to fix the amount of the tax and order its collection.¹ So it was held complied with in an act for borrowing money on state bonds when the provision was "that the faith and credit of the state is hereby pledged for the payment of principal and interest on said bonds, and a sufficient amount of taxes is hereby levied to pay the interest accruing on said bonds annually."²

Municipalities have power to contract debts for strictly corporate purposes, and for no others, except as within the limits discussed in a preceding chapter³ they may be authorized by legislation to go further. But, even for the customary purposes, the power may be restrained by constitutional provision, or by legislation. Where authority to contract debts is given, authority to tax for their satisfaction may be deemed given also, without express words to that effect, if such appears to be the intent of the legislature; but an implication to that effect is not a necessary one, and a party contracting with the municipality must take note of its power to tax, and of any limitation that may exist upon it.⁴

¹ *Morton v. Controller*, 4 S. C., 430.

² *Morton v. Controller*, 4 S. C., 430. The method of fixing upon the exact amount to be raised by the computation of some executive or ministerial officer is not objectionable. See above case. Also, *Edwards v. People*, 88 Ill., 840.

Provision is sometimes made for a regular annual levy for a "sinking fund." A sinking fund is a fund set apart to meet the requirements of some regular loan for which public obligations are issued; and it cannot be either raised for or devoted to floating indebtedness. *Union Pac. R. Co. v. Buffalo Co.*, 9 Neb., 449; *Same v. York Co.*, 10 Neb., 612; *Same v. Dawson Co.*, 12 Neb., 254. A constitutional provision was that "It shall be the duty of the legislature to provide by law, in all cases where a state or county debt is created, adequate means for payment of current interest, and two per cent. as a sinking fund for the redemption of the principal." Held, not to preclude the creation of a debt payable in ten years; the requirement of a sinking fund being only designed to make certain the payment within fifty years. *Bagby v. Bateman*, 50 Tex., 446. As to the appropriation of surplus revenues to pay previous debts, see *State v. State Auditor*, 32 La. An., 89.

³ See chap. IV.

⁴ *Jeffries v. Lawrence*, 42 Ia., 498; citing *Iowa R. R. Land Co. v. Sac Co.*, 39 Ia., 124; *Supervisors v. United States*, 18 Wall., 71.

Municipal Taxation. The municipal corporations of a state having no inherent power to tax must take such power as is conferred under the conditions and limitations that may be prescribed, and only for such purposes as may be expressed. This is fundamental.¹ The authority is not only a delegated authority conferred by the state, but it is to be assumed that the state has given all it intended should be exercised,² and the grant, like that of all special and limited grants, is to be strictly pursued.³ Express power to levy particular taxes is a negation of the power to lay others; and, if particular subjects of taxation are enumerated, the corporation cannot reach out to tax others.⁴ A county board of supervisors does not obtain the power to tax under a constitutional provision that it shall "fix the county levies for the ensuing year, and apportion the same among the various townships;" but the provision contemplates legislation to which it will be supplementary.⁵ And the legislation will be expected not merely to originate the power to tax, but to prescribe all necessary rules and regulations to give it complete effect, except as the constitution may already have done so.

It is not common, however, for the legislature to fix the precise amount of a municipal levy; nor is it indispensable that the amount should be determined by the local legislative body in all cases when not thus fixed.

¹ *Vance v. Little Rock*, 30 Ark., 435; *Basnett v. Jacksonville*, 19 Fla., 664; *Plaquemines v. Roth*, 29 La. An., 261; *Alton v. Insurance Co.*, 82 Ill., 45; *Corpus Christi v. Woessner*, 58 Tex., 462; *Jodon v. Brenham*, 57 Tex., 655.

² *State v. Brewer*, 64 Ala., 287.

³ *Richmond v. Richmond, etc.*, R. R. Co., 21 Grat., 604; *Tucker v. The Justices*, 34 Ga., 370; *Henderson v. Baltimore*, 8 Md., 352; *Sharp v. Johnson*, 4 Hill, 92; *State v. Davenport*, 12 Ia., 335; *In re Truffer*, 44 Barb., 46; *Howell v. Buffalo*, 15 N. Y., 512; *Bennett v. Buffalo*, 17 N. Y., 383; *Smith v. Davis*, 30 Cal., 536; *Taylor v. Downer*, 31 Cal., 480; *Smith v. Cofran*, 34 Cal., 310; *Montgomery v. State*, 38 Ala., 162; *St. Joseph v. Anthony*, 30 Mo., 537; *McComb v. Bell*, 2 Minn., 295; *State v. Jersey City*, 26 N. J., 444; *Municipality No. 1 v. Millandon*, 12 La. An., 769; *Kyle v. Malin*, 8 Ind., 34; *Chicago v. Wright*, 32 Ill., 192; *Scammon v. Chicago*, 40 Ill., 146; *Doughty v. Hope*, 3 Denio, 594; *Tallman v. White*, 2 N. Y., 66; *Cruger v. Dougherty*, 43 N. Y., 107.

⁴ *Baldwin v. City Council*, 53 Ala., 437. Authority to a municipality to levy a particular tax is not to be understood as enlarging by implication a previously existing limitation upon the whole amount of municipal levies. *Weber v. Traubel*, 95 Ill., 427.

⁵ *Virginia, etc., R. Co. v. Washington Co.*, 30 Grat., 471.

When a state auditing board is provided for by the constitution of the state, the allowances of the board will perhaps be made conclusive, and be required to go into the general tax levy for the year.¹ And in any case there seems to be no objection in principle to legislation under which the salaries of state officers, the general expenses of state government, the interest on state indebtedness and other demands against the state, which are audited in accordance with general legislation, shall be provided for by a levy made under general rules, without the necessity of a special act prescribing the amount of the particular tax. The same is true of the municipalities. When the amount is to be determined by a mere act of computation, it is properly ministerial rather than legislative.

While the method provided by legislation for fixing the amount of local levies is different in different states, and even in the same state for different classes of taxes, it can be said that in general the determination is left to local boards who are clothed for the purpose with a *quasi* legislative authority. These boards for counties will perhaps be boards of supervisors or commissioners, or county courts, so called; for cities or boroughs, common councils; for villages, a village board; for townships, a township board or board of selectmen, and for other municipal corporations some corresponding board. All such boards act by majorities in regular meetings, and any attempt to act otherwise is invalid.² And they can-

¹ See *People v. Supervisors of Queens*, 1 Hill, 195.

Where a statute provides for the levy of a tax to pay a judgment as soon as possible, a city officer cannot proceed to levy one unless otherwise authorized. *Iowa R. Lands Co. v. County of Sac*, 39 Ia., 124.

² See *ante*, pp. 257-259.

A levy of taxes made by supervisors at an adjourned meeting when they had no power to adjourn is void. *Smith v. Nelson*, 57 Miss., 138. It is void also if made at a place where the board had no lawful authority to meet. *Johnson v. Fritch*, 57 Miss., 73. But a special meeting of the board at which a levy is made will be presumed rightfully held. *Brigins v. Chandler*, 60 Miss., 862.

Where by charter a resolution for laying taxes was required to be adopted by aldermen and approved by the mayor, it is not well adopted by aldermen and mayor sitting together, with no formal approval. *Walker v. Burlington*, 56 Vt., 131.

Where a statutory meeting of a board of county commissioners is for the sole purpose of school business, an order for a gravel road tax is void. *Fahlor v. Wells Co.*, 101 Ind., 167.

not refer the authority to tax which is vested in the aggregate body to a committee with powers of final action.¹ But what is done by them within the limits of their authority will be favorably construed, and if, where they have power to make a levy, the record shows an intent to do so, it will amount to a present levy.²

In some special cases of extraordinary taxation it has been customary to provide that no authority should be had for the taxation, or for contracting debts to be paid by taxation, unless first petitioned for by a specified number of tax payers and the fact verified in some prescribed form for the action of the proper local board.³ Other conditions precedent are sometimes provided for, and the question of compliance therewith is to be certified by some local authority. The verification in these cases would not in general preclude the municipality from showing its falsity; but in favor of *bona fide* holders of municipal securities that may have been lawfully issued in reliance on the municipal action, the verification will be held conclusive.⁴

¹ *State v. Sickles*, 24 N. J., 125; *Robinson v. Dodge*, 18 Johns., 351; *Trumbull v. White*, 5 Hill, 46; *Mercer County Court v. Navigation Co.*, 8 Bush, 300. A tax, purporting to be levied by the authorities of two districts, meeting and acting jointly, is void. *State v. Reeves*, 28 N. J., 520. Authority to a county to levy a tax for county buildings will not authorize the issue of bonds for the purpose. *Shawnee County v. Carter*, 2 Kan., 115.

² *West v. Whittaker*, 37 Ia., 598; *Snell v. Fort Dodge*, 45 Ia., 564.

³ See *Couper v. Rowe*, 42 Ga., 229; *Cain v. Commissioners*, 86 N. C., 8.

⁴ *Knox County v. Aspinwall*, 21 How., 539; *Bissell v. Jeffersonville*, 24 How., 287; *Moran v. Commissioners*, 2 Black, 723; *Mercer County v. Hackett*, 1 Wall., 83; *Lexington v. Butler*, 14 Wall., 282; *Grand Chute v. Winegar*, 15 Wall., 355; *St. Joseph v. Rogers*, 16 Wall., 644; *Rock Creek v. Strong*, 96 U. S., 271; *San Antonio v. Mehaffy*, 96 U. S., 312; *Warren v. Marcy*, 97 U. S., 96; *Commissioners v. Bolles*, 94 U. S., 104; *Commissioners v. Clark*, 94 U. S., 278; *Pompton v. Cooper*, 101 U. S., 196; *Buchanan v. Litchfield*, 102 U. S., 278; *Bonham v. Needles*, 103 U. S., 648; *Pana v. Bowler*, 107 U. S., 529; *Sherman v. Simons*, 109 U. S., 735; *Coloma v. Eaves*, 92 U. S., 484; *Venice v. Murdock*, 92 U. S., 494. There are many other cases to the same effect. Where by law the county commissioners are authorized to lay a certain fence tax on application of a majority of legal voters, the determination of the commissioners upon the application is final, and cannot be attacked on a showing that some of the applicants were not voters. *Cain v. Commissioners*, 86 N. C., 8. See *First National Bank v. Concord*, 50 Vt., 257; *Mullikin v. Bloomington*, 72 Ind., 161.

But where the certificate is to be based upon an assessment roll, it is void if made when there is no roll. *People v. Suffern*, 68 N. Y., 321. Where a

But this principle has no application to a case where the municipal authorities have assumed to act and to issue negotiable securities without any legislative authority,¹ nor to a case where the securities on their face show a failure to comply with a statute requirement.² Securities issued under such circumstances cannot be validated by any act of the officers.

Voting taxes in popular meetings. Many taxes are required to be voted by popular assemblages composed of all the voters of the municipality to be taxed, or, in some instances, of certain classes of the voters, supposed to be specially interested in the tax. It is consistent with the practice of early days that this method shall be adopted in all districts whose population is not too great to render it impracticable; and we find it general in school districts, and to a large extent, also, in towns, villages and even some small cities.³ And though in the larger districts, like counties, as well as in the cities generally, the authority is most commonly intrusted to representa-

petition from tax payers is the foundation of the proceedings, mere technical defects will not be regarded. *Scott v. Hansheer*, 94 Ind., 1; *Jussen v. Board*, etc., 95 Ind., 567. As to the necessity of compliance with preliminary conditions, see further, *Lamoille V. R. R. Co. v. Fairfield*, 51 Vt., 257; *Hawkins v. Carroll*, 50 Miss., 735.

In Georgia county levies are for most purposes recommended by the grand jury (see *Couper v. Rowe*, 42 Ga., 229); but for certain necessary purposes the ordinary and county commissioners may lay taxes. See *Waller v. Perkins*, 52 Ga., 233; *Solomon v. Tarver*, 52 Ga., 405; *Walden v. Lee County*, 60 Ga., 296; *Arnett v. Griffin*, 60 Ga., 349; *Spann v. Commissioners*, 64 Ga., 498.

When a statute requires a petition for a township levy to specify the amount sought to be appropriated, but not to exceed two per centum of the taxable property, a petition which states that it is desired to raise "the sum of \$2,800, or a sum equal to two per centum of all taxable property in said township," is good. *Williams v. Hall*, 65 Ind., 129. See *Wilson v. Hamilton County*, 68 Ind., 507. Where local overseers authorized to levy a tax with the approval of two justices proceeded without, their action was held void. *Kitchen v. Smith*, 101 Pa. St., 452.

¹ *Hayes v. Holly Springs*, 114 U. S., 120.

² *Bissell v. Spring Valley*, 110 U. S., 162.

³ In Illinois it is held that where, by statute, it is provided that it shall not be lawful for a school district to lay a tax for a specified purpose without a vote of the people ordering it, a contract of the district for such a purpose, without a vote, is void, and a tax therefor will be enjoined. *School Directors v. Fogleman*, 76 Ill., 189; *Thatcher v. People*, 93 Ill., 240; *Watts v. McCleave*, 16 Ill. App., 272.

tives of the people, it is sometimes required, even in such cases, that the sense of the people shall be taken upon a proposed corporate debt or tax. The method of doing this must then be to submit distinct propositions, which can be voted upon by ballot. A proposition to levy a tax for county buildings is required by the constitutions of several states to be thus submitted. A vote is void if it is taken before there is legislation authorizing it;¹ and it is void, also, if, under the law as it then exists, there is no provision under which a portion of the municipality concerned can take part in the election.²

The repeal of a law under which a municipality was authorized, on a favorable vote of its electors, to lay a tax for a public work, will take away the power, even though the vote has been had, if any corporate act remains to be done to render the vote effectual.³

Submission to Tax Payers Only. In some special cases statutes have provided that the question of contracting a debt or levying a tax shall be submitted to tax payers only. In Minnesota and Louisiana, by reason of special provisions in the state constitutions, it is held not competent thus to restrict the vote;⁴ but in other states such submissions have been supported.⁵

¹Phelps v. Alfred Bank, 13 Wis., 432; Berliner v. Waterloo, 14 Wis., 378.

²People v. Supervisors of St. Clair, 11 Mich., 63; Campbell Co. Ct. v. Taylor, 8 Bush, 206.

³Covington, etc., R. Co. v. Kenton Co. Ct., 12 B. Monr., 144.

Where a board is empowered, after a popular vote, to levy a tax, the board must take positive action to levy it after the vote is had. Iowa R. Land Co. v. Woodbury Co., 39 Ia., 172.

⁴Harrington v. Plainview, 27 Minn., 224; Bayard v. Klinge, 16 Minn., 249; Duperier v. Viator, 35 La. An., 957.

⁵See Bullock v. Curry, 2 Met. (Ky.), 171; Gould v. Sterling, 23 N. Y., 439; Duanesburgh v. Jenkins, 57 N. Y., 177; Bennington v. Park, 50 Vt., 178; Venice v. Murdock, 92 U. S., 494.

In Texas it is held that, under a constitutional authority to levy a tax, "if two-thirds of the tax payers of such city or town shall vote for such tax," this does not mean two-thirds of those who vote, but that all must be counted. Fort Worth v. Davis, 57 Tex., 225. But an election having been held, and a favorable result declared, the courts would inquire into the truth of the declaration only in a direct proceeding to contest the election; not in a suit by a tax payer to contest the tax. Dwyer v. Hackworth, 57 Tex., 245.

Where conditions precedent to the levy of a railroad aid tax are not com-

Calling Popular Meetings. A popular assemblage for any legal purpose must be regularly convened in such manner as the law may have prescribed. The coming together of a majority of the people of a municipality, or even of all the people, at a time and in a manner not provided for by law, and the voting upon the levy of a tax, will have no legal force or validity whatever. In levying taxes, or in exercising any other function of government, the local community can only act under regular forms and according to customary legal regulations; and one of the conditions invariably is, that the power shall be exercised in an orderly manner, at a meeting assembled after due notice, and conducted according to legal forms, in order that there may be full opportunity for reflection, consultation and deliberation upon the important work to be done. Nothing short of this will insure deliberative meetings, or prevent popular gatherings degenerating into mobs, and thereby defeating the purposes for which they are authorized.

Corporate meetings may be appointed by general statute which names a certain day¹ in the year on which they are to be held. In this manner provision is usually made for annual town and school district meetings. Of such statutes every citizen is required to take notice, and a meeting assembled at the time and place appointed is a lawful meeting. This is probably the rule even where the notice of the meeting, which some statutes require to be given by publication, has been omitted; the notice by publication being provided for, not as

plied with, if the railroad company assigns its right to the tax the assignee takes it subject to all equities. *Sully v. Drennan*, 118 U. S., 287.

When, as a condition to a tax, a favorable vote of a "majority of the electors of the township" is required, this means a majority of those who vote at the same election, whether voting on the tax proposition or not. *Enyart v. Trustees*, 25 Ohio St., 618. As to when a vote for city levies is not required in North Carolina, see *Wilson v. Charlotte*, 74 N. C., 748; *Incher v. Raleigh*, 75 N. C., 267. And when for school taxes in Arkansas and California, see *County Court v. Robinson*, 27 Ark., 116; *Cole v. Blackwell*, 38 Ark., 271; *People v. Castro*, 39 Cal., 65.

It has been decided in North Carolina that the legislature may authorize less than a majority to vote taxes. *State v. Woodside*, 9 Ired., 496; *Same v. Same*, 8 Ired., 104, 106. As to what is a majority vote, see *Sanford v. Prentice*, 28 Wis., 358.

¹ It fixes the hour also unless it is otherwise determined.

an essential step, but only by way of additional precaution, to remind the people of the statutory provision which they are nevertheless bound to take notice of, whether the publication takes place or not. The right to hold the meeting comes from the statute, not from the published notice.¹ The same statute will commonly specify the subjects which may be considered at such meetings, and will limit any power to levy taxes which is permitted to be exercised. But to make the statutory notice sufficient, it would be necessary that the place of meeting be fixed, either by the statute itself or by some public act of which the electors were bound to take notice, and that the meeting be held as appointed.²

All special meetings must be regularly called as the statute may have prescribed, for no one is under obligation to pay heed to any but the legal notice, and those who come together in pursuance of any other, do not, for legal purposes, represent the electors.³ The following are customary regulations: That

¹ *People v. Cowles*, 18 N. Y., 350; *People v. Brenham*, 3 Cal., 477; *State v. Jones*, 19 Ind., 356; *People v. Hartwell*, 12 Mich., 508; *Dishon v. Smith*, 10 Ia., 212; *State v. Orvis*, 20 Wis., 235; *State v. Gates*, 22 Wis., 203. See *Marchant v. Langworthy*, 6 Hill, 646.

² A meeting adjudged to be valid under peculiar circumstances, though not held at the place designated. *Wakefield v. Patterson*, 25 Kan., 709. But a meeting held out of the state would be a nullity. *Marion Co. Com'rs v. Barker*, 25 Kan., 258.

³ *Thatcher v. People*, 93 Ill., 240, and 98 Ill., 632; *State v. Railroad Co.*, 75 Mo., 526. That a tax can only be voted at a meeting legally warned, see *Bowen v. King*, 34 Vt., 156; *People v. Jackson County*, 92 Ill., 441; *State v. Van Winkle*, 25 N. J., 73; *McPike v. Pen*, 51 Mo., 63; *State v. St. Louis, etc., R. R. Co.*, 75 Mo., 526; *Township Board v. Hastings*, 52 Mich., 523. Where the officers fix the place of meeting, it must be referred to in the notice. *Hodgkin v. Fry*, 33 Ark., 716. As to what is a sufficient warning, see *Allen v. Burlington*, 45 Vt., 202. A school district tax voted at a meeting not legally called is void. *Haines v. School District*, 41 Me., 246; *Rideout v. School District*, 1 Allen, 232; *People v. Castro*, 39 Cal., 65. A tax voted for a purpose not specified in the notice of special meeting is void. *Holt's Appeal*, 5 R. I., 603. Construction of particular notices. *Williams v. Larkin*, 3 Denio, 114; *Torrey v. Milbury*, 21 Pick., 64. A tax voted at a meeting warned without naming the hour of the meeting in the warrant is void, and it will not justify the collector in an action of trespass against him for taking property to satisfy the tax. *Sherwin v. Bugbee*, 16 Vt., 439. The return of a freeholder upon a warrant from the selectmen for warning a meeting of the inhabitants of a school district, that he had warned them according to law, was held to be conclusive in an action by one of the inhabitants against the assessors for assessing a tax on him which had been

the meeting shall be called by the officers of the municipality, either on their own motion or on the application of a certain number of the voters or freeholders; that it shall be notified either by a warning¹ delivered or its contents stated to the

voted at such a meeting. *Saxton v. Nimms*, 14 Mass., 315. Under a statute which provided that "every town meeting shall be held in pursuance of a warrant under the hands of the selectmen," a warrant signed by one only was held void, and a tax voted at a meeting held pursuant thereto was invalid, and one who had paid it might recover back of the town. *Reynolds v. New Salem*, 6 Met., 340. As to the effect of fraudulent neglect to give notice or giving misleading notice, see *People v. Allen*, 6 Wend., 486; *People v. Peck*, 11 Wend., 604; *Marchant v. Langworthy*, 6 Hill, 646; *Randall v. Smith*, 1 Denio, 214; *Jewett v. Van Steenburgh*, 58 N. Y., 85. That in proving notice of a meeting it is not sufficient to state in the affidavit or return that the notice was given "in accordance with the act," but it should state the facts, see *State v. Hardcastle*, 26 N. J., 143; *Hardcastle v. State*, 27 N. J., 551; *Cardigan v. Page*, 6 N. H., 182; *Tuttle v. Cary*, 7 Groenl., 426. Compare *People v. Highway Commissioners*, 14 Mich., 528. But see *Briggs v. Murdock*, 13 Pick., 305; *Houghton v. Davenport*, 23 Pick., 235; *Bucksport v. Spofford*, 12 Me., 487. Where the defendants in an action of trespass justified as assessors, and showed by the records of the town that they were duly elected at a town meeting legally warned, they were held not bound to go behind the records to show that the proceedings of the warning officer had been regular. *Thayer v. Stearns*, 1 Pick., 109.

¹ Difference between "calling" a meeting and "warning" it. See *Stone v. School District*, 8 Cush., 592; *Rideout v. School District*, 1 Allen, 232. And see as to the call, *George v. School District*, 6 Met., 497.

Where the warrant for a meeting specified as the object "to adopt such measures in relation to their ministerial concerns as may then and there seem expedient, and to act thereon as they see cause," held sufficient to support a vote of money in fulfillment of a contract between the minister and a committee, under which he was to discontinue the pastoral relation. *Blackburn v. Walpole*, 9 Pick., 97. A warrant "To choose a district committee and to act on other business that may be thought necessary" does not authorize prescribing a method for calling subsequent meetings by the clerk, and therefore a subsequent meeting called by the clerk cannot legally vote taxes. *Little v. Merrill*, 10 Pick., 543. A warning for a school meeting which stated the object to be "to take into consideration the expediency of raising for the use of schooling for the year ensuing," held sufficient. A vote was taken "to raise one cent and five mills on the dollar" on the list for the year, without naming any time of payment. Held to be sufficiently definite, and the tax would be payable on demand, or within a reasonable time. *Bartlett v. Kinsley*, 15 Conn., 327. As to the effect of custom on the construction of votes of town meetings, see *Freeland v. Hastings*, 10 Allen, 570, 578-9. An article in the warning of a school meeting, to see whether the district will have a school the ensuing winter, and to see what method the district will take to pay the expenses of said school, is sufficient to

several voters, or by notice published or posted in a manner particularly indicated by the statute; and that the subjects to be considered at the meeting shall be specified in the warning or notice. With all these provisions there must be careful compliance, and the meeting when held must confine itself strictly to the subjects indicated in the notice or warning.¹

Voting the Tax. In voting the tax the people will be acting in their political capacity, and their action is to be favorably construed, and not to be overruled or set aside by judicial or any other authority, so long as they keep within the limits of the power bestowed upon them. Technical defects and irregularities should be overlooked, so long as the substance of a good vote sufficiently appears, for the obvious reason that local business is largely and of necessity in the hands of plain people who are unskilled in the technicalities of law and unaccustomed to critical or even accurate use of language.² A strict construction of their doings would inevitably be mischievous, and would defeat the collection of the revenue in very many cases.³ It will be found, therefore, that the courts sustain such action wherever sufficient appears to make plain the intent of the voters, provided the intent is warranted by the law.⁴ On this principle a town vote, taken under a

authorize the district to vote a tax upon the grand list to defray the expenses of the school. *Chandler v. Bradish*, 23 Vt., 416. A warning to see if a town will vote a tax for the purpose of paying a bounty does not authorize a vote to borrow money for that purpose. *Atwood v. Lincoln*, 44 Vt., 332.

¹ Where it is prescribed that an election to vote taxes shall be held as nearly as practicable in conformity with the general election law, and the general law requires the polls to be kept open from an hour after sunrise till sunset, a tax is void which is voted at an election held only from 1 to 6 o'clock P. M. *People v. Seale*, 52 Cal., 71. Compare *Holland v. Davis*, 36 Ark., 446.

² *Irwin v. Lowe*, 89 Ind., 540; *Taymouth v. Koehler*, 35 Mich., 22. "F. moved to levy a tax," etc., "motion prevailed," held to amount to a present levy, the intent being clear. *Snell v. Fort Dodge*, 45 Ia., 564. And see *Shontz v. Evans*, 40 Ia., 189. At a school meeting it was voted "that there be an appropriation sufficient to build a house on," etc., and also that "\$800 be levied as a school-house tax." Held that a tax was voted to build a school-house at the place named in the first resolution. *Benjamin v. Malaka*, 50 Ia., 648.

³ See *School District v. Garvey*, 80 Ky., 159.

⁴ In New Jersey, towns have no authority to vote money to meet contingencies, but only for specified purposes. A vote for "incidental expenses"

statute requiring a vote for town purposes to be definite, has been sustained where it specified various purposes particularly, and then in general terms mentioned such other expenses as the town might have to defray for the year.¹ So the vote of "all the law will allow for school purposes" has been held sufficient — the law fixing a limit.² So a vote "for court-house bonds" may support a tax where the board of supervisors by resolution submitted to the people the question of taxation for a new court-house and prescribed the form of ballot.³ So a vote to levy a railroad tax of five mills on the assessment will be held sufficient if the particular object of the vote is ascertainable by reference to the remainder of the record.⁴ Other cases are mentioned in the margin.⁵

is of no validity. *State v. Saalman*, 37 N. J., 156. A town cannot by vote delegate its authority to levy taxes to a committee. *State v. Koster*, 38 N. J., 308.

¹ *Wright v. People*, 87 Ill., 582. See the same case for the right of towns in Illinois to tax in advance to create a sinking fund.

² *State v. Sickles*, 24 N. J., 125. See further as to the sufficiency of a vote for a school tax, *Adams v. Hyde*, 27 Vt., 221; *West v. Whittaker*, 37 Ia., 598. As to voting school taxes in West Virginia, see *Wells v. Board of Education*, 20 W. Va., 157.

³ *Milwaukee, etc., R. Co. v. Kossuth Co.*, 41 Ia., 57. See, further, *Tallman v. Cook*, 43 Ia., 330; *Brandirff v. Harrison Co.*, 50 Ia., 164; *Hurt v. Hamilton*, 25 Kan., 76; *Silsbee v. Stockle*, 44 Mich., 561; *Brunswick v. Finney*, 54 Ga., 317.

In levying a tax "for judgment fund," or "for city judgment tax," there is no latent ambiguity, and parol evidence is not admissible in a suit brought by a judgment creditor to show that the city council did not intend the tax for the payment of his judgment. *Rice v. Walker*, 44 Ia., 458. For an exceedingly liberal construction of a vote see *Casady v. Lowry*, 49 Ia., 523.

⁴ *Shontz v. Evans*, 40 Ia., 189. As to voting a sum in gross or voting a percentage, see *Marion Co. Com'rs v. Harvey Co. Com'rs*, 26 Kan., 181; *Buck v. People*, 78 Ill., 560; *Reed v. Millikan*, 79 Ind., 86.

⁵ A school tax nominally levied for building purposes, but neither needed nor intended for that purpose, will be enjoined. *Conner's Appeal*, 103 Pa. St., 356. In New Jersey it is necessary that school district meetings set apart specifically the sums voted by them to the several purposes, and the vote is void if they do not. *State v. Padden*, 44 N. J., 151. In Connecticut, in a vote of a school district laying a tax for its purposes, it is not essential to its validity that the particular object for which it was laid should be specified. *West School District v. Merrills*, 12 Conn., 436. A school-house having been erected under invalid votes, the district may lawfully vote a tax to pay for it. *Greenbanks v. Boutwell*, 43 Vt., 207. As to such meetings in general, their regularity and powers, see *Blackburn v. Walpole*, 9 Pick., 97; *Perry v.*

If a proposition for a tax is voted down by the electors, it may be submitted a second time unless the statute in terms or by clear implication forbids.¹

Record of Votes. In every case of the levy of taxes, whether they be voted by representative bodies or by the people, it is requisite that the action which authorizes the levy or determines anything of importance concerning it should appear of record. This is very justly and properly insisted upon in the decisions of courts. "Every essential proceeding in the course of a levy of taxes," it is said in one case, "must appear in some written and permanent form in the record of the bodies authorized to act upon them. Such a thing as a parol levy of taxes is not legally possible under the laws."² And in another, in which the action of a convention of town delegates in voting a county tax was in question, "a record of the doings of such a convention is the only evidence to show a county tax duly granted."³

Dover, 12 Pick., 206; *Little v. Merrill*, 10 Pick., 548; *Williams v. School District*, 21 Pick., 75; *School District v. Atherton*, 12 Met., 105; *Cardigan v. Page*, 6 N. H., 182; *Nelson v. Pierce*, 6 N. H., 194; *Brewster v. Hyde*, 7 N. H., 206; *Lisbon v. Bath*, 21 N. H., 319; *Schoff v. Gould*, 52 N. H., 512; *Hunt v. School District*, 14 Vt., 300; *Pratt v. Swanton*, 15 Vt., 147; *Sherwin v. Bugbee*, 17 Vt., 337; *Wyley v. Wilson*, 44 Vt., 404; *Greenbanks v. Boutwell*, 43 Vt., 207; *Allen v. Burlington*, 45 Vt., 202; *Lander v. School District*, 33 Me., 239; *Jordan v. School District*, 38 Me., 164; *Belfast, etc., R. R. Co. v. Brooks*, 60 Me., 568; *State v. Hardcastle*, 26 N. J., 143; *Hardcastle v. State*, 27 N. J., 551. The officers or the inhabitants merely treating the proceedings of an invalid meeting as valid does not make them so. *Pratt v. Swanton*, 15 Vt., 147.

A warrant for a town meeting stating the object, among other things, "to raise such sums of money as may be necessary to defray town charges for the ensuing year," is sufficient to legalize the voting of a tax for interest on town debt. *West Hampton v. Searle*, 127 Mass., 502. As to the particularity required in stating the purpose of a town tax, see *Blodgett v. Holbrook*, 39 Vt., 336.

¹*Supervisors v. Galbraith*, 99 U. S., 214.

Town boards in some states are given authority to levy taxes for certain necessary purposes where the people have neglected to vote. See *Ryerson v. Laketon*, 52 Mich., 510.

²*Campbell, J.*, in *Moser v. White*, 29 Mich., 59, 60. See, also, *Appeal of Powers*, 29 Mich., 504; *Doe v. McQuilkin*, 8 Blackf., 335; *Hecht v. Boughton*, 3 Wy., 368.

³*Richardson, J.*, in *Cardigan v. Page*, 6 N. H., 182, 191. See *Farrar v. Fessenden*, 39 N. H., 268, 277. *Fowler, J.*, says: "The records of taxes were properly received to prove the taxation, which, being matter of record,

The importance of the record is seen in the fact that it is intended by the law not only for evidence but for the only evidence of the action taken; and that when properly made up its recitals are conclusive; evidence to disprove them not being receivable.¹ The records ought to be duly authenticated on their face by the officers who make them, though if they have been kept in the proper custody and are identified beyond question this is probably not essential.² If the record is lost or destroyed its contents are subject to parol proof as in other cases, after the necessary preliminary showing has been made.³ But in the absence of evidence that a record ever existed, the fact cannot be made out by presuming it.⁴

could be proved in no other way, unless the loss of the records were first shown." See, also, *Paul v. Linscott*, 56 N. H., 347; *Hecht v. Boughton*, 2 Wyo., 368.

In Pennsylvania, in *Gearhart v. Dixon*, 1 Pa. St., 224, 228, it is said of the record of a school tax, that "where it was defective, it might be explained or supplied by parol testimony. . . . The law does not require school directors to keep a record of their proceedings, although it is better that they should do so." Compare *Moor v. Newfield*, 4 Me., 44.

In Nebraska, if the record fails to show that a school district tax was one authorized to be voted, it cannot be collected; but the mere failure to specify in the tax duplicate all the uses to which the moneys are to be applied is not fatal. *Burlington, etc., R. Co. v. Lancaster County*, 4 Neb., 293.

The omission from the record of a levy of the words "on the dollar," after the specification of the number of mills in case of some of the taxes voted, is a mere irregularity and will not vitiate the proceedings. *Jefferson Co. Com'rs v. Johnson*, 23 Kan., 717.

¹ *Taylor v. Henry*, 2 Pick., 397; *Bissell v. Jeffersonville*, 24 How., 237; *Eddy v. Wilson*, 43 Vt., 362; *Halleck v. Boylston*, 117 Mass., 469, and cases cited.

² A failure of the officers to sign the record of the board of supervisors does not vitiate a tax levied by it. *Lacey v. Davis*, 4 Mich., 140; *People v. Eureka, etc., Co.*, 48 Cal., 143; *Martin v. Cole*, 38 Ia., 141. In *Kansas* it is said if the proper officer has failed to record a levy of a tax, the neglect will not be suffered to defeat it. *Kansas City, etc., R. Co. v. Tontz*, 29 Kan., 460.

³ *Farrar v. Fessenden*, 39 N. H., 268; *Quinby v. North American, etc., Co.*, 2 Heisk., 596; *Irwin v. Miller*, 23 Ill., 348. As to helping out defective records by proof, see *McReynolds v. Longenburger*, 75 Pa. St., 18.

⁴ *Hilton v. Bender*, 69 N. Y., 75.

Where the statute requires a levy of a special tax to appear of record in a book kept in the office of the city recorder, the tax deed, though *prima facie* evidence, is defeated by showing that no record was made. Mere memorandum by city recorder is not enough. *Hintrager v. Kiene*, 62 Ia., 605.

In *Michigan*, by statute, proof in tax cases that no record can be found is

When taxes are voted by a city council or other local body, a common and very useful provision is one that the yeas and nays shall be entered on the journal, so that no member shall escape his proper share of responsibility for the vote. Such a provision is mandatory,¹ and if disregarded, a subsequent amendatory resolution passed after a change in the membership of the body will not save it.² But without such a provision it would be necessary only that the record should show a quorum present and the proposition adopted.³

Adherence to the Vote. When a proposition is required to be submitted to the people, and is actually submitted and passed upon, any subsequent modification by the officers who are to act upon it is *ultra vires* and nugatory.⁴ Those officers must obey and keep within the vote taken.⁵

Certifying the Vote. A tax, when voted by the people or by a local board, is sometimes required to be certified to some other authority by which final action in the case is then taken. This in several states is the case with school taxes, the votes for which are required to be certified by the proper school district officer to the township or county officers for the levy of the tax. It has been held in several cases that the certificate was jurisdictional, and that a levy without it could not be supported.⁶ But if the certificate is given and is sufficient in sub-

not proof that it was never made, and the presumption in favor of a tax title may sustain the proceedings. See *Upton v. Kennedy*, 36 Mich., 215. A highway tax is void where the town records do not show it was voted, and especially where it exceeds the legal limit. *Flint, etc., R. Co. v. Auditor-General*, 41 Mich., 695.

¹*Steckert v. East Saginaw*, 22 Mich., 104. Compare *Tobin v. Morgan*, 70 Pa. St., 229.

²*Pontiac v. Axford*, 49 Mich., 69.

³Where the record stated that A., B., C. and others, justices of the county court, were present, held not enough, as it did not affirmatively appear that a majority was present. *Dudley's Ex'rs v. Oliver*, 5 Ired., 227. Compare *State v. McIntoch*, 7 Ired., 68; *Insurance Co. v. Sortwell*, 8 Allen, 217; *Lacey v. Davis*, 4 Mich., 140.

⁴*Platteville v. Galena, etc.*, R. Co., 43 Wis., 493; *Hodgman v. Railroad Co.*, 20 Minn., 48; *State v. Daviess Co.*, 64 Mo., 30.

⁵*Sullivan v. Walton*, 20 Fla., 552.

⁶*Burlington, etc., R. Co. v. Saunders Co.*, 16 Neb., 123. So if given, but not complying in its essentials with the statute. *State v. Duryea*, 40 N. J., 266. The county authorities cannot levy for one year a school tax that

stance, all mere technical defects and informalities should be disregarded.¹

Conclusiveness of Municipal Action. In all legal proceedings, after proper evidence is given of municipal action, it is always to be assumed that the municipality, whether represented by its people or by its official board, has acted wisely and well upon all matters of policy and of discretion which have been submitted to it, and that the conclusion was warranted by the facts and circumstances which were the basis of its action. The courts have no power to review their action, so long as they are found to have kept within the limits of their authority. The legislature, which gives and recalls at pleasure the power to tax, may do so, but not the courts.

A learned and able court has spoken very clearly and pointedly concerning the absence of power in the judicial tribunals to entertain appeals from the municipal bodies, in the exercise of their discretionary power to tax. The case was one in which the attempt was made to enjoin school directors from the levy of a tax regularly voted. "No such appeal lies, for none is given by law. Most of our tax laws entitle the citizen

should have been certified to them for the year before. *Weber v. Railway Co.*, 108 Ill., 451, citing *Lebanon v. Railway Co.*, 77 Ill., 539. In Michigan it has been held that if the officer to whom the tax should be certified has no authority or discretion in the case, and he actually proceeds to levy the tax without the proper certificate, the failure to transmit it ought to be held the neglect of a mere formality, and the tax sustained. *Smith v. Crittenden*, 16 Mich., 152. See *Upton v. Kennedy*, 36 Mich., 215; *Iowa R. R. Land Co. v. Carroll Co.*, 39 Ia., 151; *Union Trust Co. v. Weber*, 96 Ill., 346. But as to this see *Matteson v. Rosendale*, 37 Wis., 254; *Powell v. Supervisors*, 46 Wis., 210; *Cairo, etc., R. Co. v. Parks*, 32 Ark., 131; *Worthen v. Badgett*, 32 Ark., 496; *Hodgkin v. Fry*, 33 Ark., 716.

¹ *West v. Whitaker*, 37 Ia., 598; *Snell v. Fort Dodge*, 45 Ia., 564. Where a clerk was required to certify the "aggregate amount" of the tax required to be levied, it is enough if he certifies that the necessary amount of taxes was a certain per cent. on the taxable property of the town. This gives information sufficiently definite, and the form of words is immaterial. *Gage v. Bailey*, 102 Ill., 11; *Burlington, etc., R. Co. v. Lancaster County*, 12 Neb., 324. See *Dent v. Bryce*, 16 S. C., 1; *State v. Thompson*, 18 S. C., 538; *State v. Gadsden County*, 17 Fla., 418; *Hodgkin v. Fry*, 33 Ark., 716. If a certificate for the levy of an agricultural society tax is required to be signed and sworn to by the president and secretary of the society, it is fatally defective if signed and sworn to by one of them only. *Hogelskamp v. Weeks*, 87 Mich., 422.

to a hearing before he is obliged to pay; not to a judicial hearing, indeed, but to an appeal to some special tribunals, generally the county commissioners; but the school law gives no such appeal. This is the reason why the ear of the courts should be open to well founded complaints on the part of the citizen; but where he has no irregularity, no neglect of duty, no excess of authority to complain of, nothing, indeed, but an indiscreet use of clearly granted discretion, he will vex the judicial ear in vain, for the judicial arm can redress no such wrong. The power of taxation, altogether legislative, and in no degree judicial, is committed by the legislature, in the matter of schools, to the directors of school districts. If the directors refuse to perform their duties, the court can compel them. If they transcend their powers, the court can restrain them. If they misjudge their power, the court can correct them. But if they exercise their unquestionable powers unwisely, there is no judicial remedy."¹ This is a clear and strong statement of a wise and salutary general principle.

When, therefore, a school district, having competent power by statute to do so, determines in due form of law to erect a school-house, no discontented party is to be heard to allege, as a basis for legal relief, that the building was unnecessary or the cost too great, or that in any other particular the action taken was unwise or impolitic. It is conclusive that it has been decided upon by the competent tribunal;² and if the decision was by a meeting of electors, the record of the meeting is conclusive that those who met and voted upon the question were competent to do so.³

Judicial Questions. It is possible, however, for judicial questions to arise under some tax laws, which must first be

¹ Woodward, J., in *Wharton v. School Directors*, 42 Pa. St., 353, 364.

² Williams v. School District, 21 Pick., 75; *Petition of Powers*, 52 Mo., 218; *Wharton v. School Directors*, 42 Pa. St., 353.

³ Eddy v. Wilson, 43 Vt., 262. Possibly it might be otherwise if fraud were alleged. The action of a town having authority to buy and improve a cemetery cannot be attacked on grounds of extravagance when the power has not been exceeded. *Jenkins v. Andover*, 103 Mass., 94. That courts cannot restrict or restrain a power conferred to grant licenses for revenue, see *Kniper v. Louisville*, 7 Bush, 599; citing *Mason v. Lancaster*. 4 Bush, 406.

passed upon by the local authorities, but where their decision cannot be final. Many such questions are referred to in later chapters of this work. It has been held in Indiana that where a subscription of a township in aid of a railroad was by law to be made by county commissioners when certain facts appeared, the county commissioners in acting upon the facts were acting judicially, and an appeal would lie from them to the courts;¹ but the cases in which such an appeal would be allowable must be very rare.

Restrictions upon municipal taxation. All municipal corporations and bodies are, in respect to the power to tax, under certain restrictions, some of which inhere in the very nature of government, while others are expressly imposed. We have seen already that the states, by virtue of their membership in the Union, are by implication forbidden to lay any tax which would preclude or embarrass any federal agency, or the exercise of any federal power. What the states cannot themselves do, they cannot empower their municipal bodies to do.² Congress, as to the municipalities within the territories and the District of Columbia, might doubtless give larger powers of taxation than could be conferred by the states, but it is not customary to do so. We have also seen that by implication the powers of taxation that are conferred by the state are so restricted as to preclude the taxation of state agencies and state property. Also that local taxation must be restricted to local purposes. Upon these subjects nothing further need be said here.

But it has been deemed important by the people in many states that they should go further, and impose special restrictions, not only in respect to local taxation, but also in respect to state levies; and they have, therefore, done so by their constitutions. Some of these are an absolute negation of taxation for certain purposes; as, for example, to give aid to private

¹ *County Commissioners v. Karp*, 90 Ind., 236.

² *Stuyvesant v. New York*, 7 Cow., 588; *Illinois Conference Female College v. Cooper*, 25 Ill., 148; *Haywood v. Savannah*, 12 Ga., 404; *O'Donnell v. Bailey*, 24 Miss., 886.

corporations.¹ Some such restrictions have been deemed necessary to prevent the state, as well as the municipalities, from engaging in wild schemes and speculative or extravagant enterprises, and they fix a limit to power which must be strictly observed. It is also by some constitutions expressly made the duty of the legislature, when it shall create a public corporation and delegate to it the power to tax, to impose restrictions on that power, in order that it may not be abused. One object in all written constitutions is the protection of minorities against oppressive action on the part of majorities. Such oppressive action in the case of the local bodies is not unlikely to consist in the levy of enormous taxes, or the incurring of enormous debts, under the influence of temporary excitements and passions, and perhaps for purposes which cooler reflection would condemn. The mandate that restriction shall be imposed is, therefore, a very proper one; but it is addressed to the discretion of the legislature,² and there is no extraneous authority to regulate or to enforce its exercise.

¹In some cases a question has arisen whether such a restriction, when imposed in general terms, was a restriction on the state, and also on its municipalities. Without undertaking to classify them, the following are referred to: *Slack v. Railroad Co.*, 13 B. Monr., 1, 16; *Dubuque County v. Railroad Co.*, 4 Greene (Iowa), 1; *Clapp v. Cedar County*, 5 Ia., 15; *State v. Wapello County*, 13 Ia., 388; *Clark v. Janesville*, 10 Wis., 136; *Bushnell v. Beloit*, 10 Wis., 195; *Prettyman v. Supervisors*, 19 Ill., 406; *Robertson v. Rockford*, 21 Ill., 451; *Johnson v. Stark County*, 24 Ill., 75; *Perkins v. Lewis*, 24 Ill., 208; *Butler v. Dunham*, 27 Ill., 474; *People v. Chicago*, 51 Ill., 17, 34; *Richmond v. Scott*, 48 Ind., 568; *People v. Supervisors, etc.*, 16 Mich., 254; *Bay City v. State Treasurer*, 23 Mich., 449, 504. An exemption from "public taxes," held not to be an exemption from taxation for municipal purposes. *Morgan v. Cree*, 46 Vt., 773; S. C., 14 Am. Rep., 640.

²*People v. Mahaney*, 13 Mich., 481, 487. In this case it was decided that the power of a police board to determine what sums should be raised for their purposes was limited, the statute confining the power to the necessary police expenses. And see *Paine v. Spratley*, 5 Kan., 525; *Bank of Rome v. Rome*, 18 N. Y., 88; *Hill v. Higdon*, 5 Ohio St., 243, 248; *Northern Ind. R. Co. v. Connelly*, 10 Ohio St., 159, 165; *Maloy v. Marietta*, 11 Ohio St., 636. A provision requiring the legislature to restrict the power of municipal taxation is complied with, in an act for a special street assessment, by limiting it to an assessment to the middle of the block upon adjacent property. *Hines v. Leavenworth*, 8 Kan., 186.

A provision in the constitution giving the legislature authority to restrict the power of cities in taxation and assessments, and to prevent abuses in assessments, will not prevent passing laws to limit the power of courts to set aside assessments. *Matter of Mead*, 74 N. Y., 216.

Excessive Taxes. It is not incompetent for a municipality having power to levy a tax for a specified purpose to add an item to provide for possible deficiencies in collection.¹ And in the case of a state levy, if the state officers having authority for the purpose fix upon a percentage on the assessment which in their judgment will actually produce the required amount, the levy is not to be held void, either in whole or in part, because the actual production is somewhat in excess.² But where the limit is precisely fixed by law it should not be exceeded, even for the purpose of paying a judgment, unless the judgment was rendered upon a contract, and the contract was one which was entered into before the statutory limit was fixed.³

It is neither incompetent nor unusual for the state to confer upon its counties, cities, villages and townships a very general authority to tax for their purposes all the subjects of taxation within their territorial limits as fully as the state itself taxes them.⁴ But the power, both as to extent and duration, is during the pleasure of the legislature,⁵ subject only to the restric-

¹ See *Hyde Park v. Ingalls*, 87 Ill., 11; *Vose v. Frankfort*, 64 Me., 229; *Edwards v. People*, 88 Ill., 340; *People v. Wiltshire*, 92 Ill., 260; *Union Trust Co. v. Weber*, 96 Ill., 346; *People v. Cooper*, 10 Ill. Ap., 384.

It is not competent by law to leave to a state board the power to fix the rate of state taxation "after allowing for delinquency in collection," since that would be a delegation of legislative power. *Houghton v. Austin*, 47 Cal., 646. Compare *San Francisco, etc., R. Co. v. State Board*, 60 Cal., 12.

² *Edwards v. People*, 88 Ill., 340; *Union Trust Co. v. Weber*, 96 Ill., 346.

³ See *Witkowski v. Bradley*, 35 La. An., 904. Also *Dean v. Lufkin*, 54 Tex., 265.

⁴ *Wingate v. Sluder*, 6 Jones, L., 552; *Durach's Appeal*, 62 Pa. St., 491; *Cheaney v. Hooser*, 9 B. Monr., 330, 339; *Augusta v. National Bank*, 47 Ga., 562. Authority to assess "all taxable property" embraces all taxable at the time the authority is given, and all made taxable by subsequent legislation. *Buffalo v. Le Couteulx*, 15 N. Y., 451. A limitation of taxes to a certain percentage of the assessed valuation is enlarged by implication when the legislature authorize the creation of any particular debt, to the extent that may be necessary to meet the demand. *Commonwealth v. Commissioners of Alleghany County*, 40 Pa. St., 348. See p. 348, n. 1.

⁵ A general authority given by a city charter to tax property for its purposes does not preclude the state making exemptions within the city afterwards. *Richmond v. Richmond & Danville R. R. Co.*, 21 Grat., 604. If city boundaries are extended after the time for the annual assessment has passed, it is competent to provide for an assessment for the current year of the property newly added. *Swift v. Newport*, 7 Bush, 87. Compare *Waldron v. Lee*, 5 Pick., 323; *Jackman v. School District*, 5 Gray, 413. The right

tion already mentioned, that when municipal corporations under competent authority have contracted debts, having at the time power to tax for their payment, the creditors have a right to rely upon this power for their security, and it cannot afterwards be so far restricted as to prejudice their demands.¹

The most common of the express restrictions on the municipal power to tax is one limiting the amount or the rate that can be imposed in any one year. A municipal levy in disregard of the restriction is void.²

The legislature, in the plenitude of its power in matters of

to tax may be taken away by the legislature even after the tax has been levied. *Augusta v. North*, 57 Me., 392.

¹See *ante*, p. 76, and cases cited. Also, *Wolff v. New Orleans*, 108 U. S., 358; *Louisiana v. Pillsbury*, 105 U. S., 278; *Gibbs v. Green*, 54 Miss., 592.

It has been decided that when by constitutional limitation a city is restricted to a certain per cent. on the valuation at the time when city bonds are voted and sold, it is not competent subsequently to so direct the taxing power of the city to other objects as to prevent payment of interest on the bonds. If the taxing power will not produce enough for all purposes, the proceeds should be shared *pro rata*. *Sibley v. Mobile*, 3 Woods, 585.

²*State v. Humphreys*, 25 Ohio St., 520; *State v. Strader*, 25 Ohio St., 527; *Dean v. Lufkin*, 54 Tex., 265; *Witkowski v. Bradley*, 35 La. An., 904. In Arkansas it has been held that an excessive levy cannot be sustained even as to the amount that might legally have been voted (*Worthen v. Badgett*, 32 Ark., 494); though when the levy is brought up on *certiorari*, it will be quashed only as to the excess. *Vance v. Little Rock*, 30 Ark., 435. In Nebraska the submission to popular vote of the question whether a levy should be made in excess of the legal limit is void. *Burlington, etc., R. Co. v. Clay Co.*, 18 Neb., 367. And so would the levy be if made, even though the purpose was to pay previous indebtedness. *State v. Gosper Co. Com'rs*, 14 Neb., 22.

In New Hampshire an excessive tax is held void for the excess only. *Taft v. Barrett*, 58 N. H., 447. In Kansas, where a county tax was limited to ten mills a year, a tax of eighteen mills for the current expenses of prior years it was held should not be wholly enjoined, the court saying: "It may be that in those years only a small amount of tax was levied, and if so, the county may levy an additional amount for those years, provided the two levies for any one year do not exceed ten mills." *Commissioners v. Blake*, 19 Kan., 299. See on the general subject, *State v. Van Every*, 75 Mo., 530; *Cummings v. Fitch*, 40 Ohio St., 56.

The general laws of Iowa do not limit the power of a city to tax so that, after levying ten mills for general city purposes and road purposes, it cannot levy a tax to pay a judgment against it. *Rice v. Walker*, 44 Ia., 458.

A limitation as to one purpose which is specified is not a limitation as to others. *Brokaw v. Gibson Co.*, 73 Ind., 543.

taxation, may of course make special exceptions, so as to authorize the incurring of particular obligations which will require taxation in excess of the general limitation to provide for them.¹

The General Restriction. But the most important, and perhaps the most effective, restriction of all is the rule of law which requires all municipal organizations or boards to show the grant of any authority they may assume to exercise. Towns, it has been said — and the remark applies to all such organizations — are corporations of limited powers; they cannot vote and assess money upon the inhabitants for all purposes indiscriminately, but must be confined to the established powers of towns, as settled by positive enactment or by well defined and ancient usage.² They cannot, therefore, tax ex-

¹ *United States v. New Orleans*, 98 U. S., 381; *Wolff v. New Orleans*, 103 U. S., 358. Where the power to tax is limited generally, a special act empowering the levy of a railroad aid tax to that extent enlarges it. *Quincy v. Jackson*, 113 U. S., 332. See *Butz v. Muscatine*, 8 Wall., 575; *Commonwealth v. Pittsburgh*, 34 Pa. St., 496; *Commonwealth v. Alleghany Co.*, 40 Pa. St., 348.

The constitution of Missouri contained a restriction upon school district taxation, but provided that for the purpose of erecting public buildings the rate limited might be increased when the rate of increase should have been submitted to a vote of the people, etc. Such a provision is not self-executing, but requires legislation for its enforcement. *St. Joseph Board, etc., v. Patten*, 62 Mo., 444.

² *Shaw*, Ch. J., in *Cushing v. Newburyport*, 10 Met., 508, 510. There is a very valuable statement in this case of the power of towns in respect to schools, and its history. For a history of the legislation of Michigan territory and state on the same subject, and the powers of the districts, see *Stuart v. School District*, 30 Mich., 69.

As to the right to establish free schools in a particular district of a state by a statute which leaves the final decision to the voters of the district, see *Bull v. Read*, 13 Grat., 78. The right to refer such questions to the voters of the locality was also affirmed in *Slack v. Railroad*, 18 B. Monr., 1, 9, 28; *Stein v. Mobile*, 24 Ala., 591, and numerous other cases. The legislature may, in its discretion, create independent school districts without the assent of the residents, and authorize a board chosen by its voters to make an annual levy for the erection of buildings and the support of schools therein. *Kuhn v. Board of Education*, 4 W. Va., 409. That a school district tax is not within a statute which limits the amount of a tax for town and county purposes, see *Taft v. Wood*, 14 Pick., 362; *Goodrich v. Lunenburg*, 9 Gray, 38, 40; *Blickensderfer v. School Directors*, 20 Pa. St., 38.

cept for the very purposes allowed by law, and in the manner and under the conditions prescribed by law.¹

Exhausting authority. The taxing power once conferred is presumptively continuous, and to be exercised again and again as often as may be required by the exigencies of government and as often as may be consistent with the act of delegation.² But custom has much to do with the construction of such powers, and sometimes a single exercise must be deemed to exhaust the power for the time being, when the custom is to tax but once within a certain period of time; as, for instance, within the year. And this is the general custom in the case of local taxes.³ If the amount of tax which by law can be im-

¹ A tax voted to build a school-house on a site not legally designated is invalid; that being a condition precedent. *Marble v. McKenney*, 60 Me., 332. Where the statute required assessors, before assessing any school district tax, to determine in which district the lands of persons residing out of the town should be taxed, and to certify their determination to the town clerk, who was to record the same, *held*, that an assessment without complying with this requirement was invalid, and an inhabitant of the district might avail himself of the defect. The determination, it will be seen, was really as to what should be the limits of the district. *Taft v. Wood*, 14 Pick., 362. See, also, *Rawson v. School District*, 100 Mass., 134. By statute a town was not to be redistricted oftener than once in ten years, "so as to change the taxation of lands of proprietors." A tax levied in a new district established in violation of this provision is void. *Gustin v. School District*, 10 Gray, 85. See *Holmes v. Baker*, 16 Gray, 259.

Where supervisors have power to levy a tax only at their regular session, if that session is finally adjourned, and they then come together, change their record to make it show a temporary adjournment, and vote a tax, the vote is void. *Scott v. Union Co.*, 63 Ia., 583.

² See *Municipality v. Dunn*, 10 La. An., 57; *Williams v. Detroit*, 2 Mich., 560.

³ See *State v. Van Every*, 75 Mo., 530; *Cummings v. Fitch*, 40 Ohio St., 56; *Vance v. Little Rock*, 30 Ark., 435.

A school board having power to levy a tax not exceeding one per cent. in one year, *held* that when they ordered a tax, though below the maximum, they had exhausted their power for the year. *Oliver v. Carsner*, 39 Tex., 336. So in Oregon it has been decided that after one assessment of all the taxable property has been made and returned, and the tax levied thereon, there is no power to make a new assessment in order to reach property which has been brought within the district since the regular assessment. *Oregon Steam Nav. Co. v. Portland*, 2 Or., 81. But an omission of the county court to exact license taxes when making the general levy does not preclude requiring them afterwards. *State v. Maguire*, 52 Mo., 420.

In Texas it is held that if a commissioners' court which has exhausted its

posed for the year is already levied, the authority is of course exhausted, and a further levy under any pretense is void.¹ It is of no legal importance that the first levy which exhausted the power was made under the compulsion of judicial *mandamus*.² But an abortive attempt to make an assessment does not exhaust the power, and if no other obstacle exists, the officers may disregard the futile action and proceed anew.³

authority in making a levy for ordinary purposes makes an additional levy in part for the same purpose, the whole is void. *Dean v. Lufkin*, 54 Tex., 265. A limitation for one purpose is not a limitation as to others. *Brokaw v. Gibson County*, 73 Ind., 543. A railroad aid tax being limited to five per cent., a county cannot, after voting that to one road, make a further vote to another. *Dumphy v. Supervisors*, 58 Ia., 273.

¹ A city had authority to levy taxes not exceeding fifteen mills on the dollar for the year. An ordinance was passed levying a tax to that extent. Afterwards one was passed for levying two mills additional for sinking fund. Held, that the first was valid and the last void. Had the whole been voted in one ordinance, it seems the whole would have been void. *Cummings v. Fitch*, 40 Ohio St., 56. But perhaps it might be sustained if the amount actually levied did not exceed the legal limit. *People v. Cooper*, 10 Ill. App., 384.

When the amount of school-house fund tax is limited to ten mills, a further tax to pay a judgment against the school district cannot be levied, although there is a provision that where a judgment has been obtained against the school district the board shall pay it by an order, the payment of which is to be provided for by the district meeting. *Sterling, etc., Co. v. Harvey*, 45 Ia., 466. See for a similar point, *Commissioners of Osborne Co. v. Blake*, 25 Kan., 356.

² *Vance v. Little Rock*, 80 Ark., 435.

³ *Himmelman v. Cofran*, 36 Cal., 411, citing *Pond v. Negus*, 3 Mass., 230; *Libby v. Burnham*, 15 Mass., 144; *Bangor v. Lancy*, 21 Me., 472. On the general subject see, also, *Woodruff v. Fisher*, 17 Barb., 224; *Howell v. Buffalo*, 15 N. Y., 512; *People v. Haines*, 49 N. Y., 587; *Lappin v. Nemaha County*, 6 Kan., 403.

CHAPTER XII.

LISTING OF PERSONS AND VALUATION OF ESTATES FOR TAXATION.

General course. When taxes for any particular district have been lawfully voted, it next becomes necessary, before a tax can become a charge upon either person or property, that a list of taxables should be made by the officer to whom by law that duty is intrusted. If the tax to be laid is a capitation tax, nothing more may be needful; but capitation taxes are so few and so unimportant that they scarcely call for more than a passing remark. But when taxes are to be apportioned among the taxables in proportion to the value of property, or according to special benefits, or upon the results of business, it becomes requisite that an official estimate should be made for that purpose. This estimate, when made under state laws, is commonly called an assessment, and the completed document is given the name tax list or assessment roll, or something equally significant and indicative of its nature. Under state laws general levies are most commonly made upon an assessment by the value of property, and it is of such an assessment that we shall speak in this chapter.

An assessment, strictly speaking, is an official estimate of the sums which are to constitute the basis of an apportionment of a tax between the individual subjects of taxation within the district.¹ It does not, therefore, of itself lay the charge upon either person or property, but it is a step preliminary thereto, and which is essential to the apportionment. As the word is more commonly employed, an assessment consists in the two processes of *listing* the persons, property, etc., to be taxed, and of *estimating* the sums which are to be the guide in an apportionment of the tax between them. When this listing and estimate are completed in such form as the law may have prescribed, nothing remains to be done, in order to determine the individual liability, but the mere arithmetical

¹Wells v. Smyth, 55 Pa. St., 159; Geren v. Gruber, 26 La. An., 694; Road v. Mitchell Co., 39 Ia., 444; Perry Co. v. Railroad Co., 58 Ala., 456.

process of dividing the sum to be raised among the several subjects of taxation, in proportion to the amounts which they are respectively assessed. Sometimes the word assessment is used as implying the completed tax list; that is to say, the list of persons or property to be taxed, with the estimates with which they are chargeable, and the tax duly apportioned and extended upon it;¹ but this employment of the word is unusual except in the cases in which the levy is apportioned by benefits; and in those cases the act of determining the amount of the benefits is of itself, under most statutes, a determination of the individual liability, and the result only needs to be entered upon the roll or list² to complete the levy.

It is customary to provide by law that one assessment shall be made use of for the levy of both state and local taxes, for the year or other period of time for which assessments are made, instead of directing a separate assessment for each description of tax. This is a matter as well of economy as of convenience, as one assessment answers all purposes. Independent assessments are sometimes provided for in the case of school taxes and some others, but they raise no peculiar questions, and require no special consideration.

Necessity for Assessment. An assessment, when taxes are to be levied upon a valuation, is obviously indispensable. It is required as the first step in the proceedings against individual subjects of taxation, and is the foundation of all which follow it. Without an assessment they have no support, and are nullities.³ The assessment is, therefore, the most important of all

¹ A statute limiting the time to contest taxes "for any error or defect going to the validity of the assessment," held to use the word assessment as going to the whole statutory method of imposing taxes upon property. *Prentice v. Ashland Co.*, 56 Wis., 345. As to the meaning of assessment in railroad cases in Alabama, see *State Auditor v. Jackson Co.*, 65 Ala., 142; *Perry Co. v. Railroad Co.*, 65 Ala., 391.

² For meaning of "list" and "grand list" in Vermont, see *Wilson v. Wheeler*, 55 Vt., 446. An assessment cannot be made by the legislature. See, for a case held to be an attempt of the sort, *Albany, etc., Bank v. Maher*, 9 Fed. R., 884. Also, *Attorney-General v. Leavenworth*, 2 Kan., 61.

³ *Thurston v. Little*, 3 Mass., 429; *Thayer v. Stearns*, 1 Pick., 482; *McCall v. Larimer*, 4 Watts, 351; *Miller v. Hale*, 26 Pa. St., 432; *Matter of Nichols*, 54 N. Y., 62; *Driggers v. Cassady*, 71 Ala., 529; *Early v. Whittingham*, 43 Ia., 162; *Quivey v. Lawrence*, 1 Idaho, 313; *Perry v. Railroad Co.*, 58 Ala.,

the proceedings in taxation, and the provisions to insure its accomplishing its office are commonly very full and particular.¹

Mandatory Requirements. The assessment being so important, the statutory provisions respecting its preparation and contents ought to be observed with particularity. They are prescribed in order to secure equality and uniformity in the contributions which are demanded for the public service, and if officers, instead of observing them, may substitute a discretion of their own, the most important security which has been devised for the protection of the citizen in tax cases might be rendered valueless. The assessment must, therefore, be made by the proper officers or it will be void; and if a board of review, which has power to appoint the assessors and afterwards to review their work, should appoint any of their own members to that office, the appointment would be void, and an assessment made by the appointees illegal.² So the assessment

456. A statute which cures irregularities cannot cure this defect of jurisdiction. *McReynolds v. Longenberger*, 57 Pa. St., 13. See *Brady v. Offut*, 19 Ia. An., 184; *McCready v. Sexton*, 29 Ia., 356. In California a tax, in order to be valid, must rest upon an assessment duly made by an assessor chosen by the people of the district assessed. *People v. Hastings*, 29 Cal., 449. See *Farris v. Coover*, 10 Cal., 589. A school or other township assessment by county assessors is void. *People v. Hastings*, 29 Cal., 449; *People v. Sargeant*, 44 Cal., 430; *Williams v. Corcoran*, 46 Cal., 553; *Reiley v. Lancaster*, 39 Cal., 354. A school tax must be assessed by district assessors. *People v. Railroad Co.*, 49 Cal., 414. See for a like point, *Mason v. Johnson*, 51 Cal., 612; *Smith v. Farrelly*, 52 Cal., 77. See *Granger v. Parsons*, 2 Pick., 392. But in Massachusetts school district taxes may be on the town valuation, the statute providing for no other. *Waldron v. Lee*, 5 Pick., 323. See *Weber v. Reinhard*, 73 Pa. St., 370, where, in a case of taxation of the product of mines by the ton, the question, what is an assessment, was discussed. In Kansas the assessment roll should contain the names of all persons who should return personal property statements, even though they have no property not exempt from taxation. *State v. Phillips Co.*, 26 Kan., 419.

¹ No assessment is required when the statute itself prescribes the amount to be paid, and this can be recovered by suit. *United States v. Halloran*, 14 Blatch., 1; *King v. United States*, 99 U. S., 229; *United States v. Pacific R. Co.*, 1 McCrary, 1; 4 Dill., 71.

² *Hawkins v. Jonesboro*, 63 Ga., 527. If a board of supervisors which has no authority to increase an assessment shall assume to do so, and taxes shall be levied upon the increased assessment, the taxes will be void. *Rood v. Mitchell*, 39 Ia., 444.

will be void if the assessors delegate the office of making it to a clerk; though, if he merely makes it in the first instance, and the assessors examine and supervise the work as it progresses, and adopt it when completed, it may be sustained.¹ It will be void also if, when an annual assessment is required, the assessor merely copies for one year the roll for the preceding year.² The particular requirements of the assessment will be noted further on, but it may be stated here — what there will be occasion to repeat in other connections — that mere irregularities in making it, which cannot be injurious, will be overlooked.³

Date of the Assessment. Assessments are made periodically, and in many of the states every year.⁴ The customary regulation is that the assessment shall be made or completed on a certain day, or that it shall be made as of a certain day. This fixes the liability of persons and property to taxation for the year.⁵ There are some inconveniences and inequalities resulting from this, but some regulation of the kind is indispensable. A force of tax officers cannot be kept employed for the year in watching the transfers of property, the movements of persons, and vicissitudes of business, in order to equalize the charges upon them; periodical assessments, if they produce injustice in one case, may correct it in the next, and on the whole are likely to be fair. At any rate, they constitute the best regulation the law can establish. "In the imposition of taxes, exact and critical justice and equality are absolutely unattainable. If we attempt it, we might have to divide one year's tax upon a given article of property among a dozen dif-

¹ *Snell v. Fort Dodge*, 45 Ia., 564. If the statute allows the appointment of deputies, a deputy duly appointed may make the assessment. *Meek v. McClure*, 49 Cal., 623.

² *Nason v. Whitney*, 1 Pick., 140; *People v. Hastings*, 29 Cal., 449; *Greenough v. Fulton Coal Co.*, 74 Pa. St., 486; *Woodman v. Auditor-General*, 52 Mich., 28; *Lebanon v. Railroad Co.*, 77 Ill., 539; *Johnson v. Royster*, 88 N. C., 194. See *Thurston v. Little*, 3 Mass., 429.

³ *San Francisco, etc., R. Co. v. State Board*, 60 Cal., 12; *South Platte Land Co. v. Crete*, 11 Neb., 344.

⁴ A constitutional provision that property shall be valued for taxation every fifth year will not prevent the legislature providing for more frequent assessments. *Ex parte Lynch*, 16 S. C., 32.

⁵ *People v. Commissioners*, 104 U. S., 466.

ferent individuals who owned it at different times during the year, and then be almost as far from the desired end as when we started. The proposition is utopian. The legislature must adopt some practicable system;"¹ and this practicable system is found to be the one which has been indicated. Every person is therefore to be taxed for the year upon his personalty, estimated as of the time of the assessment, and every parcel of real estate according to its value as set down in the proper list or roll. Changes in the ownership of property, or in the value after the periods of assessment, cannot be taken notice of in taxation until the time for a new assessment has arrived. This is the general rule.²

¹*Shaw v. Dennis*, 10 Ill., 505, 518. Property not in existence or not in the state at the time the assessment is taken cannot be taxed for the year. *People v. Kohl*, 40 Cal., 127; *Wangler v. Black Hawk Co.*, 56 Ia., 384; *Colbert v. Supervisors of Lake*, 60 Miss., 142.

The assessment dates from the time fixed by the statute. After it is made and notice given as required by statute, it is not competent to change names or put new names upon it for taxation. *Clark v. Norton*, 49 N. Y., 243; *Overing v. Foote*, 65 N. Y., 263. But in some states this is expressly provided for (see *Stockman v. Robbins*, 80 Ind., 195; *State v. Howard*, 80 Ind., 466), though the parties whose names are put on must be personally notified. In Nebraska one is taxable on moneys received for securities sold after the tax year has begun. *Jones v. Seward Co.*, 10 Neb., 154.

For questions arising where one has moved into the state within the year, see *White v. State*, 51 Ga., 252; *Johnson v. Lyon*, 106 Ill., 64. Cotton out of the state on February 1, held not taxable to the owner in the state for the year beginning on that day. *Colbert v. Supervisors of Lake*, 60 Miss., 142.

²*State v. Hardin*, 34 N. J., 79; *State v. Jersey City*, 44 N. J., 156. One is to be taxed where he resides on the day fixed by statute for taking the assessment, though set off into another town before it is completed. *Harmon v. New Marlborough*, 9 Cush., 525. But if he moves out of the town before the day fixed for its completion, he cannot be taxed for his personalty in it. *People v. Supervisors of Chenango*, 11 N. Y., 563; *Ware v. First Parish*, etc., 8 Cush., 267. In Vermont, a person resident in a school district at the time of listing, and properly listed there, remains liable on the list while it continues in force, notwithstanding he has subsequently removed from the district. *Woodward v. French*, 31 Vt., 337; *Walker v. Miner*, 33 Vt., 769; *Ovitt v. Chase*, 37 Vt., 196. Where plaintiff had a place of business in Boston every year from 1st of December to 1st of March, but none on 1st of May when assessment was to be made, *held*, that he was not taxable in Boston. *Field v. Boston*, 10 Cush., 65. The fact that a debt is contracted while one is an inhabitant does not justify a personal tax upon him in respect of it, after he has ceased to be such. *Dow v. First Parish in Sudbury*, 5 Met., 73.

The rule may undoubtedly be varied by statute, and in some states there are provisions for placing upon the roll property which was overlooked when the assessment was made;¹ and sometimes the authority goes so far as to allow of the placing of taxables upon the roll which have been omitted for several years, and assessing them for each year omitted.²

It has been held in Iowa that where by statute an assessment was to be made in every odd numbered year, and was duly made for a township accordingly, and a city was then carved out of the township, there was no authority of law for making a new assessment in the even numbered year except as to omitted property.³

Tax payers' lists. It has been deemed advisable in some of the states to provide by law that persons resident within the several taxing districts shall, by a specified time, deliver to the assessor a written exhibit of their property or business for the purpose of taxation,⁴ and it is expected that this shall be

¹ An additional assessment for personalty discovered after the tax warrant had been issued is not a new tax. *Harwood v. North Brookfield*, 130 Mass., 561. In Tennessee collectors are made assessors for the purpose of assessing any lands omitted from the roll for the year. *Otis v. Boyd*, 8 Lea, 679. A law provided for the assessment of an additional tax on property "discovered" by the board of assessors to have been omitted from the last assessment. *Held*, that private information communicated to one member of the board was not such discovery. The board must be satisfied of the omission. *Noyes v. Hale*, 137 Mass., 266.

² See *State v. La. Savings, etc., Co.*, 32 La. An., 1136; *Maguire v. Mobile Co.*, 71 Ala., 401. But in Arkansas a tax deed is void which recites that an assessment was made in 1867 for the taxes of 1859-60 and 1861. *Jacks v. Dyer*, 31 Ark., 334. See *Nor. Car., etc., R. Co. v. Commissioners*, 77 N. C., 4; *Sudderth v. Brittain*, 76 N. C., 458.

³ *Snell v. Fort Dodge*, 45 Ia., 564. See *Richards v. Wapello Co.*, 48 Ia., 507; *Hilgenberg v. Wilson*, 55 Ind., 210. Under the Louisiana act of 1847 an assessment of real estate not complained of when made could not be changed for five years except to add for improvements or to deduct for destruction. *State v. Board of Assessors*, 31 La. An., 306.

⁴ In Maine the statute directs the assessors to give notice to the tax payers to bring in their lists; but this is only directory. *Boothbay v. Race*, 68 Me., 351. In California, under the statute for taxing migratory stock, a statement of intention as to moving such stock must be called for at the time of the assessment, or the owner of the stock need not furnish it. *People v. Shippee*, 53 Cal., 675.

sufficiently full and complete to enable the assessors to make the assessment from it.

Oath to List. In some states the list has been required to be given in under oath; and where this is the statute the tax payer will take no benefit from the list unless it is sworn to.¹

Conclusiveness of List. The statute commonly determines what conclusiveness shall be allowed to the list; but in general it may be said it is not conclusive on the assessors,² though if in due form it is taken as *prima facie* correct, and the assessors add to it in making up their assessment only as the statute allows.³

Penalties for Not Giving. The failure to hand in the list, or the refusal to verify it, is made by the statute to subject the

¹Lee v. Commonwealth, 6 Dana, 311. As to what is sufficient verification, see Lanesborough v. County Com'rs, 131 Mass., 424; Arnold v. Middletown, 41 Conn., 206. In Wisconsin, if the tax payer does not make oath to his list, the assessor is not bound by it, and may arrive at his property by other means. If the tax payer claims the assessment to be excessive, his remedy is to appeal. Lawrence v. Janesville, 46 Wis., 364. In Kansas, etc., R. Co. v. Ellis County, 19 Kan., 584, it appeared that the tax payer returned a sworn statement of its property as required by law. After notice given, the county commissioners, upon their personal knowledge and previous returns made by the tax payer, but without evidence introduced on the hearing, save in corroboration of the correctness of the statement, raised the valuation. Held valid. The court say the proceeding is only *quasi* judicial, and while evidence may be taken, it is not indispensable.

²Felsenthal v. Johnson, 104 Ill., 21.

³The list is to be taken as presumptively including all the tax payer's property, although it does not in terms say so. Lanesborough v. County Com'rs, 131 Mass., 124.

A statute of Massachusetts provided that the tax payer's return should be taken as true by the assessors, unless the tax payer refused when required "to answer on oath all necessary inquiries as to the nature and amount of his property." A severe penalty was laid upon any false return. Held, that while the assessors might abate the tax upon an item improperly included in the list (Charlestown v. County Com'rs, 109 Mass., 270), they cannot add anything to the list upon any information, however satisfactory, which is not communicated to the tax payer. He has a right to be heard upon the proposed addition. Moors v. Street Com'rs of Boston, 134 Mass., 431. In Ohio a chose in action omitted from the list may be put in by the auditor. Cameron v. Cappeller, 41 Ohio St., 533.

If a tax payer, by mistake of law, makes his return to the wrong town, and so is twice taxed, he is held to be without remedy. People v. Atkinson, 108 Ill., 45.

tax payer to some specified liability. Sometimes to the doubling for taxation such estimate as the assessor shall make of his property;¹ sometimes to a definite penalty; sometimes to deprivation of any right to appeal against what he may regard as an unjust assessment. The right to discriminate in some manner against those who fail to hand in lists has often been judicially recognized.² When the discrimination consists merely in submitting the party to the "doom" of the assessor, and depriving him of any appeal, it would seem that there could be no valid objection to it.³ The assessor will be likely, under such circumstances, to make liberal estimates of property, so that the state, it may be presumed, will not be the loser, and the tax payer, if he is over assessed, suffers a misfortune for which no one, unless it be himself, is blamable. But when a statute goes further, and subjects the party to penalties of any kind, to be inflicted by a ministerial officer without a hearing, for a neglect that may have been unintentional and perhaps entirely excusable, it is not so clear that it is consistent with the genius of the common law or with general principles of American jurisprudence. But the authorities sustain such statutes, as is said in one case, "on the ground of state necessity and immemorial usage."⁴

¹ *Butler v. Bailey*, 2 Bay, 244.

² See *State v. Bell*, 1 Phil. (N. C.), 76; *Winnimisset Co. v. Chelsea*, 6 Cush., 477; *Donovan v. Insurance Co.*, 30 Md., 155; *State v. Welch*, 28 Mo., 600; *State v. Leavell*, 3 Blackf., 117; *State v. Hamilton*, 5 Ind., 310; *Louisville, etc., R. R. Co. v. State*, 25 Ind., 177. In Texas the tax payer who neglects or refuses to render a list of taxable property is subject to indictment. *Caldwell v. State*, 14 Tex. Ap., 171.

³ See *Porter v. County Commissioners*, 5 Gray, 365; *Otis Company v. Ware*, 8 Gray, 509; *State v. Apgar*, 31 N. J., 358; *State v. Board of Equalization*, 7 Nev., 83.

⁴ *Ex parte Lynch*, 16 S. C., 33. In this case the statute required an addition to the assessment of fifty per cent. as a penalty for default in making return of the property for taxation.

In Minnesota it has been decided that where the constitution requires all taxation to be by value, it is incompetent to provide by law for increasing the assessed valuation by a sum to be added as a penalty for not handing in a list. *McCormick v. Fitch*, 14 Minn., 252. And see *State v. Allen*, 2 McCord, 55. A contrary ruling in Indiana was made in the case of *Boyer v. Jones*, 14 Ind., 354, where a party had refused to list property which he claimed was not taxable, and was subjected to a penalty of fifty per cent. on the valuation, for the refusal. In Vermont, where on a similar refusal the assess-

It has been decided in Kentucky that penal provisions of this character must be strictly construed;¹ a decision quite in harmony with the general rules of construction. But when the construction is clear, they are generally enforced. The Massachusetts statute (1835) took away all right to abatement of an excessive assessment on appeal to the county commissioners, when the appellant had failed to bring in a list of his estate to the assessors, unless he could show good cause for the failure; and also when he had failed to make oath to the truth of the list if required by the assessors to do so. Under this statute it was held that the assessors could not waive the bringing in of the list; that corporations as well as natural persons must comply with it; that an exhibition to the assessors of a plan of the tax payer's real estate, or referring them to the list of a preceding year, would not be a compliance with the statute;² that the list must be handed in before the tax is actually assessed;³

ors were to proceed to make their appraisal and then double it, it was held that they could not do this on a mere rumor of what the man was worth, and then deny him a hearing. *Howes v. Barrett*, 56 Vt., 141. See *Brush v. Baker*, 56 Vt., 143.

Some statutes make provision for enforcing by suit the penalties for neglect to hand in lists. See *Drexel v. Commonwealth*, 46 Pa. St., 31.

¹ *Alexander v. Commonwealth*, 1 Bibb, 515; *McCall v. The Justices*, 1 Bibb, 516; *Olds v. Commonwealth*, 3 A. K. Marsh., 465; *Chiles v. Commonwealth*, 4 J. J. Marsh., 577. The point was made in *Drexel v. Commonwealth*, 46 Pa. St., 31, but not decided. In Connecticut it is held that a list sufficient as to the personal estate cannot be rejected as to that because not sufficient as to the realty. *New Canaan v. Hoyt*, 23 Conn., 148. In Alabama a statute requiring every person in the state "who is liable to pay taxes" to render "a list of his taxable property" to the assessors, and providing that if he does not, they may call at his residence for a list of his taxables or for the amount of taxes due from him, held applicable to one liable only to a poll tax. *Carter v. Mercer*, 9 Ala., 556. As to what is a sufficient listing in Vermont, see *Blodgett v. Holbrook*, 39 Vt., 336.

² *Winnimisset Co. v. Chelsea*, 6 Cush., 477. And see *Otis Co. v. Ware*, 8 Gray, 509. The statute required the assessors to notify the inhabitants, at the town meeting or otherwise, to bring in lists. It was held in the first of these cases that if a failure to give notice was relied upon, it devolved on the tax payer to show it. Corporations may be required to furnish for taxation lists of their stockholders to all the local authorities where they severally reside. *Donovan v. Insurance Co.*, 30 Md., 155.

³ *Porter v. County Commissioners*, 5 Gray, 365; *Otis Co. v. Ware*, 8 Gray, 509. The omission to require an oath to it is not fatal. *Lynam v. Anderson*, 9 Neb., 367.

and that if not handed in, the tax payer submits himself to the "doom" of the assessors.¹

It has also been held, on a construction of the statute, that no abatement would be made before a list was brought in, though a sufficient excuse for not bringing it in at the proper time was shown.² Handing in a list which, by mistake of the lister's rights, is made to embrace property not liable to taxation, will not estop him from claiming an abatement as to such exempt property; there being no reason of justice or public policy why it should.³ But while this is true, it is also true that the tax payer cannot complain of any mere irregularity in the action of the assessors into which they have been led by an error or imperfection in his own list not affecting

¹ *Lincoln v. Worcester*, 8 Cush., 55, 63. But where a list was not brought in until after the time limited for it had expired, but the delay was chargeable to the assessors themselves, who expressly told the party's agent nothing should be lost by the delay, it was held that the right to apply for an abatement was not lost. *Lowell v. County Commissioners*, 3 Allen, 546.

² *Charlestown v. County Commissioners*, 101 Mass., 87. In abating a tax which has been paid, the county commissioners have no right to allow interest; the statute not providing for it. *Lowell v. County Commissioners*, 3 Allen, 550. Nor costs, for the same reason. *Same v. Same*, 3 Allen, 556. Successors of assessors who have levied a tax may abate it if application therefor is made within the statutory time. *Hibbard v. Garfield*, 102 Mass., 72; *Carleton v. Ashburnham*, 102 Mass., 348. One who has handed in no list and is over-taxed, cannot pay his tax, and then recover back on showing a mistake in the assessors; a mistake not rendering the tax illegal. *Lott v. Hubbard*, 44 Ala., 593.

³ *Charlestown v. County Commissioners*, 109 Mass., 270, citing *Dunnell Manuf. Co. v. Pawtucket*, 7 Gray, 277, where the point was substantially the same. In Illinois it has been decided that if one voluntarily lists for taxation corporate stocks which are not taxable, and they are taxed accordingly, he cannot complain, as it is his own fault. *Republic Life Ins. Co. v. Pollak*, 75 Ill., 292. See *People v. Railroad Co.*, 49 Cal., 414. When the list of a corporation contains erroneous items, the corporation cannot, in a suit in which it relies upon the list, disprove its correctness. *People v. Railroad Co.*, 49 Cal., 414. An erroneous overvaluation by the officer of the corporation will not entitle the corporation to recover back any portion of the taxes paid. *Cerbat Mining Co. v. State*, 29 Hun, 81.

A tax payer taxable on receipts of business gave in his list, but protested that the tax was not lawful. He afterwards contended that, as to a part, he was not taxable, because it had been paid to others as their share of the business. Held, as to this, he was estopped by his list. *Am. U. Exp. Co. v. St. Joseph*, 66 Mo., 675.

his substantial rights.¹ These references will perhaps sufficiently indicate the views which have been taken by the courts of statutes of this nature.²

Right to a hearing. The summary nature of tax proceedings has been remarked upon already. They are made summary of necessity. The assessment, if made in compliance with the law, will establish conclusively the basis of periodical taxation. Every inhabitant of the state is liable, by means thereof, to have a demand established against him on the judgment of others regarding the sum which he should justly and equitably contribute to the public revenues. Every owner of property in the state, whether he be an inhabitant or not, is

¹ As where, the party's agent being called upon for a list, he furnished it, but omitted one parcel of land, which was taxed as non-resident in consequence. *Kinsworthy v. Mitchell*, 21 Ark., 145. To the same effect is *Nelson v. Pierce*, 6 N. H., 194. The tax payer giving an erroneous description of his lands to the assessor is estopped from complaining of it. *Hubbard v. Windsor*, 15 Mich., 146.

² The person from whom a list is required under a penalty cannot excuse himself by showing as to an article he should have listed (a billiard table) that another person had listed it. *Olds v. Commonwealth*, 3 A. K. Marsh., 465. Where one excused himself from making a list, saying it was unnecessary, held to be a refusal. *State v. Parker*, 33 N. J., 192. See *State v. Bishop*, 34 N. J., 45; *State v. Parker*, 34 N. J., 49; *State v. McChesney*, 34 N. J., 63. The list is not conclusive on the assessors. *Thompson v. Tinkcom*, 15 Minn., 295. But it has been said they ought to adopt the valuation of the lister in the absence of any evidence of its incorrectness (*People v. Reddy*, 43 Barb., 539; *People v. Assessors of Albany*, 40 N. Y., 154); though they are not liable for any *bona fide* exercise of their power in this regard. *Vose v. Willard*, 47 Barb., 320; *Bell v. Pierce*, 48 Barb., 51; *Stearns v. Miller*, 25 Vt., 20; *Wilson v. Marsh*, 34 Vt., 352. But for a failure to perform ministerial duties to the lister's prejudice the officers may be liable. *Kellogg v. Higgins*, 11 Vt., 240; *Fairbanks v. Kittredge*, 24 Vt., 9.

In Nevada a tax payer who fails to hand in his list is allowed no standing before the board of equalization. *State v. Board of Equalization*, 7 Nev., 83. In New Jersey he loses his right to appeal. *State v. Apgar*, 31 N. J., 358. An early statute in South Carolina provided that a "tax of \$10,000" should be imposed upon every person keeping open an office for the sale of lottery tickets, and that "it shall be the duty of the tax collector in the district where such lottery offices are opened, in default of the person or persons keeping such offices to return the same and pay the tax imposed by this law, to issue his execution as in other cases of defaulters." The court held this, though called a tax, to be really a penalty, which it was not competent to authorize the collector to impose. *State v. Allen*, 2 McCord, 55.

liable to have a lien in like manner established against his property. Moreover, the persons who make the assessment lighten the burden upon themselves in proportion as they increase it upon others. They must act to a large extent upon imperfect and unsatisfactory information, and the danger that when most honest and fair minded they will misjudge and thus do injustice is always imminent. It is therefore a matter of the utmost importance to the person assessed that he should have some opportunity to be heard and to present his version of the facts before any demand is conclusively established against him; and it is only common justice that the law should make reasonable provision to secure him as far as may be practicable against the oppression of unequal taxation, by making the privilege of being heard a legal right.

The obligation to secure such a right is recognized by the statutes of the several states, whose provisions, however, are greatly lacking in uniformity. We have just seen that in some states the tax payers are either required or allowed to bring in lists of their taxable property; and, when these lists are in due form and properly verified, a certain degree of conclusiveness is given to them. Where such lists are not required, it is provided in some states that when the valuation of personal estate is made by the assessor, the person assessed may reduce the assessment by his own oath, which, for this purpose, is made conclusive.¹ In other states an appeal is allowed to some board of review; and perhaps there is no state which does not provide some method whereby it is intended that the party assessed shall have a hearing before the assessment becomes fixed and final. If the statutory directions are observed, they perhaps make all the provision that is necessary for the purposes of justice.

It is unfortunately often the case, however, that statutory provisions are not strictly observed, and that either the public or individuals will suffer in consequence. The question presented may then be, whether the provisions which have been disregarded are mandatory to the officers, or it may arise on the terms of some curative statute which undertakes to heal the defects. In substance the question will be, whether the

¹See *People v. Davenport*, 91 N. Y., 574.

right to be heard in tax cases is a constitutional right and indefeasible.

Upon this subject there is a general concurrence of authorities in the affirmative. It is a fundamental rule that in judicial or *quasi* judicial proceedings affecting the rights of the citizen he shall have notice and be given an opportunity to be heard before any judgment, decree, order or demand shall be given and established against him.¹ Tax proceedings are not in the strict sense judicial, but they are *quasi* judicial, and as they have the effect of a judgment, the reasons which require notice of judicial proceedings are always present when the conclusive steps are to be taken.² Provision for notice is therefore part of the "due process of law" which it has been customary to provide for these summary proceedings; and it is

¹ *Philadelphia v. Miller*, 49 Pa. St., 440, 448; *Melvin v. Weare*, 56 N. H., 436; *Cahoon v. Coe*, 57 N. H., 556, 570; *Stuart v. Palmer*, 74 N. Y., 183; *Lowell v. Wentworth*, 6 Cush., 221; *Lehman v. Robinson*, 59 Ala., 219; *Pacific R. Co. v. Cass Co.*, 53 Mo., 17; *Clement v. Hale*, 47 Vt., 680; *Brush v. Baker*, 56 Vt., 143; *State v. Drake*, 33 N. J., 194; *State v. Anderson*, 38 N. J., 83; *State v. Commissioners*, 41 N. J., 83; *Butler v. Supervisors*, 26 Mich., 22; *Thomas v. Gain*, 35 Mich., 155; *Dool v. Cassapolis*, 42 Mich., 547; *Woodman v. Auditor-General*, 52 Mich., 28; *Darling v. Gunn*, 50 Ill., 424; *South Platte Land Co. v. Buffalo Co.*, 7 Neb., 253; *Barker v. Omaha*, 16 Neb., 269; *Commissioners v. Lang*, 8 Kan., 284; *Brown v. Denver*, 7 Col., 305; *Queen v. Dyott*, L. R., 9 Q. B. Div., 47.

² In *Baltimore v. Johns Hopkin's Hospital*, 56 Md., 1, it was decided, three judges to two, overruling *Baltimore v. Scharf*, 54 Md., 499, that in proceedings to assess the cost of repairing a street upon the abutting property, notice to parties was not a matter of right. The reasoning of the court distinguishes between cases of taking property under the eminent domain and cases of taxation, and holds that in the latter notice is not essential. Compare *Allegany Co. Com'rs v. Mining Co.*, 61 Md., 545. Where assessors discover that property has been omitted from the roll, they may put it on without giving notice. *Wabash, etc., R. Co. v. Johnson*, 108 Ill., 11.

On the general subject of the right to a hearing in some stage of the proceedings, see further, *San Mateo County v. Sou. Pac. R. Co.*, 13 Fed. Rep., 722; *S. C.*, 8 Sawy., 238; *Santa Clara Co. v. Sou. Pac. R. Co.*, 18 Fed. Rep., 385; *Albany City Bank v. Maher*, 20 Blatch., 341; *McMillen v. Anderson*, 95 U. S., 37; *Hagar v. Reclamation District*, 111 U. S., 701. In these last cases it was decided to be sufficient if, after the levy of the tax, the party in a suit for the purpose was allowed to contest the legality and justice of the tax. Where notice is given for a hearing of objections to a drainage assessment, the party must make his objections at that time, and if he fails to do so he is not to be heard afterwards when application is made for a sale of the lands assessed. *Blake v. People*, 109 Ill., 504.

not to be lightly assumed that constitutional provisions, carefully framed for the protection of property rights, were intended or could be construed to sanction legislation under which officers might secretly assess the citizen for any amount in their discretion, without giving him an opportunity to contest the justice of the assessment. It has often been very pointedly and emphatically declared that it is contrary to the first principles of justice that one should be condemned unheard;¹ and it has also been justly observed of taxing officers, that "it would be a dangerous precedent to hold that any absolute power resides in them to tax as they may choose without giving any notice to the owner. It is a power liable to great abuse;" and it might safely have been added, it is a power that under such circumstances would be certain to be abused. "The general principles of law applicable to such tribunals oppose the exercise of any such power."² This being the case, it is not to be supposed that the legislature by any ambiguous or doubtful language has undertaken to confer it. All reasonable presumptions in construction should favor justice and right.

It is not customary to provide that the tax payer shall be heard before the assessment is made, except where a list is called for from him; but a hearing is given afterwards, either before the assessors themselves, or before some court or board of review. And of the meeting of that court or board the tax payer must in some manner be informed: either by personal notice, or by some general notice which is reasonably certain to reach him,³ or — which is equivalent — by some general law

¹ *Cahoon v. Coe*, 57 N. H., 556, and cases cited; *Stuart v. Palmer*, 74 N. Y., 183; *San Mateo County v. Railroad Co.*, 7 Sawy., 517.

² *Patten v. Green*, 13 Cal., 325, 329; *Cleghorn v. Postelwaite*, 43 Ill., 423. If possible, statutes will be so construed as to require notice. *Sioux City, etc., R. Co. v. Washington County*, 3 Neb., 30; *Kansas Pac. R. Co. v. Russell*, 8 Kan., 558; *Baltimore v. Grand Lodge*, 60 Md., 230. Where an assessment is to be made by frontage, notice is not important and therefore not required. *Cleveland v. Tripp*, 13 R. I., 50.

³ When one has by city charter the right to appear "and be heard" before the common council, it is not competent for the council to limit the objections to such as may be made in writing. *State v. Jersey City*, 25 N. J., 309. But neither one who has made objection to the assessment in writing, nor those who do not appear at all, can object. *State v. Jersey City*, 28 N. J., 500. Further as to the right to be heard in general, see *Larimer v. McCall*,

which fixes the time and place of meeting, and of which he must take notice. The last is a common method of bringing the assessment to the notice of the tax payer, and it is perhaps the best of all, because it comes to be generally understood, and is remembered.¹

Whatever statutory provisions are made for notice and hearing must be regarded, under the rules of construction already given, as mandatory. A compliance with them in all essential particulars should therefore be held a condition precedent to any further proceedings.² It is not enough to sustain a tax

⁴ W. & S., 133; *Stewart v. Trevor*, 56 Pa. St., 374. And that there must be opportunity afforded for it at the time and place fixed by law, see *Sioux City, etc., R. R. Co. v. Washington County*, 3 Neb., 30.

Notice by publication, when authorized by law, is sufficient. *In re De Peyster*, 80 N. Y., 565. The fact that the person assessed is abroad when the assessment roll is opened for correction, and therefore made no objection, is no defense to the payment of the tax. *Serrill v. New Orleans*, 27 La. An., 520.

Where personal notice is required, proof of giving it is a jurisdictional fact. *Scott v. Brackett*, 89 Ind., 413. A notice does not hold good from year to year—it must be given annually. *Dean v. Aiken*, 49 Vt., 541. It must be definite: a notice “to the heirs of A.,” held defective. *New Orleans v. Heirs of St. Rome*, 28 La. An., 17. Compare *New Orleans v. Estate of Stewart*, 28 La. An., 180.

¹ That in general the tax payer must take notice of the general law fixing the time and place of hearing, see *Methodist Pr. Church v. Baltimore*, 6 Gill, 391; *O’Neal v. Bridge Co.*, 18 Md., 1, 26; *State v. Runyon*, 41 N. J., 98. There being no jurisdiction to assess a personal tax against a non-resident, he is not chargeable with constructive notice of the action of assessors, and is under no obligation to appear before them. *St. Paul v. Merritt*, 7 Minn., 198. As to tangible property which he might have in the state, it would, however, be otherwise.

² *Thames Manuf. Co. v. Lathrop*, 7 Conn., 550, 555; *Lowell v. Wentworth*, 6 Cush., 221; *Kansas Pacific R. R. Co. v. Russell*, 8 Kan., 558; *Marsh v. Chestnut*, 14 Ill., 223; *Cleghorn v. Postlewaite*, 43 Ill., 428; *Nashville v. Weiser*, 54 Ill., 245; *Mix v. People*, 72 Ill., 241; *Philips v. Stevens Point*, 29 Wis., 594; *Walker v. Chapman*, 22 Ala., 116; *Insurance Co. v. Yard*, 17 Pa. St., 331, 338; *French v. Edwards*, 13 Wall., 506, 511; *Albany City Bank v. Maher*, 19 Blatch., 175; *National Bank v. Cook*, 77 Ill., 622. In the case in 7 Conn., 550, the assessment was held void because an abstract thereof which the law required should be filed by the 1st of December was actually not filed till the 20th, though this was ten days before the meeting of the board of review. A similar error would not now be fatal in Illinois under the statute. See *Buck v. People*, 78 Ill., 560; *Purrlington v. People*, 79 Ill., 11; *Thatcher v. People*, 79 Ill., 597; and other cases referred to in these.

under such circumstances that the officers have acted with just intent, or even that the assessment is relatively fair; the conclusive answer to any suggestion of the kind is that the party has been denied his lawful right to meet such a claim at the proper time.¹ When, therefore, either directly by the statute, or by some officer or board under its authority, a certain time is fixed for the meeting of a board of review, and the board fails to meet; or a certain time for the return and filing of the assessment for inspection before the meeting of the board, and it is not filed, whereby opportunity for inspection is lost,—the tax proceedings must be regarded as having failed to become effectual, because of the failure of the officers properly to follow them up as required by law. No argument can be admissible in such a case which proposes the acceptance of something else as a substitute for the securities the statute has provided. To substitute anything would require legislation; and even legislation for the purpose would be of doubtful validity if it failed to provide what would fully accomplish the same substantial purpose.²

Classification of property: Real and personal. It is customary to classify property for taxation as real and personal, and to assess the two classes on somewhat different principles. The classification is commonly made on common law distinctions; but this is not necessarily the case, and it will frequently be found that the enumeration of property in statutes as real

¹ See *Stuart v. Palmer*, 74 N. Y., 183; *Jewell v. Van Steenburgh*, 58 N. Y., 85, and cases cited; *State v. Jersey City*, 25 N. J., 309.

The provisions made by the legislature for a review of city assessments cannot be changed by city ordinance. *Dwyer v. Hackworth*, 57 Tex., 245.

But where the party taxed applies to a court of equity to enjoin the tax, but relies exclusively on a failure to follow the law, and alleges no injustice or inequality, his suit will be dismissed. *Albany, etc., Co. v. Auditor-General*, 37 Mich., 291. And see *Baltimore v. Grand Lodge*, 61 Md., 280.

The fact that assessors have made a defective assessment is not in the way of their making a valid one. *State v. Northern Belle Mining Co.*, 15 Nev., 385.

The determination of the tax to be paid by a corporation is not void because of being made without notice, where the statute provides for a subsequent notice—which was duly given—and an appeal. *Commonwealth v. Runk*, 26 Pa. St., 235.

² *Cahoon v. Coe*, 57 N. H., 556; *Stuart v. Palmer*, 74 N. Y., 183.

or personal for the purposes of taxation differs considerably from what it would be for other purposes in the same state.¹ The method provided for enforcing the tax may also by implication make some change in the common law distinctions. A few cases will be referred to. Where land is owned by one person and buildings thereon by another, the two are to be separately assessed, and the assessment of the buildings as real estate is proper.² It is proper also to so assess the buildings when the land is exempt from taxation.³

The foundations, columns and superstructure of an elevated railroad in a city are taxable real estate.⁴ So is the track of a surface street railway.⁵ So is a pier constructed in a harbor.⁶ So is a toll bridge.⁷ When land purchased of the United States or of the state has been paid for, or when the right to a complete title has in any way been acquired, it is proper to tax the party who is then, in contemplation of equity at least, the real owner, for the land as land;⁸ but the state may provide by law for taxing improvements as such, though made upon

¹ See *Steere v. Walling*, 7 R. I., 317.

² *People v. Brooklyn Assessors*, 93 N. Y., 308; *People v. Commissioners of Taxes*, 80 N. Y., 573; *Same v. Same*, 82 N. Y., 459. This rule applies to buildings erected by a tenant on leased land. *People v. Board of Assessors*, 84 Hun, 559, citing *People v. Cassity*, 46 N. Y., 46; *Smith v. Mayor*, 68 N. Y., 552; *Russell v. New Haven*, 51 Conn., 259; *Milligan v. Drury*, 130 Mass., 428. Compare *Flanders v. Cross*, 10 Cush., 514.

³ *People v. Brooklyn Assessors*, 93 N. Y., 308; *Russell v. New Haven*, 51 Conn., 259; citing *Brainerd v. Colchester*, 31 Conn., 407; *Lord v. Litchfield*, 36 Conn., 116.

⁴ *People v. Com'rs of Taxes*, 82 N. Y., 459. The mains of a water-works company are real estate, but are taxable where the buildings, machinery, etc., are situated, though extending into another town. *Appeal of Des Moines, etc., Co.*, 48 Ia., 324.

⁵ *People v. Cassity*, 46 N. Y., 46; *New Haven v. Fair Haven, etc., R. Co.*, 38 Conn., 422. But it is not to be assessed in parcels — at least without express statutory authority. *State v. District Court*, 31 Minn., 354. Compare *Appeal of Railway Co.*, 32 Cal., 499; *Appeal Tax Court v. Railroad Co.*, 50 Md., 274; *Philadelphia, etc., R. Co. v. Appeal Tax Court*, 50 Md., 397.

⁶ *Smith v. New York*, 68 N. Y., 552. See *People v. Com'rs of Taxes*, 52 N. Y., 659.

⁷ *Alexandria, etc., Co. v. Dist. of Col.*, 1 Mack., 217; *Hudson Riv. Br. Co. v. Patterson*, 74 N. Y., 365.

⁸ See *Bellinger v. White*, 5 Neb., 399; *McMahon v. Welsh*, 11 Kan., 280; *ante*, p. 78.

government lands;¹ and it is entirely competent to provide for the assessment of any mere possessory right in lands; whether they be lands owned by private individuals or by the government,² as well as any inchoate title to land which has been bought and paid for in part.³ It is to be understood, however, that, while the statute might treat the interest assessed as either real or personal, no greater interest could be sold for the tax than the person taxed was entitled to.

So a boom of floating timber chained to fixed piers is taxable as real estate.⁴ And it has been held that, in the assessment of mills, the machinery contained therein should be included, even though it was personalty by common law rules, and the owner a non-resident.⁵ The mains of a gas light company are appurtenant to its lots, and only taxable therewith unless otherwise provided by statute.⁶ Lands bought of the state and not yet paid for are generally made taxable to the purchaser, though his interest may be merely equitable.⁷ The

¹ See *People v. Mining Co.*, 1 Idaho, 409; *People v. Lumber Co.*, 1 Idaho, 420; *New York, etc., R. Co. v. Yard*, 43 N. J., 121. A sale of the land for the tax would, of course, be incompetent. *Quivey v. Lawrence*, 1 Idaho, 313. Inchoate homestead titles not taxable in Kansas. *Long v. Culp*, 14 Kan., 412; *Chase Co. v. Shipman*, 14 Kan., 532.

² *State v. Moore*, 12 Cal., 56; *People v. Frisbie*, 31 Cal., 146; *People v. Black D. M. Co.*, 37 Cal., 54; *Reily v. Lancaster*, 39 Cal., 354. A mere right to cut and remove timber for a series of years is not taxable as real estate. *Clove Spring Iron Works v. Cone*, 56 Vt., 603. The same ruling as to an easement to convey water in pipes under ground. *Chelsea Water-Works v. Bowley*, 17 Q. B., 358. Where the ownership of the surface and of the mines underneath has been severed in conveyance they should be separately assessed. *Sanderson v. Scranton*, 105 Pa. St., 469.

³ See *People v. Shearer*, 30 Cal., 645.

⁴ *Hall v. Benton*, 69 Me., 346.

⁵ *Sprague v. Lisbon*, 30 Conn., 18. But the legislature has power to require fixtures to be listed and taxed as personalty; e. g., a steam-engine, boiler, etc., affixed to the soil. See *Johnson v. Roberts*, 103 Ill., 655. But the assessors cannot, of their own authority, tax as personal estate what in fact is real. See *Richards v. Wapello Co.*, 48 Ia., 507.

⁶ *Capital City, etc., Co. v. Insurance Co.*, 51 Ia., 31. See *Fall River v. County Com'rs*, 125 Mass., 567. The word *machinery* held to include gas pipes laid under the streets and gas meters. *Commonwealth v. Lowell Gas Light Co.*, 12 Allen, 75. See *Providence Gas Co. v. Thurber*, 2 R. I., 15; *People v. Brooklyn Assessors*, 39 N. Y., 81.

⁷ See *Com'rs of St. Joseph Co. v. Ruckman*, 57 Ind., 96; *Henderson v. State*, 58 Ind., 244.

rolling stock of railroads is sometimes treated as personalty, and sometimes as fixtures, under tax laws; and perhaps, under some laws, it may be both; that is, it may be included in the assessment of the road as realty, but be subject to be taken as personalty on process issued for the enforcement of the tax levied.¹

Personal taxes in general. Where one has no domicile within the state, he is not assessable there for any mere personal tax not connected with actual presence of property or business within its jurisdiction, though he himself may formerly have been domiciled in the state, and may at the time be within it. But when a party is actually domiciled in the state, some latitude in determining where he shall be taxed — though not a broad one — is allowable. Statutes prescribing the place for personal taxation sometimes make use of the word domicile, sometimes inhabitancy, sometimes place of abode, or some similar term or phrase. Probably these are in general used in the same sense, or nearly so, in tax laws.²

"No exact definition can be given of domicile; it depends upon no one fact or combination of circumstances, but from the whole taken together it must be determined in each particular case. It is a maxim that every man must have a domicile somewhere; and also that he can have but one. Of course it follows that his existing domicile continues until he acquires another; and *vice versa*, by acquiring a new domicile he relinquishes his former one. From this view it is manifest that very slight circumstances must often decide the question. It depends upon the preponderance of evidence in favor of two or more places; and it may often occur that the evidence of facts tending to establish the domicile in one place would be entirely conclusive were it not for the existence of facts and circumstances of a still more conclusive and decisive character which fix it beyond question in another. So, on the contrary, very slight circumstances may fix one's domicile, if not controlled by more conclusive facts fixing it in another place. If a seaman without family or property sails from the place of

¹ In Kentucky cars and engines cannot be sold under a tax warrant. *Elizabethtown, etc., R. Co. v. Trustees*, 12 Bush, 233.

² *Thorndike v. Boston*, 1 Met., 242.

his nativity, which may be considered his domicile of origin, although he may return only at long intervals, or even be absent many years, yet if he does not, by some actual residence or other means, acquire a domicile elsewhere, he retains his domicile of origin."¹ So going abroad with one's family and actually taking up one's residence in a foreign city, but with the intention at some time of returning, does not deprive one of his domicile of birth, or the authorities of the place of domicile of the right to tax him.² So if one before the time of making an assessment has left the state with the intention of not returning, he is still taxable at the place of his domicile in it unless he has actually acquired a domicile in another state, or at least has fixed upon one and is *in itinere* thither.³ If a party having a domicile in the country takes a house in a city and lives there winters, but continues to live in the country summers, this is no change of domicile,⁴ and he must be assessed for taxation where he thus retains his domicile, even though at the time of assessment he resides at the other place.⁵ A domicile cannot be lost by mere abandonment, though it be with definite purpose not to return to it.⁶

¹ *Shaw*, Ch. J., *Thorndike v. Boston*, 1 Met., 242, 245. See *Cabot v. Boston*, 12 Cush., 52; *Lee v. Boston*, 2 Gray, 484; *Bulkley v. Williamstown*, 3 Gray, 493; *Daniel v. Sullivan*, 46 Ga., 277; *Kilburn v. Bennett*, 3 Met., 199; *Grant v. Jones*, 39 Ohio St., 506; *Matter of Nichols*, 54 N. Y., 62; *Foster v. Hall*, 4 Humph., 345.

² *Sears v. Boston*, 1 Met., 250; *Otis v. Boston*, 12 Cush., 44; *Carnoe v. Freetown*, 9 Gray, 357; *Borland v. Boston*, 132 Mass., 89. See *Hallowell v. Saco*, 5 Me., 143.

³ *Borland v. Boston*, 132 Mass., 89; *Colton v. Longmeadow*, 12 Allen, 598. *Briggs v. Rochester*, 16 Gray, 337, seems to be overruled by *Borland v. Boston*. See *Culbertson v. County Com'rs*, 52 Ind., 361.

⁴ *Harvard College v. Gore*, 5 Pick., 370. See *Arnold v. Davis*, 8 R. I., 341; *Tripp v. Brown*, 9 R. I., 240.

⁵ *Lee v. Boston*, 2 Gray, 484; *Thayer v. Boston*, 124 Mass., 133; *Wright v. Boston*, 126 Mass., 161. In New Jersey, where one is to be taxed where he resides on the day appointed for beginning the assessment, the residence is held to be that which would entitle one to vote. *State v. Casper*, 36 N. J., 367. But in New York, under a different statute, a different conclusion was reached. See *Bell v. Pierce*, 51 N. Y., 12. Compare *Greene v. Gardiner*, 6 R. I., 242; *Nugent v. Bates*, 51 Ia., 77.

⁶ *Warren v. Thomaston*, 43 Me., 406. See, further, *Stockton v. Staples*, 66 Me., 197. A wife cannot change the domicile for the husband. *Parsons v. Bangor*, 61 Me., 457; *Porterfield v. Augusta*, 67 Me., 556.

That poll taxes are only to be assessed at the place of one's domicile, see

Where one is taxed for his personalty at the place of domicile, it is in general immaterial that some or even the whole of it is at the time out of the state.¹

Assessment of personalty. It will be expected of any law for the levy of taxes that it will specifically or otherwise enumerate the kinds of property to be taxed. This is essential, since all property is never taxed, and the assessor is without guide unless the statute supplies it.² Perhaps the most common method of assessing one for his personalty is to assess him a gross sum supposed to represent the value of all; but under some statutes an enumeration of articles is required, and under others there is an enumeration of some things and a valuation in gross of all others. Whatever may be the system prescribed by the statute it must be acted upon,³ and there must be suffi-

State v. Ross, 23 N. J., 517; *Herriman v. Stowers*, 48 Me., 497. That one living on land under the exclusive jurisdiction of the federal government is not subject to state taxation on polls, see *Opinions of Justices*, 1 Met., 580. Laborers in a county on a temporary job are not taxable there. On *Yuen Hai Co. v. Ross*, 8 Sawy., 884.

On the general subject, see, further, *Woodard v. Isham*, 48 Vt., 128; *Kellogg v. Supervisors*, 52 Wis., 92. A merely colorable change of residence to escape taxation will not be regarded. *Draper v. Hatfield*, 124 Mass., 53. See *Thayer v. Boston*, 124 Mass., 132. If one engages in business in another state, but leaves his family permanently at his former place of residence, he remains taxable there. *Nugent v. Bates*, 51 Ia., 77; *Culbertson v. Floyd Co.*, 52 Ind., 361. See *McCutchen v. Rice Co.*, 7 Fed. Rep., 558.

If a line runs through one's house, he must be taxed in the town which includes the most necessary and indispensable portion. He cannot be taxed in both. *Judkins v. Reed*, 48 Me., 386; *Chenery v. Waltham*, 8 Cush., 327. If he is assessed in two towns, his election to pay in one rather than the other is not conclusive, but he is liable in the one of his actual inhabitancy. *Lyman v. Fiske*, 17 Pick., 231; *Chenery v. Waltham*, 8 Cush., 327. See, also, *Hardy v. Yarmouth*, 6 Allen, 277, 284. His being taxed in one is not evidence that his residence and proper place of taxation is not in another. *Mead v. Roxborough*, 11 Cush., 362. See *People v. Atkinson*, 103 Ill., 45.

¹See *Kirtland v. Hotchkiss*, 100 U. S., 491; *Commonwealth v. Hays*, 8 B. Monr., 1; *Goldgart v. People*, 106 Ill., 25; *Horne v. Green*, 52 Miss., 452; *Forsman v. Byrns*, 68 Ind., 247; *Lose v. State*, 72 Ind., 285; *Griffith v. Watson*, 19 Kan., 23.

²*Lott v. Ross*, 38 Ala., 156, citing *Moseley v. Tift*, 4 Fla., 402; *De Witt v. Hays*, 2 Cal., 463. That property has been assigned by an insolvent in trust for his creditors is no reason for not taxing it. *Wright v. Wigton*, 84 Pa. St., 163.

³See *Falkner v. Hunt*, 16 Cal., 167; *People v. Sneath*, 28 Cal., 612.

cient appearing on the face of the tax list to show as to anything specified that it is apparently taxable.¹ But taxability would *prima facie* appear if the description of the thing brings it within the enumeration of things specified in the statute to be taxed, and it is not necessary in listing to negative a possible exemption.²

General Description. "Property," in a statute authorizing the imposition of taxes, will be held without further specification to include solvent credits,³ but not a claim to damages for land taken by the public and not yet determined,⁴ and not a mere right to collect wharfage fees in the future.⁵

Place of Assessment. The general rule that personalty is to be assessed to the owner where he has his domicile has been mentioned.⁶ This rule is applicable to bonds and other choses

¹ *Adam v. Litchfield*, 10 Conn., 127; *Whittlesey v. Clinton*, 14 Conn., 72. Compare *Goddard v. Seymour*, 30 Conn., 394; *Hammersley v. Franey*, 39 Conn., 179.

² *Monroe v. New Canaan*, 43 Conn., 309.

³ *Savings Association v. Austin*, 46 Cal., 415. See *People v. Park*, 23 Cal., 138; *Louisville v. Henning*, 1 Bush, 381; *Catlin v. Hull*, 21 Vt., 152. As to when a claim is a "debt due" within the meaning of a statute for the taxing of such debts, see *Bucksport v. Woodman*, 68 Me., 33; *Arnold v. Middletown*, 41 Conn., 206; *Deane v. Hathaway*, 136 Mass., 129; *Hale v. County Com'rs*, 137 Mass., 111.

⁴ *Lowell v. Boston*, 106 Mass., 540. See *Hancock v. Whittemore*, 50 Cal., 522.

⁵ *De Witt v. Hays*, 2 Cal., 463. Bonds issued by a railroad company established by act of congress are not public stocks or securities, but are taxable as debts due. *Hale v. County Com'rs*, 137 Mass., 111. A city in assessing property may include its own bonds owned by a resident. *People v. Com'rs of Taxes*, 76 N. Y., 64. Where certificates of deposit are taxable, an entry on a pass book is held to be one. *Oulton v. Savings Inst.*, 1 Sawy., 695; *S. C. in error*, 17 Wall., 109.

As to when a collateral inheritance tax is payable, see *Commonwealth v. Williams' Ex'rs*, 13 Pa. St., 29; *Commonwealth's Appeal*, 34 Pa. St., 204; *Miller v. Commonwealth*, 27 Grat., 110. Annuitants are only taxable in respect of sums which have become due and remain unpaid. *Ex parte McComb*, 4 Bradf., 151; *State v. Cornell*, 31 N. J., 374; *State v. Pettit*, 39 N. J., 654; *State v. Shurts*, 41 N. J., 279.

⁶ Cattle are to be assessed to the owner where he lives, though kept in another county. *Barnes v. Woodbury*, 17 Nev., 383.

A town which taxes a man as a resident takes the burden of showing that he is such, if the right is questioned. *Hurlburt v. Green*, 41 Vt., 490; *Same v. Same*, 42 Vt., 316. Consent by a person to be taxed where he does not

in action, though the debtor resides out of the state,¹ and though they are secured by mortgage on lands out of the state;² and it applies to shares held in foreign corporations.³ The legislature may make exceptions to the general rule, and some few are commonly made.

Water-craft. Vessels are commonly taxable only at the port of registry,⁴ and ferry boats plying between two states are taxable where they are owned,⁵ not at the place in the other state to which they run.⁶

Tangible Personalty. Statutes sometimes provide that tangible personal property shall be assessed wherever in the state it may be, either to the owner himself or to the agent or other person having it in charge; and there is no doubt of the right to do this, whether the owner is resident in the state or not.⁷

reside does not give jurisdiction and would not bind him. *Blood v. Sayre*, 17 Vt., 609.

In a town in which the owner has no domicile, and a chattel no *situs*, it is not competent to tax the owner for town expenses not presumptively beneficial to him. *Berlin Mills Co. v. Wentworth's Location*, 60 N. H., 156.

¹ *Hayne v. Delieesseline*, 3 McCord, 374; *Augusta v. Dunbar*, 50 Ga., 387. But perhaps if both obligor and obligee reside within the state, it would be competent to provide by statute for collecting the tax from the former. See *Harper v. Commissioners*, 23 Ga., 566; *Bridges v. Griffin*, 33 Ga., 113. See what is said of this last case in *Augusta v. Dunbar*, 50 Ga., 387.

² *Kirtland v. Hotchkiss*, 42 Conn., 426; S. C. in error, 100 U. S., 491.

Notes owned by a non-resident are not made taxable within the state by the fact of being secured upon land within it. *Arapahoe Com'rs v. Cutler*, 3 Col., 349; *Grant v. Jones*, 39 Ohio St., 506.

³ *McKeen v. Northampton Co.*, 49 Pa. St., 519; *Whitsell v. Same*, 49 Pa. St., 526; *Bradley v. Bauder*, 36 Ohio St., 23.

⁴ *Hays v. Pacific Steamship Co.*, 17 How., 596. See *State v. Haight*, 30 N. J., 428; *People v. Com'rs of Taxes*, 58 N. Y., 242; *Voght v. Ayer*, 104 Ill., 583. The assessment of a vessel by name sustained by an admiralty court, where the owner had failed to list it. *The North Cape*, 6 Biss., 505. If a vessel may by law be assessed in different districts, assessment in one is exclusive of others. *Halstead v. Adams*, 108 Ill., 609.

⁵ *Mobile v. Baldwin*, 57 Ala., 62.

⁶ *St. Louis v. Ferry Co.*, 11 Wall., 423; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S., 196; *San Francisco v. Talbot*, 63 Cal., 485.

⁷ See *Corfield v. Coryell*, 4 Wash. C. C., 371, 380; *State v. City Council*, 2 Speers, 628; *Harrison v. Vicksburg*, 3 S. & M., 581; *Worth v. Fayetteville*, *Winston's L. & Eq.*, 617; *Padelford v. Mayor*, 14 Ga., 438; *Pearce v. Augusta*, 37 Ga., 597; *Shriver v. Pittsburg*, 66 Pa. St., 446; *Walton v. Westwood*.

Sometimes, also, the rule is made applicable to choses in action.¹

Property in Business. The property of a partnership is generally with much propriety required to be taxed at the place where the partnership business is carried on;² and the like provision is made for other cases where one is conducting a business at a place other than that where he resides. It would be proper in such a case to make the assessment to the

73 Ill., 125; *People v. Ogdensburgh*, 48 N. Y., 390; *Supervisors v. Davenport*, 40 Ill., 197; *Boardman v. Supervisors of Tompkins*, 85 N. Y., 359, and cases cited; *Hardesty v. Fleming*, 57 Tex., 395; *Grant v. Jones*, 39 Ohio St., 506; *Mitchell v. Plover*, 53 Wis., 548; *People v. Niles*, 35 Cal., 282; *Oakland v. Whipple*, 39 Cal., 112; *Lanesborough v. County Commissioners*, 131 Mass., 424; *Curtis v. Ward*, 58 Mo., 295; *Taylor v. St. Louis Co. Ct.*, 47 Mo., 594. These cases pass upon various questions arising under statutes providing for such assessment and apply the rule to non-resident owners of property as well as to residents. An assessment to an agent without describing him as such held good. *Lockwood v. Johnson*, 106 Ill., 334. Property belonging to a non-resident which is at a railroad station awaiting transportation to the owner is not taxable in the state. *Standard Oil Co. v. Bachelor*, 89 Ind., 1.

¹ As to when, under the phraseology of the statutes of Missouri, New York and Kansas, securities held abroad for a resident of those states respectively are excluded from taxation to him where he lives, see *State v. Howard Co. Court*, 69 Mo., 454, and cases cited; *People v. Smith*, 88 N. Y., 576; *Wilcox v. Ellis*, 14 Kan., 588; *Fisher v. Commissioners*, 19 Kan., 414.

Personalty received by a distributee in the state from the estate of one abroad is liable to taxation in the state under a statute taxing property distributed "to or among the next of kin" of an intestate. *Alvany v. Powell*, 2 Jones, Eq., 51.

² *Bemis v. Boston*, 14 Allen, 366, citing *Dwight v. Boston*, 12 Allen, 316; *Peabody v. County Commissioners*, 10 Gray, 97; *Fairbanks v. Kittredge*, 24 Vt., 9.

The assessment should be a joint assessment. *Swallow v. Thomas*, 15 Kan., 66; *Thibodaux v. Keller*, 29 La. An., 508; *Oliver v. Lynn*, 130 Mass., 143. See *Hoadley v. County Commissioners*, 105 Mass., 519.

The tax is a charge only upon those who were partners at the date of the assessment. *Washburn v. Walworth*, 133 Mass., 499. As to who are not taxable as partners, see *Stinson v. Boston*, 125 Mass., 348; *United States v. Glab*, 99 U. S., 225. For a case of taxation of a partnership by a wrong name, see *Lyle v. Jacques*, 101 Ill., 644. The tax sustained under peculiar circumstances.

As to assessments to joint owners generally, see *Meyer v. Dubuque Co.*, 49 Ia., 193.

person in charge of the business, unless the statute gave other direction.¹

Trust Property. In general personal estate in the hands of a trustee is to be assessed to him at the place of his domicile,² but it is sometimes made taxable to the persons beneficially entitled if they are residents of the state.³ If the fund is in

¹Putnam v. Fife Lake, 45 Mich., 125; McCoy v. Anderson, 47 Mich., 502; Hittinger v. Westford, 135 Mass., 258; Danville Co. v. Parks, 88 Ill., 170. Lumber kept for sale is taxable as "merchants' goods" where situate. Sanford v. Spencer, 62 Wis., 230; Washburn v. Oshkosh, 60 Wis., 453.

The cutting of ice held not a manufacture. Hittinger v. Westford, 135 Mass., 258. One who has a factory in charge of an agent at a state prison, and is also a jobber of the goods so made at another place, is within a statute providing that goods of manufacturers in the hands of agents shall be listed where the agent's business is conducted. He cannot at his election be taxed exclusively at one of the two places. Selz v. Cagwin, 104 Ill., 647. As to what is one's "place of business," see Barker v. Watertown, 137 Mass., 227.

A private banker living in one place, and having a bank in another, is for the purposes of taxation to be regarded as resident where the bank is located. Miner v. Fredonia, 27 N. Y., 155. And see Gardiner, etc., Co. v. Gardiner, 5 Greenl., 133; Bates v. Mobile, 46 Ala., 158. But it has been held that the furniture of an inn is only taxable to the innkeeper at the place of his residence. Charlestown v. County Commissioners, 109 Mass., 270. An army officer held taxable on his furniture where he was temporarily stationed in the service. Finley v. Philadelphia, 32 Pa. St., 381.

Under a statute for the taxation of "all lands and personal estates within this state," one cannot be assessed on capital invested in business in another state, or on chattels upon a farm in another state. People v. Commissioners of Taxes, 23 N. Y., 224.

The statute provided that non-residents "doing business" in the state should be taxed on sums invested "in said business." Held not to apply to a manufactured article merely sent into the state for sale by an agent, who sold and remitted the price. Parker Mills v. Commissioners of Taxes, 23 N. Y., 242.

²State v. Matthews, 10 Ohio St., 431; Catlin v. Hull, 21 Vt., 152; Latrobe v. Baltimore, 19 Md., 13; Baltimore v. Stirling, 29 Md., 48; Greene v. Mumford, 4 R. I., 313; Carlisle v. Marshall, 36 Pa. St., 397. See Hardy v. Yarmouth, 6 Allen, 277.

³Hathaway v. Fish, 13 Allen, 267; Davis v. Macy, 124 Mass., 193. If a part are non-resident, the trustee living in the state may be taxed in respect of their interests. Davis v. Macy, *supra*. If property is held abroad for a resident of Massachusetts, to whom only the income is payable, the fund is not taxable to the beneficiary in that state. Dorr v. Boston, 6 Gray, 181. See Preston v. Boston, 12 Pick., 7; Hathaway v. Fish, 13 Allen, 267.

If, under a statute which authorizes the taxation of trustees as owners, it

charge of a court, it is taxable in the jurisdiction having control of it.¹

Property of Decedent Estates. To determine where the personal property belonging to the estates of decedent estates shall be taxed, it is necessary to consult statutes. It is sometimes taxable to the estate as such at the place of *situs*, if the deceased was a non-resident, or at his last place of domicile if a resident;² but sometimes also to the personal representative in his character as such and at his place of domicile.³ And it will continue to be taxable to the estate or to the representative until actually distributed, but not afterwards.⁴

appears there are several trustees not residing in the same district, the tax should be apportioned among them. *Hardy v. Yarmouth*, 6 Allen, 277. But resident and non-resident trustees cannot be jointly assessed. *Stinson v. Boston*, 125 Mass., 348.

¹ *Lewis v. Chester Co.*, 60 Pa. St., 325. But personalty having an actual *situs* elsewhere might be taxed where it is. *Ibid.* See *Supervisors v. Daventport*, 40 Ill., 197. In New Jersey it is held that commissioners who, under the order of a court, sell property and invest the proceeds are not taxable thereon as trustees. *State v. Irons*, 35 N. J., 464; *State v. Staats*, 39 N. J., 653.

² See *Cornwall v. Todd*, 38 Conn., 443. An assessment in the name of the deceased sustained. *New Orleans v. Ferguson*, 28 La. An., 240. *Contra*, *Cook v. Leland*, 5 Pick., 236; *McGregor's Ex'r v. Vanpel*, 24 Ia., 436; *Stephens v. Booneville*, 34 Mo., 323.

³ *State v. Collector*, 39 N. J., 79; *State v. Jones*, 39 N. J., 650; *Gallatin v. Alexander*, 10 Lea, 475; *Johnson v. Oregon City*, 2 Or., 327. Doubtless when it is taxed at the place of domicile of the deceased, the proper method would be to tax to the personal representative unless the statute gave other direction. See *Revere v. Boston*, 123 Mass., 375; *Cameron v. Burlington*, 56 Ia., 320. Where the value of a mortgage is to be deducted from the assessment of the land mortgaged, the location of the land may determine the place of taxation of the mortgage. *State v. Runyon*, 41 N. J., 98. In Ohio, when there are two administrators who reside in different counties, one of whom has control of the estate, it should be taxed to him at his domicile. *Brown v. Noble*, 42 Ohio St., 405.

⁴ *Herrick v. Big Rapids*, 53 Mich., 554; *Hardy v. Yarmouth*, 6 Allen, 277; *State v. Leggett*, 40 N. J., 308; *Carleton v. Ashburnham*, 103 Mass., 348; *Ex parte McComb*, 4 Bradf., 151; *Holcombe v. Holcombe*, 39 N. J. Eq., 592.

As to taxes on successions, see *ante*, p. 30. Also *Schoolfield's Ex'r v. Lynchburg*, 8 Am. & Eng. Corp. Cas., 488. A deed of gift may under some circumstances be a succession and taxable as such. *United States v. Banks*, 17 Fed. Rep., 322. Tax assessed against a person by name after his death. This is no debt against the administrator on which suit can be brought. The assessment should have been against the heirs or whoever else was in

Property of Persons Under Guardianship. The place of taxation of the personal estate of persons under guardianship is different under different statutes. Under some it is taxable where the ward has his domicile;¹ under others it is taxable to the guardian who has it in his possession, as it would be if owned by himself;² and in any case, probably, this would be the rule if the guardian living in the state had possession of the property, and the ward were a non-resident.³

Assessment of corporations: *In General.* All private corporations are expected to be assessed for taxation under general laws, unless they are expressly exempt by charter or other law;⁴ and if not expressly mentioned in an enumeration of taxables, they may be held included under the term "persons" or "inhabitants."⁵ This, however, is matter of construction only,

possession. *Cook v. Leland*, 5 Pick., 236. Property of the estate cannot be seized for the tax. *Stafford v. Twitchell*, 33 La. An., 520. Where by statute the personalty of an estate was to be assessed to the executor or administrator, if it is taxed to "the estate" of the deceased, a suit will not lie against the administrator for the tax. *Wood v. Torrey*, 97 Mass., 321.

A tax properly assessed to the personal representative may be enforced against him personally. *Williams v. Holden*, 4 Wend., 228. See *Payson v. Tufts*, 13 Mass., 493. But a tax assessed against the estate as such after the representative was appointed cannot be so enforced. *Wood v. Torrey*, 97 Mass., 321.

Where the property has no *situs* in the state, and neither the personal representative nor a party in interest resides in the state, it is not taxable there. *Dallinger v. Rapello*, 14 Fed. Rep., 32. The same is true if the income merely is payable to an inhabitant of the state. *Dallinger v. Rapello*, 15 Fed. Rep., 434.

Where property is taxable to the representatives, and there are two or more, one of whom has it in possession, it should be taxed to him. *State v. Jones*, 39 N. J., 650.

¹ *West Chester Sch. Dist. v. Darlington*, 38 Pa. St., 157; *School Directors v. James*, 2 W. & S., 568; *Mason v. Thurber*, 1 R. I., 481; *Vogel v. Vogler*, 78 Ind., 853. See *Kirkland v. Whately*, 4 Allen, 462.

² *Payson v. Tufts*, 13 Mass., 493; *Baldwin v. First Parish*, 8 Pick., 494; *Louisville v. Sherley*, 80 Ky., 71. And the guardian is personally liable for the tax. *Payson v. Tufts*, *supra*.

³ *West Chester Sch. Dist. v. Darlington*, 38 Pa. St., 157.

⁴ See *Portland Bank v. Apthorp*, 12 Mass., 252; *Bank of Penn. v. Commonwealth*, 19 Pa. St., 144.

⁵ See *Baldwin v. Trustees*, 37 Me., 369; *People v. McLean*, 80 N. Y., 254; *Louisville, etc., R. Co. v. Commonwealth*, 1 Bush, 250. In Kansas the valuation of property by a railroad company for the purposes of taxation is to be accepted the same as that of a natural person. *Kansas, etc., R. Co.*

and it may be quite apparent on the face of the statute that such was not the intent.¹ The proper place for the taxation of a corporation in respect of its personalty is the place of its principal office, unless some other rule is prescribed by statute;² and a foreign corporation doing business in the state is taxable the same as a domestic corporation if the terms of the statute are such as to warrant it.³ But it is common to classify them separately for taxation, and corporations of different kinds, as railroads, insurance, banking and manufacturing corporations, are also thus classified in the discretion of the legislature.

The method of taxing these artificial bodies, when not fixed by the constitution or by charter, is left to the legislative judgment,⁴ and the diversity actually met with under tax laws is very great.

v. Wyandotte Co., 16 Kan., 587. Otherwise as to realty. *St. Joseph, etc., R. Co. v. Smith*, 19 Kan., 225.

¹ *Hartford Fire Ins. Co. v. Hartford*, 3 Conn., 15; *Cherokee, etc., Ins. Co. v. The Justices*, 28 Ga., 121. See *British, etc., L. I. Co. v. Com'rs of Taxes*, 1 Keyes, 303; *Parker Mills v. Same*, 23 N. Y., 242.

² *Portland, etc., R. R. Co. v. Saco*, 60 Me., 196; *State v. Person*, 32 N. J., 134; *Pacific R. R. Co. v. Cass County*, 53 Mo., 17; *Orange & Alexandria R. R. Co. v. Alexandria*, 17 Grat., 176; *Pelton v. Transportation Co.*, 37 Ohio St., 450; *Western Transportation Co. v. Scheu*, 19 N. Y., 408; *People v. McLean*, 80 N. Y., 254; *Union S. B. Co. v. Buffalo*, 82 N. Y., 351. A domestic corporation is thus taxable, in respect to all its stock, though part of its property is situate abroad and part of its stockholders reside abroad. *American Coal Co. v. Commissioners*, 59 Md., 185.

The rule stated in the text applies to railroad companies. *Appeal Tax Court v. Railroad Co.*, 50 Md., 274. See *Richmond, etc., R. Co. v. Commissioners*, 84 N. C., 504; *Boston, etc., Glass Co. v. Boston*, 4 Met., 181.

Where a manufacturing corporation is required to be assessed in the town "where the operations of the company are to be carried on," this means the manufactory, and not the place of financial operations. *Oswego Starch Factory v. Dolloway*, 21 N. Y., 449. Where a steamship company has part of its assets invested in ships being built out of the state, it may be taxed in respect of them at its home office. *People v. Com'rs of Taxes*, 64 N. Y., 541. A tax on corporate bonds, to be paid by the corporation and deducted, is not a tax on the corporation. If laid by value, this means the actual, not the par, value. *Commonwealth v. Lehigh Val. R. Co.*, 104 Pa. St., 89.

³ *People v. McLean*, 80 N. Y., 354. As to what is a "shop" and the "stock in trade" of a foreign corporation doing business in the state, see *Boston Loan Co. v. Boston*, 137 Mass., 332. A corporation chartered in two states has a domicile in both. *Bridge Co. v. Mayer*, 31 Ohio St., 317.

⁴ *Delaware Railroad Tax*, 18 Wall., 206, 231; *Porter v. Rock Island St. R. Co.*, 76 Ill., 561.

Franchise Taxes. An excise tax on the franchise of a corporation is sometimes imposed. Where a tax is plainly imposed on the corporate privilege, it must be sustained unless the constitution forbids, even though in effect it duplicates the burden on the corporate body. But such taxes are often measured by a standard which suggests the question whether in fact they are not taxes on property; in which case they might not perhaps be admissible. A case in illustration is that of a tax of a percentage on the capital stock paid in; which in Massachusetts has been held not to be a property tax but a tax on the franchise.¹ Such a tax may obviously be either the one thing or the other, and the phraseology of the statute under which it is laid may determine which it is in the particular case. So in the same state a tax on savings banks measured by their deposits has been held a franchise tax,² and the same ruling has been had in Connecticut,³ and Maine,⁴ while in New Hampshire the contrary has been held.⁵ So in Massachusetts a tax measured by the excess of the market value of all the corporate stock over and above the property otherwise taxable,⁶ and one measured by the whole value of the corporate shares,⁷ have been held to be, not taxes on property, but franchise taxes, and therefore a corporation taxed was not entitled to a deduction in respect to such portion of the capital stock as was invested in non-taxable securities.⁸ And in the same state a tax on in-

¹ *Portland Bank v. Apthorp*, 12 Mass., 252. See *Trustees v. Roome*, 93 N. Y., 313. See *ante*, p. 226.

² *Commonwealth v. People's Savings Bank*, 5 Allen, 428; *Provident Inst. v. Massachusetts*, 6 Wall., 611; *Commonwealth v. Savings Bank*, 123 Mass., 493. See for definition of excise tax, *Oliver v. Washington Mills*, 11 Allen, 263, 272.

³ *Coite v. Society for Savings*, 32 Conn., 173; *Society for Savings v. Coite*, 6 Wall., 594, questioned in *Nichols v. New Haven, etc., Co.*, 42 Conn., 103.

⁴ *Jones v. Savings Bank*, 66 Me., 242.

⁵ *Bartlett v. Carter*, 59 N. H., 105.

⁶ *Commonwealth v. Lowell Gas Co.*, 12 Allen, 75; *Commonwealth v. Hamilton Manuf. Co.*, 12 Allen, 298; *Hamilton Manuf. Co. v. Massachusetts*, 6 Wall., 632; *Commonwealth v. Cary Imp. Co.*, 98 Mass., 19.

⁷ *Manuf. Ins. Co. v. Lord*, 99 Mass., 146.

⁸ See cases in last two notes. Also *Coite v. Society for Savings*, 32 Conn., 173; *Society for Savings v. Coite*, 6 Wall., 594; *Monroe Savings Bank v. Rochester*, 37 N. Y., 365.

In *Bank of Commerce v. New York*, 2 Black, 620, it was held that while a tax on the nominal capital of a bank without regard to the nature or value

insurance companies measured by the value of policies in force is held a franchise tax.¹ In Connecticut a tax on a corporation measured by its cash capital has been held a franchise tax,² but in a later case a tax measured by the market value of the capital stock and by the funded and floating indebtedness was adjudged a property tax, and the earlier cases were questioned.³ In Pennsylvania the following have been held to be franchise taxes: A tax on a mining company measured by the product mined;⁴ a tax on the net earnings; and the tax will not be affected by the fact that a part of the earnings was derived from non-taxable securities;⁵ a tax on the capital stock as such,⁶ and a tax measured by dividends.⁷ In Maryland a tax on gross receipts has been held to be not a tax on property but on the franchise.⁸ There was a like ruling in Maine in respect of a tax on railroads laid on an estimate of the roadways, roll-

of the property composing it was a franchise tax, a tax measured by the value of the capital was a tax on property, and any portion of the capital invested in non-taxable securities must be deducted from the valuation. This was followed in *Bank Tax Case*, 2 Wall., 200. See *Wilmington, etc., R. Co. v. Reid*, 13 Wall., 264; and compare *Delaware Railroad Tax*, 18 Wall., 206.

¹ *Conn. Mut. Life Ins. Co. v. Commonwealth*, 133 Mass., 161. Such a tax cannot be imposed upon a copartnership, as it has no franchise or special privilege to be taxed. *Gleason v. McKay*, 134 Mass., 419. An excise tax may be imposed on a foreign corporation doing business in the state. *Attorney-General v. Bay State Mining Co.*, 99 Mass., 148; *Conn. Mut. Life Ins. Co. v. Commonwealth*, 133 Mass., 161.

² *Coite v. Conn. Mut. Life Ins. Co.*, 36 Conn., 513. See *Bank of Commerce v. New York*, 2 Black, 620. See *Belo v. Forsyth Co.*, 82 N. C., 415.

³ *Nichols v. New Haven, etc., Co.*, 42 Conn., 103.

⁴ *Kittanning Coal Co. v. Commonwealth*, 79 Pa. St., 100.

⁵ *Philadelphia Contributorship v. Commonwealth*, 98 Pa. St., 48.

⁶ *Carbon Iron Co. v. Carbon Co.*, 39 Pa. St., 251. And see *Farmers' Bank v. Commonwealth*, 6 Bush, 127. A tax on the capital stock irrespective of value held to be a privilege tax, and valid, though the whole capital was invested in non-taxable securities. *Holly Springs Co. v. Marshall Co.*, 52 Miss., 281.

⁷ *Phoenix Iron Co. v. Commonwealth*, 59 Pa. St., 104. In this case it was held that a company paying such a tax and none specifically on dividends was liable under the general law of the state to a tax on net earnings.

⁸ *State v. Philadelphia, etc., R. Co.*, 45 Md., 361. A tax on foreign corporations, however measured, cannot as to one not actually doing business within the state be a franchise tax. *Commonwealth v. Standard Oil Co.*, 101 Pa. St., 119. Where the corporate franchise and property are exempt from taxation, it is not competent to impose a tax measured by gross receipts. *State v. Baltimore, etc., R. Co.*, 48 Md., 49.

ing stock and franchises, leaving the buildings and local fixtures to be taxed by the municipalities where they were situated.¹

Dividends. An excise tax is sometimes measured by dividends, and when that is the case, anything divided as profit, and actually passed to the stockholders, is to be deemed dividend, whether actually declared or not.² And if a dividend is declared, the tax is payable upon it, whether earned or not.³ It is immaterial as regards the tax whether the dividend is paid in money or in certificates which go to increase the stock of the several shareholders,⁴ though a mere arithmetical increase in shares, without passing anything out of the corporate treasury or property, is no dividend.⁵ A franchise tax measured by dividends may be imposed, though the corporation is at the same time taxable on net earnings.⁶ Where the tax is to be measured by dividends made above a certain percentage of the capital, this will be taken to mean the capital actually paid in, and not the authorized capital.⁷ Surplus accumulations made before the law for taxing dividends took effect, though divided afterwards, will not be held to be such dividends as the law intended.⁸ When a tax is measured by div-

¹ *State v. Maine Cent. R. Co.*, 74 Me., 376. In Iowa a tax on railroad companies of one per cent. on gross earnings, one-half to be paid to the state and the other half apportioned among the municipalities, was sustained in *Dubuque v. Chicago, etc., R. Co.*, 47 Ia., 196, and was held applicable to unincorporated owners of roads.

² *Commonwealth v. Pittsburgh, etc., R. Co.*, 74 Pa. St., 83.

³ *Commonwealth v. Pittsburgh, etc., R. Co.*, 74 Pa. St., 83; *Columbia, etc., Co. v. Commonwealth*, 90 Pa. St., 307.

⁴ *Commonwealth v. Cleveland, etc., R. Co.*, 29 Pa. St., 370; *State v. Farmers' Bank*, 11 Ohio, 94; *Lehigh Crane Iron Co. v. Commonwealth*, 55 Pa. St., 448. See *Bailey v. Railroad Co.*, 22 Wall., 604; *Lake Shore, etc., R. Co. v. People*, 46 Mich., 193.

⁵ *Commonwealth v. Pittsburgh, etc., R. Co.*, 74 Pa. St., 83.

⁶ *Phoenix Iron Co. v. Commonwealth*, 59 Pa. St., 104.

⁷ *Second, etc., R'y Co. v. Philadelphia*, 51 Pa. St., 465; *Philadelphia v. Ferry Pass. R'y Co.*, 52 Pa. St., 177; *Philadelphia v. Ridge Av. R'y Co.*, 102 Pa. St., 190.

⁸ *People v. Albany Ins. Co.*, 92 N. Y., 458. See, also, *Chicago, etc., R. Co. v. Page*, 1 Biss., 461. When taxation is by property value, dividends, until actually paid over, are taxable to the corporation, but after being paid over are taxable as property of the parties receiving them. *Board of Revenue v. Gas Light Co.*, 64 Ala., 269.

dividends the corporation cannot deduct a sum which its members have contributed to make up a loss.¹ If the tax is measured by dividends exceeding a specified percentage, this will be held to mean the aggregate dividends for the year, and the corporation cannot, by declaring several, each of which is below the percentage named, escape the tax.²

Income. When the tax is to be measured by income, this must be understood as gross income, and it will be chargeable even though there be no profits.³ If a railroad company which is taxable on gross income leases its road to another, receiving nothing but rent, it is nevertheless taxable on the gross income of the road.⁴ Income, when not qualified in a tax law, may be held to mean that which comes in or is received from any service, business or investment of capital, without reference to outgoing expenditures; and it thus differs from net income, net earnings or profits, which mean the gain with both receipts and expenditures taken into the account.⁵

¹ *Columbia Conduit Co. v. Commonwealth*, 90 Pa. St., 307. Such a standard is taken as a proper means of arriving at the value of the franchise. *People v. Albany Ins. Co.*, 92 N. Y., 458.

² *Philadelphia v. Ridge Av. R'y Co.*, 102 Pa. St., 190. For other cases respecting the taxation of dividends, see *Haight v. Railroad Co.*, 6 Wall., 15; *Railroad Co. v. Jackson*, 7 Wall., 262; *United States v. Railroad Co.*, 17 Wall., 322; *United States v. Central Nat. Bank*, 15 Fed. Rep., 222. In *State v. City Council of Charleston*, 5 Rich., 561, it was decided that where a corporation was exempt from taxation, the stockholders were not taxable in respect of dividends received from it. If a corporation issue scrip to its members which represents funds in its hands, to be paid at some future day to the members, but which in the mean time is contingently liable for demands, the corporation should be taxed in respect to this fund as its property. *People v. Commissioners of Taxes*, 31 Hun, 261, citing *People v. Assessors of Brooklyn*, 76 N. Y., 202.

³ *People v. Supervisors of New York*, 18 Wend., 605. See *Waring v. Savannah*, 60 Ga., 93; and compare *Matter of Western Railway*, 5 Met., 596; *Commonwealth v. Ocean Oil Co.*, 59 Pa. St., 61. And see *ante*, p. 221.

⁴ *Goldsmith v. Railroad Co.*, 62 Ga., 468; *Wright v. Railroad Co.*, 64 Ga., 783, 794.

⁵ *People v. Supervisors of Niagara*, 4 Hill, 20; *People v. Supervisors of New York*, 18 Wend., 605. See *Opinions of Justices*, 5 Met., 596; *New Orleans v. Hart*, 14 La. An., 803; *New Orleans v. Fassman*, 14 La. An., 865; *Commonwealth v. Ocean Oil Co.*, 59 Pa. St., 61; *Commonwealth v. Penn Gas Coal Co.*, 62 Pa. St., 241. An enterprise which the stockholders of a corporation as such engage in and make large profits, but in which they are

In the case of such a tax no deduction is to be made in respect to any part of the income derived from non-taxable securities.¹ When a tax is measured by profits, the issue of certificates to the shareholders certifying that they respectively have an increased interest in the corporation to an amount specified is evidence that such profits have been made.²

Taxing Franchises as Property. In some states all taxation as far as possible is brought to an *ad valorem* standard. Franchises are property,³ and in such states may be taxed by a valuation, being estimated for the purpose either separately or as a part of the aggregate corporate property.⁴

Railroad taxation. The difficulties of assessing lines of railroad which extend through many municipalities in the same way that property in general is assessed are so great and so obvious that in many states it is not attempted, and a franchise tax is imposed as a substitute for all other taxation. But in other states a railroad is listed, assessed and valued as an entirety, and the value then apportioned for taxation between the several municipalities by some standard prescribed by law, which generally is the length of line within the municipalities respectively. There is no constitutional objection to that method of taxing this species of property,⁵ and it is perhaps

personally liable, is not to be considered the enterprise of the corporation, and it is not taxable in respect of such profits. *Credit Mobilier v. Commonwealth*, 67 Pa. St., 233. See as to meaning of income and profits, *ante*, pp. 221, 222. •

¹*Phila. Contributorship v. Commonwealth*, 98 Pa. St., 48. For a case in which income was held not taxable because shares were taxable, see *Boston Water Power Co. v. Boston*, 9 Met., 199.

²*People v. Assessors of Brooklyn*, 16 Hun, 196; S. C. on appeal, 76 N. Y., 202. See as to surplus earnings, *People v. Com'rs of Taxes*, 76 N. Y., 64.

Where the tax is measured by annual earnings, a loss on a security bought years before cannot be made use of to diminish the tax. *Phila. Contributorship v. Commonwealth*, 98 Pa. St., 48.

³*Worth v. Petersburg, etc., R. Co.*, 89 N. C., 301; *Ottawa Glass Co. v. McCaler*, 81 Ill., 556; *San Jose Gas Co. v. January*, 57 Cal., 614.

⁴*Pacific Hotel Co. v. Leib*, 83 Ill., 602; *Union Ins. Co. v. Weber*, 96 Ill., 346. In California the market value of the shares of stock with the value of corporate real and personal property deducted is deemed the value of the franchise. *Spring Valley Water Works v. Schottler*, 62 Cal., 69.

⁵*State Railroad Tax Cases*, 92 U. S., 575; *Law v. People*, 87 Ill., 385; *Union Pac. R. Co. v. Cheyenne*, 113 U. S., 516; *Missouri Riv., etc., R. Co.*

more just than any other.¹ In some states the assessing board apportions the aggregate value between the municipalities according to the estimated value of that portion of the road with its improvements lying within the limits of each,² and in still others the road-bed, right of way and superstructure are assessed as a whole, while the buildings and local improvements are left to be assessed locally like the property of natural persons.³ In thus assessing the road as a whole, the law in some states takes into account the franchise as property, and requires it to be valued with the rest;⁴ in others it does not. The rolling stock and other personalty of the company should be assessed at the place of its home office unless some other provision is made by law;⁵ but under some statutes the rolling stock is considered real estate, and is estimated with the road itself.⁶

Where a road is thus to be assessed as a whole, bridges, tun-

v. Morris, 7 Kan., 210; *State v. Severance*, 55 Mo., 378; *Franklin County v. Railroad Co.*, 12 Lea, 521; *Richmond, etc., R. Co. v. Alamance Co.*, 84 N. C., 504; *Dubuque v. Railroad Co.*, 47 Ia., 196; *Chicago, etc., R. Co. v. Davenport*, 51 Ia., 451. As to what is included in the railroad track, see *Chicago, etc., R. Co. v. People*, 4 Ill. App., 468; *Same v. Same*, 98 Ill., 350, and 99 Ill., 464. Where the board to make the assessment was composed of the county clerks of the counties through which the road run, it was held that a deputy county clerk might act in the absence of his principal. *Missouri River, etc., R. Co. v. Morris*, 7 Kan., 210. Mere irregularities in the assessment will not be noticed. *Ibid.* See *Smith v. Leavenworth Co.*, 9 Kan., 296; *Missouri Riv., etc., R. Co. v. Blake*, 9 Kan., 489. A failure to enter upon the assessment book of the township the amount apportioned to it is a mere irregularity. *Sioux City, etc., R. Co. v. Osceola Co.*, 45 Ia., 168. And see *Wilson v. Weber*, 96 Ill., 454. •

The apportionment is a mere clerical act, and may be done by the clerk of the board. *Union Trust Co. v. Weber*, 96 Ill., 346; *Wilson v. Weber*, 96 Ill., 454.

¹ See *Applegate v. Ernst*, 3 Bush, 648.

² See *State v. Severance*, 55 Mo., 378. In estimating the value of a railroad, lumber distributed along its line for repairs is to be taken into account. *Fitchburg R. Co. v. Prescott*, 47 N. H., 62.

³ See *State v. Maine Cent. R. Co.*, 74 Me., 376. See *San Francisco, etc., R. Co. v. State Board*, 60 Cal., 12.

⁴ See *Franklin County v. Railroad Co.*, 12 Lea, 521; *Huck v. Chicago, etc., R. Co.*, 86 Ill., 352; *Ottawa, etc., R. Co. v. McCafer*, 81 Ill., 556.

⁵ See *ante*, p. 378.

⁶ *Bangor, etc., R. Co. v. Harris*, 21 Me., 533; *Cumberland, etc., R'y v. Portland*, 37 Me., 444; *Louisville, etc., R. Co. v. State*, 25 Ind., 177; *Maus v. Railroad Co.*, 27 Ill., 77; *Sangamon, etc., R. Co. v. Morgan Co.*, 14 Ill., 163; *State v. Severance*, 55 Mo., 378; *Randall v. Elwell*, 53 N. Y., 521; *Philadel-*

nels, easements in and over streets, and other things and rights of a like nature, are to be taken into account, and are not subjects of separate assessment;¹ while property not held or used for railroad purposes, but of which the corporation may have become owner, should be separately listed and taxed, unless the statute plainly makes a different provision.² Where one railroad company leases the lines of other companies as extensions of its own, under authority given by its charter, such leased lines should be taken into account, valued, and the value apportioned with the line of the lessee company.³

In other states still, the local assessors are left to list and value such railroad property as is within their jurisdiction, including such portion of the road-bed and superstructure as lies within their municipality, in the same manner as they would any other property.⁴ In valuing railroad property it must be

phia, etc., R. Co. v. Appeal Tax Court, 50 Md., 397; Dubuque v. Illinois, etc., R. Co., 39 Ia., 56. See Union Trust Co. v. Weber, 96 Ill., 346.

As to the return of rolling stock for taxation, including leased cars, etc., see Shawnee Co. Com'rs v. Topeka, etc., Co., 26 Kan., 363.

¹Appeal Tax Court v. Western, etc., R. Co., 50 Md., 274.

²Savannah, etc., R. Co. v. Morton, 71 Ga., 24. Compare Hannibal, etc., R. Co. v. State Board, 64 Mo., 294, where it was held that, under the statute of Missouri, the land contracts of a railroad company were to be taken into the account and valued with the road. See, also, Wright v. Southwestern R. Co., 64 Ga., 783; *ante*, p. 232.

³Huck v. Chicago, etc., R. Co., 86 Ill., 352. Compare State v. Southwestern R. Co., 70 Ga., 11; Wright v. Southwestern R. Co., 64 Ga., 783. As to the assessment of an equipment company, see Shawnee Co. Com'rs v. Equipment Co., 26 Kan., 363; Richmond, etc., R. Co. v. Alamance Co., 84 N. C., 504.

Steamers used by a railroad company in transporting freight cars across water intervening between the *termini* of the tracks are not taxable as part of the "roadway" or "road-bed." San Francisco v. Railroad Co., 63 Cal., 467.

As to municipal taxation of the franchises of railroad companies, see Huck v. Chicago, etc., R. Co., 86 Ill., 352; San Jose v. San Jose, etc., R. Co., 53 Cal., 476.

For questions arising upon the consolidation of companies formed in different states, see Erie R. Co. v. Pennsylvania, 21 Wall., 492; Ohio, etc., R. Co. v. Weber, 96 Ill., 443; Railroad Tax Cases, 92 U. S., 575; Railroad Co. v. Vance, 96 U. S., 450, and other cases cited *ante*, pp. 211, 212.

And as to railroad exemptions and questions of duplicate taxation in general, see *ante*, pp. 209-211; 219-234.

⁴See Albany, etc., R. Co. v. Osborn, 12 Barb., 223; Albany, etc., R. Co. v. Canaan, 16 Barb., 244; The Tax Cases, 12 Gill & J., 107; Sangamon, etc.,

estimated by the same standards as other property is valued by.¹ A railroad track cannot be assessed as non-resident real estate, that term being only applied to property not occupied and used.²

Insurance companies. This class of corporations is generally required to pay a franchise tax. The methods of measuring it are quite diverse. Sometimes it is by the premium money received within the year;³ and when this is the case, the premiums received for insurance out of the state may be included if the terms of the statute are such as to require it.⁴ Sometimes it is on a net valuation of policies held in the state,⁵ sometimes on surplus earnings over some specified allowance for dividends,⁶ sometimes on the capital,⁷ and sometimes on the

R. Co. v. Sangamon Co., 14 Ill., 163; State v. Ill. Cent. R. Co., 27 Ill., 64; Providence, etc., R. Co. v. Wright, 2 R. I., 459.

In Illinois it has been held that a tax on railroad property is not invalid by reason of its being assessed in the wrong name as owner. Union Trust Co. v. Weber, 96 Ill., 346. In the same case it was held that a railroad and the franchise could not be assessed to a construction company who had built it, though the company was still in possession.

¹ The Tax Cases, 12 Gill & J., 117; Chicago, etc., R. Co. v. Livingston Co., 68 Ill., 458. This last case decides that in Illinois the improvements upon the realty are not to be separately valued. A valuation required by statute of the corporate officers is not conclusive upon the assessors. Hannibal, etc., R. Co. v. State Board, 64 Mo., 294.

² People v. Barker, 48 N. Y., 70; Buffalo, etc., R. Co. v. Supervisors of Erie, 48 N. Y., 93.

³ People v. Thurber, 13 Ill., 554; People v. State Treasurer, 31 Mich., 6; Germania Life Ins. Co. v. Commonwealth, 85 Pa. St., 513; *Ex parte* Cohn, 13 Nev., 424.

⁴ Ins. Co. of N. A. v. Commonwealth, 87 Pa. St., 173. Compare People v. Nat. Fire Ins. Co., 27 Hun, 188. Whether premium money received for insurance on imports still remaining in the bonded warehouse can be included, see People v. Nat. Fire Ins. Co., 61 How. Pr., 334; and People v. Nat. Fire Ins. Co., 27 Hun, 188, which are in conflict.

⁵ Conn. Mut. Ins. Co. v. Commonwealth, 133 Mass., 161.

⁶ People v. Com'rs of Taxes, 76 N. Y., 64.

⁷ Where a mutual insurance company was authorized to accumulate from its profits a fund to continue liable for its losses during the term of its existence, held that this accumulation was *capital*, and liable to taxation as such. Sun Mut. Ins. Co. v. New York, 8 N. Y., 241; People v. Supervisors of New York, 16 N. Y., 424; Mutual Ins. Co. v. Supervisors of Erie, 4 N. Y., 442. That a tax on the market value of the stock of corporations is not applicable to the guaranty stock of a mutual life insurance company, which is redeem-

capital with the addition of any accumulated surplus.¹ There is no constitutional impediment to taxation by any of these standards.

Foreign insurance companies may be required to pay a tax as a condition to doing business in the state, even if home companies are not taxed, or are taxed by a different standard.² The tax is not a regulation of commerce.³ Notwithstanding that the insurance company is taxed, its agents may also be required to pay a license fee as such.⁴ An English joint stock company, though not incorporated, is taxable as a "company incorporated or associated."⁵ And a company conducted on the mutual co-operative plan, though it owns no property and accumulates no fund for the payment of its losses, but relies entirely upon assessments to meet losses, and obligates itself to pay only such amounts as the assessments may yield, is nevertheless taxable as an insurance company.⁶

Miscellaneous corporations. For the purposes of state taxation the character of a corporation which, by its charter, has various distinct and different franchises is to be ascertained by the character of the principal business in which it is engaged at the time of assessment.⁷ If a corporation return for assessment is to be on blanks furnished from the proper office, the return must be made even though the furnishing of the blank has been neglected.⁸ It is unimportant in the taxation of a domestic

able from its earnings, such stock being rather in the nature of a debt of the corporation than stock as generally understood, see *Commonwealth v. Berkshire Life Ins. Co.*, 96 Mass., 25. As to the taxation of the capital of mutual life insurance companies, see *Coite v. Conn. Mut. Life Ins. Co.*, 36 Conn., 512.

¹See *State v. Parker*, 34 N. J., 479; *Same v. Same*, 35 N. J., 574.

²*Ducat v. Chicago*, 48 Ill., 172; S. C. in error, 10 Wall., 410; *Ex parte Cohn*, 18 Nev., 424; *Germania L. Ins. Co. v. Commonwealth*, 85 Pa. St., 513; *Walker v. Springfield*, 94 Ill., 364; *Home Ins. Co. v. Swigert*, 104 Ill., 653.

³*Paul v. Virginia*, 8 Wall., 168.

⁴*Walker v. Springfield*, 94 Ill., 364. As to what are agencies which would be thus taxable, see *New Orleans v. Rhenish West. Lloyds*, 81 La. An., 781; *New Orleans v. Insurance Co.*, 38 La. An., 10.

⁵*Oliver v. Liverpool, etc., Co.*, 100 Mass., 531; *Liverpool, etc., Co. v. Massachusetts*, 10 Wall., 566.

⁶*Lee Mut. Fire Ins. Co. v. State*, 60 Miss., 395.

⁷*Int. Nav. Co. v. Commonwealth*, 104 Pa. St., 36.

⁸*Pacific, etc., Co. v. Lieb*, 83 Ill., 602. See *Lake Shore, etc., R. Co. v. People*, 46 Mich., 193. The return will not be conclusive upon the taxing

corporation that some part of its capital is invested out of the state in building vessels for its use.¹ A foreign corporation doing business in the state may be taxed on the business or the franchise; but a statute for the taxation of its business will be construed as intending the business in the state.²

A bank, subject to a specific tax on its capital, is not taxable on collaterals deposited for loans.³ Deposits in a bank are its property and taxable to it as such.⁴ A bank is taxable though temporarily enjoined from business.⁵ A trust company, whose only business is investing its own capital in mortgages and selling such securities with the company's guaranty, is not a banking corporation.⁶ Where manufacturing companies are made a class by themselves for taxation, a dry-dock company is not to be deemed such a corporation.⁷

Taxing by value. It has been shown in preceding pages that in whatever form the corporation is taxed, it is competent also to tax the shares of the corporators, though this, in effect, may be duplicate taxation.⁸ This statement must be taken with the implied exception that the shares of non-resident

officers, unless made so by statute. See *Chicago, etc., R. Co. v. Paddock*, 75 Ill., 616; *St. Louis, etc., R. Co. v. Surrall*, 88 Ill., 535; *Lake Shore, etc., R. Co. v. People*, 46 Mich., 193; *San Francisco, etc., R. Co. v. State Board*, 60 Cal., 12.

¹ *People v. Com'rs of Taxes*, 64 N. Y., 541.

² *People v. Equitable Trust Co.*, 96 N. Y., 387. A tax of a percentage on the capital stock of the corporation was sustained.

³ *Waltham Bank v. Waltham*, 10 Met., 334.

Under a statute for taxing the "average value of the moneys and credits which have been in the possession or under the control" of a private banker, only his own moneys and credits are taxable. *Branch v. Marengo*, 43 Ia., 600. As to tax on commissions, see *Citizens' Bank v. Sharp*, 53 Md., 521.

⁴ *State v. Carson City Sav. Bank*, 17 Neb., 146. But a time deposit in a private bank is taxable to the depositor. *Hall v. Greenwood Co.*, 22 Kan., 37. See *Savings Bank v. New London*, 20 Conn., 111; *Phila. Sav. Fund Society v. Yard*, 9 Pa. St., 359.

⁵ *Commonwealth v. Savings Bank*, 126 Mass., 526; *Same v. Savings Bank*, 123 Mass., 493. As to the taxation of saving societies in general, see *Savings Bank v. New London*, 20 Conn., 111; *Coite v. Society for Savings*, 32 Conn., 173.

⁶ *Selden v. Equitable Trust Co.*, 94 U. S., 419. The case arose under the United States revenue laws.

⁷ *People v. Dock Co.*, 92 N. Y., 487.

⁸ *Ante*, pp. 221, 231.

shareholders are not taxable,¹ unless their taxability at the corporate place of business is annexed as an incident to the corporate privilege, in which case they may not only be taxed, but the payment of the tax enforced through the corporation by requiring it to withhold the amount from dividends.²

When the purpose of the law is to tax the corporation on the value of its property, this may be done either by assessing the actual capital stock as being presumptively the actual measure of its property, or by assessing the property specifically on an estimate of value.³ If the property is to be listed and taxed as in the case of natural persons, what is said elsewhere on those subjects will not need repetition here.⁴

Taxation of national banks. By the act of congress of June 3, 1864, the shares of stock held by any person or body corporate in any of the national banks are allowed to be in-

¹ *Ante*, pp. 22, 23; *State v. Thomas*, 26 N. J., 181. The general rule is that corporate shares are to be assessed to the owner at his place of domicile. *Conwell v. Connersville*, 15 Ind., 150; *Madison v. Whitney*, 21 Ind., 261; *ante*, p. 23.

² *Minot v. Railroad Co.*, 18 Wall., 276. See *State Railroad Tax Cases*, 92 U. S., 595. The fact that a part of the stockholders are non-residents will not exempt a corporation from the payment of an excise tax, even though it be measured by the market value of its stock. *Commonwealth v. Hamilton Manuf. Co.*, 12 Allen, 298.

³ The word "stock," in a statute authorizing the taxation of stock in corporations, means not only the stock subscriptions, but the actual tangible property of the corporation. *State v. Hamilton*, 5 Ind., 310; *Auditor of Floyd County v. New Albany & Salem R. R.*, 11 Ind., 570; *Mich. Cent. R. Co. v. Porter*, 17 Ind., 380; *Whitsell v. Northampton County*, 49 Pa. St., 526; *McKeen v. Same*, 49 Pa. St., 519; *State v. Branin*, 23 N. J., 484. In Louisiana the taxable value of that portion of the capital of a corporation represented by shares is, for assessment purposes, held to be the total par value of the shares when they are above par. *New Orleans, etc., Co. v. Assessors*, 32 La. An., 19. See *New Orleans Gas Light Co. v. Assessors*, 31 La. An., 475; *Louisiana Oil Co. v. Assessors*, 34 La. An., 618. When the value of the stock is par, it is of no importance that the tangible property in which the capital is invested is worth less than cost. *St. Charles St. R. Co. v. Assessors*, 31 La. An., 852. See *Nichols v. New Haven, etc., Co.*, 42 Conn., 103. For peculiar questions respecting the taxation of capital, see *Lake Shore, etc., R. Co. v. People*, 46 Mich., 193.

⁴ In taxing the property of a bank with property in general, losses and gains cannot be disregarded. *City Bank v. Bogel*, 51 Tex., 355. Where capital is exempt, money in the corporate treasury is not to be assessed. *Fall River v. County Commissioners*, 125 Mass., 567.

cluded in the valuation of personal property "in the assessment of taxes imposed by or under state authority, at the place where such bank is located, and not elsewhere, but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state," and not exceeding "the rate imposed upon the shares of any of the banks organized under the authority of the state" where the bank is located; and nothing in the act is to exempt the real estate of such banks "from either state, county or municipal taxes, to the same extent, according to its value, as other real estate is taxed."¹ Under this act, if no tax is imposed by the state on shares in state banks, the shares in the national banks are not taxed at all.² This difficulty was met with in states whose laws taxed the capital of banks, but not the shares thereof.³ The act was not intended to restrict the state power of taxation, but only to prevent unfriendly discrimination in taxation against the moneyed capital invested in national banks.⁴

The act does not admit of the taxation of the capital as such,⁵ and the shares must be taxed by the same standards which are applied in the case of other moneyed capital.⁶ If

¹ As to the taxation of real estate of national banks, see *Second Nat. Bank v. Caldwell*, 13 Fed. Rep., 429. The value of the real estate must be deducted in taxing the shares of a national bank if it is in taxing those of a state bank. *Loftin v. Citizens' Nat. Bank*, 85 Ind., 841.

² *Van Allen v. The Assessors*, 3 Wall., 573; *Bradley v. People*, 4 Wall., 459.

³ *Bradley v. People*, 4 Wall., 459; *Smith v. First National Bank of Tecumseh*, 17 Mich., 479.

⁴ *Adams v. Nashville*, 95 U. S., 19.

The power to tax national banks extends to the territories. *People v. Moore*, 1 Idaho, 504. A statute for taxing the surplus capital of banks will be applied to national and state banks alike. *National Bank v. Peterborough*, 56 N. H., 38.

⁵ *Smith v. First National Bank of Tecumseh*, 17 Mich., 479; *Collins v. Chicago*, 4 Biss., 472. See *Smith v. Webb*, 11 Minn., 378; *First National Bank of Hannibal v. Meredith*, 44 Mo., 500; *National Bank of Mobile v. Mobile*, 62 Ala., 284; *National Bank v. Douglass Co.*, 3 Dill., 330. See *Lemly v. Commissioners*, 85 N. C., 379. See *People v. National Gold Bank*, 51 Cal., 508.

⁶ *Van Allen v. Assessors*, 3 Wall., 573; *People v. Com'rs of Taxes*, 94 U. S., 415. But the valuation is not necessarily limited to the par value. *Hepburn v. School Directors*, 23 Wall., 480. As to what exemptions of other property would make taxation of national banks illegal, see *Boyer v. Boyer*, 113 U. S., 689. The fact that bank shares are taxed at a higher rate than

the state law, justly administered, would produce uniformity, but the officers knowingly and purposely apply a different rule of valuation to the shares of national banks, in order to impose disproportionate taxes upon them, the courts will give relief.¹ Whatever deductions are allowed in assessing the shares of state banks must be allowed also in assessing the shares of national banks.² A license tax cannot be imposed upon national banks,³ nor can the states exercise any control over them except as permitted by congress.⁴ The shares cannot be taxed by municipalities when the shares of state banks are not so taxable.⁵ But the fact that two banks, by their charter, are specially taxed, will not preclude the taxation of the shares in the national banks by general law;⁶ neither are the shares to be excluded from taxation, because some other classes of moneyed

shares in other than moneyed corporations is not material, provided they are not taxed higher than shares in other moneyed corporations or than personal property. *First National Bank v. Waters*, 19 Blatch., 242. See *Hepburn v. School Directors*, 23 Wall., 480.

¹ *Pelton v. National Bank*, 101 U. S., 143; *Cummings v. National Bank*, 101 U. S., 153; *St. Louis National Bank v. Papin*, 4 Dill., 29; *Covington City National Bank v. Covington*, 21 Fed. Rep., 484; *Exchange National Bank v. Miller*, 19 Fed. Rep., 372. See *Boyer v. Boyer*, 113 U. S., 689. The case must, however, be a plain one to justify interfering to enjoin the tax. *First National Bank v. Farwell*, 10 Biss., 270; S. C., 7 Fed. Rep., 518. See *National Bank v. Kimball*, 103 U. S., 732. Mere errors in assessing national bank stock will raise no federal question. *Williams v. Weaver*, 100 U. S., 547. That a national bank may enjoin illegal taxation on behalf of its shareholders, see *Cummings v. National Bank*, 101 U. S., 153; *Hills v. Exchange Bank*, 105 U. S., 319; *National Bank v. Wells*, 18 Blatch., 478; *Albany National Bank v. Maher*, 9 Fed. Rep., 884; *City National Bank v. Paducah*, 2 Flipp., 61. But a shareholder cannot complain of legislation that does not injure him. *Stanley v. Supervisors*, 15 Fed. Rep., 488; S. C., 21 Blatch., 241; *Supervisors v. Stanley*, 105 U. S., 305; *Hills v. Exchange Bank*, 103 U. S., 319.

² *People v. Weaver*, 100 U. S., 539; *National Bank v. Wells*, 18 Blatch., 478; *Evansville Bank v. Britton*, 105 U. S., 322; *Miller v. Heilbron*, 58 Cal., 133; *City Nat. Bank v. Paducah*, 2 Flipp., 61; *Pollard v. State*, 65 Ala., 628; *Maguire v. Mobile Co.*, 71 Ala., 401.

³ *Macon v. First Nat. Bank*, 59 Ga., 648. See *Second National Bank v. Caldwell*, 13 Fed. Rep., 429.

⁴ *Farmers', etc., Bank v. Dearing*, 91 U. S., 29; *Covington City Nat. Bank v. Covington*, 21 Fed. Rep., 484; *Macon v. First Nat. Bank*, 59 Ga., 648.

⁵ *Craft v. Tuttle*, 27 Ind., 832; *Wright v. Stiltz*, 27 Ind., 838. See *Howell v. Cassopolis*, 35 Mich., 471.

⁶ *Lionberger v. Rowse*, 43 Mo., 67; S. C. in error, 9 Wall., 468.

capital are exempt from taxation by laws of limited application.¹ In assessing the shares it is not necessary to make a deduction in respect to capital invested in national securities.² The state may tax the shares at the place where the bank is located without regard to the residence of shareholders,³ and may require the tax to be paid by the bank.⁴

Assessment of real property. Tax laws in general give very careful and specific directions for the assessment of real property, and in doing so have in view for the most part the interests of those who are responsible for or may be concerned in their taxation. Very simple proceedings might suffice to enable the state to collect its revenues from lands if only its own interests were to be regarded; but as rights in any particular parcel of land are liable to be diversified and numerous, and as the duty to pay the tax, if neglected by the party primarily liable, is likely to fall secondarily on others who may be in ignorance of the neglect, a government careful of the interests of its individual citizens will not fail to make such provisions as will be reasonably certain to notify every party concerned of any default, and give him ample opportunity to protect his interest from sacrifice or forfeiture. The duty to do this becomes particularly manifest when it is remembered that real estate when sold for taxes seldom brings more than a

¹ Everitt's Appeal, 71 Pa. St., 216. See *Adams v. Nashville*, 95 U. S., 19; *Albany, etc., Bank v. Maher*, 19 Blatch., 175.

² *First Nat. Bank v. Concord*, 59 N. H., 75; *First Nat. Bank v. Peterborough*, 56 N. H., 38; *First Nat. Bank v. Farwell*, 10 Biss., 270; S. C., 7 Fed. Rep., 518; *Exchange Nat. Bank v. Miller*, 19 Fed. Rep., 372.

³ *Williams v. Weaver*, 75 N. Y., 30; *McIver v. Robinson*, 53 Ala., 456; *Kyle v. Fayetteville*, 75 N. C., 445. See *Buie v. Fayetteville*, 79 N. C., 267.

⁴ *National Bank v. Commonwealth*, 9 Wall., 353; *Lionberger v. Rowse*, 9 Wall., 468.

That national banks may be compelled to make disclosure of property, etc., as in other cases, see *First Nat. Bank v. Hughes*, 6 Fed. Rep., 737; *Waite v. Dowley*, 94 U. S., 527. That the ordinary process for collection may be applied to them, see *National Bank v. Morrison*, 1 McCrary, 204. And see, in general, *Tappan v. Merchants' Nat. Bank*, 19 Wall., 490; *Providence Inst. v. Boston*, 101 Mass., 575; *First Nat. Bank v. St. Joseph*, 46 Mich., 526; *Charleston v. National Bank*, 5 Rich. (N. S.), 108; *People v. Moore*, 1 Idaho, 504.

The property of a national bank continues exempt after insolvency as before. *Rosenblatt v. Johnston*, 104 U. S., 462.

small fraction of its real value. It may be assumed, therefore, as the general fact, that the directions given are intended to be carefully observed.

General Course. It is not customary to assess the owners of land for a sum in gross, estimated to be the value of the real estate owned or possessed by them; but the land is described and valued in parcels, in order that, if the owner fails to make payment, the land itself may be proceeded against. No one can be taxed in respect to his ownership of land unless the land itself is within the jurisdiction of the taxing authority; his personal liability depending on the right to reach and tax the land. Government lands, we have seen, are not taxable at all; but when they are sold by executory contract it is customary to provide for the taxation of the purchaser's interest — sometimes as real and sometimes as personal estate.¹ In other cases of sales by executory contract the vendor is owner until the vendee becomes entitled to a conveyance, and if the law requires an assessment to the owner, it is complied with by assessing the vendor.²

Classification of Lands. Among the most useful of the provisions for the protection of persons taxed is one that unoccupied, unseated or non-resident lands, as they are variously designated, shall be assessed on a different list from the occupied or seated lands; or if not on a different list, then on a different part of the same list. The purpose is that the two distinct classes of land shall be assessed separately, so that the owner or other person interested in any parcel, knowing its character as occupied or unoccupied, shall know exactly where to look for his assessment, and shall thus be more certain to dis-

¹See *Prescott v. Beebee*, 17 Kan., 320; *Bentley v. Barton*, 41 Ohio St., 410.

As to assessment of Indian lands after the Indian title is extinguished by treaty, see *Fellows v. Denniston*, 23 N. Y., 420; *State v. Miami County*, 63 Ind., 497; *Franklin County v. Pennock*, 18 Kan., 579; *Kansas Indians*, 5 Wall., 737; *Peck v. Miami Co.*, 4 Dill., 370; *Pennock v. Commissioners*, 103 U. S., 44.

²*Sherwin v. Mudge*, 127 Mass., 547. Property bought with borrowed money is to be considered the property of the purchaser though the lender holds a lien upon it for the money. *Lyle v. Jacques*, 101 Ill., 644.

In Iowa, if a vendee by contract has paid a part, he should be taxed for the land and the vendor for the money due. *Meyer v. Dubuque Co.*, 49 Ia., 193. Compare *Wiley v. Koons*, 49 Ind., 272; *Henderson v. State*, 53 Ind., 60.

cover any claim made upon him by reason of his interest and be enabled to discharge it before anything shall be lost to him in consequence of a default.¹

The terms "seated," "resident" and "occupied" lands may not convey precisely the same idea as they are employed in the several state statutes, and probably do not.² They will in general, however, be found sufficiently explained in the several statutes. The general idea of the statutes classifying lands for taxation is, that those which are cultivated or occupied, so that some one within the taxing district is personally in charge and therefore liable for taxation in respect to them, shall be taxed in a list by themselves. There are very essential distinctions, however, to be observed in considering the several statutes. The custom in most of the states is that, when the

¹ See *Burd v. Ramsey*, 9 S. & R., 109; *Ritter v. Worth*, 58 N. Y., 637.

² As to what are to be regarded as "seated" lands in Pennsylvania, see *Wilson v. Waterson*, 4 Pa. St., 214, in which it is held that lands having a house upon them and some improvements, though not occupied, are not to be regarded as unseated without unequivocal marks of the abandonment of the improvement, and its permissive return to its natural state. The improvement of part of a tract makes the whole seated, though divided by a county line. *Ellis v. Hall*, 19 Pa. St., 292. Where a number of unoccupied tracts are to be used in the supplying a mill with timber to cut, this does not make them seated. *Heft v. Gephart*, 65 Pa. St., 510. Lands are seated when occupied, even though the occupant is an intruder. *Campbell v. Wilson*, 1 Watts, 508; *Larimer v. McCall*, 4 W. & S., 133. And the occupation and cultivation of part of a warrant fixes the character of the whole. *Biddle v. Noble*, 68 Pa. St., 279. Residence without cultivation, or cultivation without residence, will preclude land being sold as unseated. *George v. Messenger*, 73 Pa. St., 418. As to what will constitute seated lands in general, see *Campbell v. Wilson*, 1 Watts, 508; *Sheafer v. McCabe*, 2 Watts, 421; *Fish v. Brown*, 5 Watts, 441; *Kennedy v. Dailey*, 6 Watts, 269; *Wallace v. Scott*, 7 W. & S., 247; *Larimer v. McCall*, 4 W. & S., 133; *Mitchell v. Bratton*, 5 W. & S., 451; *Milliken v. Benedict*, 8 Pa. St., 169; *Jackson v. Sassaman*, 29 Pa. St., 106; *Hathaway v. Ellshree*, 54 Pa. St., 498; *Lackawana Iron, etc., Co. v. Fales*, 55 Pa. St., 90; *Stewart v. Trevor*, 56 Pa. St., 374; *Green v. Watson*, 34 Pa. St., 332; *Hoffman v. Bell*, 61 Pa. St., 444; *George v. Messenger*, 73 Pa. St., 418; *Watson v. Davidson*, 87 Pa. St., 270; *Jackson v. Stoetzel*, 87 Pa. St., 302; *Arthurs v. King*, 95 Pa. St., 167; *Earley v. Euwer*, 102 Pa. St., 338.

Whether land is to be taxed as seated or unseated depends altogether upon the appearance it may present to the eye of the assessor. If there appears to be such permanent improvement as indicates a personal responsibility for taxes, the land should be returned and taxed as seated. Occasional occupation by miners and the digging of coal by trespassers do not make it seated. *Stoetzel v. Jackson*, 105 Pa. St., 562.

periodical assessments are made, the lands are examined or their condition inquired into, and they are classed irrespective of any former assessment; while in Pennsylvania the rule is that lands once seated are presumed to continue so, and nothing but an unequivocal abandonment by the occupier, without the intention of returning, will warrant their being changed to the unseated list.¹ And the abandonment of part of an entire tract while the occupation of the remainder continues will not prevent the whole being regarded as seated.² So, again, the general rule is that while the owner or occupant is taxed personally for the land he owns or occupies, the tax is also made a lien upon the land, which will be sold for its satisfaction in case the tax is not collected of the person. In Pennsylvania, on the other hand, while the tax on seated lands is a personal charge, that on the unseated lands alone has until recently been made a lien to be enforced by sale. And even since the recent law which makes seated lands liable to sale for taxes, the proceedings are different, personal notice to the owner being required.³

Under all the statutes, however, the requirement of a classification of lands as seated and unseated, resident or non-resident, etc., is probably to be considered imperative.⁴ It has been so held in Maine,⁵ Massachusetts,⁶ New Hampshire,⁷ New

¹ *Harbeson v. Jack*, 2 Watts, 124; *Milliken v. Benedict*, 8 Pa. St., 169; *Negley v. Breeding*, 32 Pa. St., 325; *Arthurs v. Smathers*, 38 Pa. St., 40, 44; *Stewart v. Trevor*, 56 Pa. St., 374.

² *Patterson v. Blackmore*, 9 Watts, 104. See *Ellis v. Hall*, 19 Pa. St., 292.

³ See *Broughton v. Journeay*, 51 Pa. St., 31; *Lovejoy v. Lunt*, 48 Me., 377.

⁴ Possibly Connecticut is an exception. See *Adams v. Seymour*, 80 Conn., 402.

⁵ The law required improved lands to be assessed to the owner. *Held*, that an assessment to person unknown was void. *Brown v. Veazie*, 25 Me., 359; *Barker v. Hesseltine*, 27 Me., 354. To same effect are *Carmichael v. Aiken*, 13 La. An., 205; *Bidleman v. Brooks*, 28 Cal., 72. An assessment of a whole lot to a person, and a sale of the whole, is void if a part was never owned or possessed by him. *Barker v. Blake*, 36 Me., 433; *Greene v. Walker*, 68 Me., 311. For a case of resident land assessed as non-resident, see *Lunt v. Wormell*, 19 Me., 100.

If non-resident land is given in by a resident agent for assessment to him as agent it may be so assessed. *Williams v. Young*, 51 Ga., 463.

⁶ *Rising v. Granger*, 1 Mass., 48; *Desmond v. Babbitt*, 117 Mass., 233.

⁷ *Bowles v. Clough*, 55 N. H., 339; *Perley v. Stanley*, 59 N. H., 537; *Thompson v. Ela*, 60 N. H., 562.

York,¹ Pennsylvania,² and in so many other states that any question that might once have been an open one must now be regarded as finally settled.³

Assessment of Occupied Lands. There is a general concurrence of authority that, when the statute provides for the assessment of occupied or seated lands to the owner or occupant, the requirement that it shall be so assessed is imperative.⁴

¹ *Whitney v. Thomas*, 23 N. Y., 281; *Crooke v. Andrews*, 40 N. Y., 547; *Newell v. Wheeler*, 48 N. Y., 486; *Ritter v. Worth*, 58 N. Y., 627.

² *Milliken v. Benedict*, 8 Pa. St., 169. As to the effect of consent to land being assessed in the wrong list, see *Larimer v. McCall*, 4 W. & S., 133; *Milliken v. Benedict*, *supra*; *Negley v. Breeding*, 32 Pa. St., 325; *Hathaway v. Ellsbree*, 54 Pa. St., 498. And as to erroneous listing in general, see *Commercial Bank v. Woodside*, 14 Pa. St., 404; *Stewart v. Trevor*, 56 Pa. St., 374. Lands assessed as seated cannot be transferred to the unseated list without notice to the owner where practicable. *Larimer v. McCall*, 4 W. & S., 133; *Milliken v. Benedict*, 8 Pa. St., 169; *Commercial Bank v. Woodside*, 14 Pa. St., 404; *Stewart v. Trevor*, 56 Pa. St., 374; *Bechdle v. Lingle*, 66 Pa. St., 38. But if a parcel has been on no list for several years, the owner has no such right. *Bechdle v. Lingle*, *supra*. Nor generally, it seems, in case of abandonment. *Laird v. Hiester*, 24 Pa. St., 452.

³ See *Messenger v. Germain*, 6 Ill., 681; *Green v. Craft*, 28 Miss., 70; *Raynor v. Lee*, 20 Mich., 384; *Milwaukee Iron Co. v. Hubbard*, 29 Wis., 51, 56; *Washington v. Pratt*, 8 Wheat., 681. Where the law requires the land to be assessed to the patentee when the owner is unknown, any other assessment is invalid. *Yenda v. Wheeler*, 9 Tex., 408; *Thompson v. Ela*, 60 N. H., 562.

Putting to an assessment of non-resident lands the name of a former owner, held immaterial. *Alvord v. Collin*, 20 Pick., 418. See *Miller v. Hale*, 26 Pa. St., 432; *Philadelphia v. Miller*, 49 Pa. St., 440; *O'Grady v. Barnhisel*, 23 Cal., 287; *O'Neal v. Virginia, etc., Co.*, 18 Md., 1. In Louisiana it is held that vacant property may be validly assessed in the name of its deceased non-resident owner if it still belongs to his estate. *Sewell v. Watson*, 31 La. An., 589. But if it never belonged to him the assessment is void. *Fix v. Succession of Dierker*, 30 La. An., 175. If one is owner when proceedings are commenced, an assessment to him is not rendered invalid by a change in ownership, before they are confirmed, of which the assessors have no notice. *Morange v. Mix*, 44 N. Y., 315.

⁴ It need not be so assessed unless the statute requires it. *Thompson v. Carroll's Lessee*, 22 How., 422; *Witherspoon v. Duncan*, 4 Wall., 210, 219. The rule has been applied with great strictness in Wisconsin in holding that an assessment of the wife's separate estate to the husband, he living with her upon it, was void under a statute requiring lands to be assessed to the owner or occupant. *Hamilton v. Fond du Lac*, 25 Wis., 496. Listing of land belonging to an estate to "widow and heirs" of the deceased person held sufficient. *Wheeler v. Anthony*, 10 Wend., 346. But a listing to the

Such an assessment is intended to establish a personal liability, and it is very manifest that assessors can have no power to charge one class of persons when the statute specifies a different class for the purpose. Thus, if the statute says the *owners* shall be assessed, the assessors cannot lawfully charge *occupants* who are not owners,¹ though, if the statute only requires the assessors to list in the names of the owners respectively, *if known*, if they omit the name in the list, or set down the lands as belonging to persons unknown, the presumption that they

widow alone was held void in *Yancey v. Hopkins*, 1 Munf., 419. A listing to "estate of J. B. Coles," held good. *State v. Jersey City*, 24 N. J., 108. To the same effect are *Dickison v. Reynolds*, 48 Mich., 158; *Moale v. Baltimore*, 61 Md., 224. Compare *Cruger v. Dougherty*, 43 N. Y., 107. Such a listing held bad in North Carolina. *Morrison v. McLauchlin*, 88 N. C., 251. In New York it is said such a listing would be irregular. If there are trustees under a will holding the estate, it should be assessed to them. *Trowbridge v. Horan*, 78 N. Y., 439. As to Kansas, see *Reading v. Wier*, 29 Kan., 429. See, further, *Elliot v. Spinney*, 69 Me., 31.

There is a statute in Arkansas that "no sale of any lands or town lots for the payment of taxes shall be considered invalid on account of its having been charged on the tax book in any other name than that of the rightful owner, if such land be in other respects sufficiently described in the tax book, and the taxes for which the same is sold be due and unpaid at the time of such sale." This statute enforced in *Merrick v. Hutt*, 15 Ark., 331. And see *Kinsworthy v. Mitchell*, 21 Ark., 145; *Garibaldi v. Jenkins*, 27 Ark., 453, 456. Compare the Missouri cases of *Abbott v. Lindenbower*, 42 Mo., 162; S. C., 46 Mo., 291; *Hume v. Wainscott*, 46 Mo., 145. Mistakes in names not calculated to mislead will not vitiate. *Van Voorhis v. Budd*, 39 Barb., 479; *Pierce v. Richardson*, 37 N. H., 306. An assessment to L. H. S. is not an assessment to the owner when he has been dead ten years, and the property stands of record in the name of his succession. *Stafford v. Twitchell*, 33 La. An., 520. It is proper to assess partnership lands to the partnership, instead of the individual partners. *Hubbard v. Winsor*, 15 Mich., 146.

¹ *Mansfield v. Martin*, 3 Mass., 419. But the assessment of the lands of a company to one member who was in possession as agent was held sufficient, and the addition of "agent" to his name treated as surplusage. *Wells v. Battelle*, 11 Mass., 477. See further, *Coombs v. Warren*, 34 Me., 89; *Knox v. Huidekoper*, 21 Wis., 527; *Cardigan v. Page*, 6 N. H., 182; *Ainsworth v. Dean*, 21 N. H., 400; *Kelsey v. Abbott*, 13 Cal., 609; *Abbott v. Lindenbower*, 42 Mo., 162; S. C., 46 Mo., 291; *Hume v. Wainscott*, 46 Mo., 145; *Johnson v. McIntire*, 1 Bibb, 295. The sale of an individual's land assessed as state land is void. *Redmond v. Banks*, 60 Miss., 293.

An owner of land is not personally liable for the tax when it is assessed to another. *Jefferson City v. Mock*, 74 Mo., 61.

In California it has been held that one in possession of lands after his title has been cut off by a tax sale is not taxable for the land. *Maina v. Elliott*, 51 Cal., 8. It is not likely that this would be held in some other states.

performed their duty in endeavoring to ascertain the owner may support the assessment, until evidence that the officers did know the owner overcomes this presumption.¹

Care should be taken that the name given in the list² be the

¹ Blackwell on Tax Titles, 145, citing *Cardigan v. Page*, 6 N. H., 182; *Smith v. Messer*, 17 N. H., 420; *Nelson v. Pierce*, 6 N. H., 194; *Ainsworth v. Dean*, 21 N. H., 400; *Brown v. Veazie*, 25 Me., 359; *Merritt v. Thompson*, 18 Ill., 716; *Shimmin v. Inman*, 26 Me., 228; *Jaquith v. Putney*, 48 N. H., 188; *Stockton v. Dunham*, 59 Cal., 608, 609; *Corning Town Co. v. Davis*, 44 Ia., 622. In this last case such an assessment is said to be a mere irregularity.

The statute provided that the assessment should show "the owner of each lot or portion of a lot (if known to the superintendent), if unknown, the word 'unknown' shall be written opposite the number of the lot," etc. *Held*, that when the assessment was returned with the word "unknown" thus placed, "it amounted to an official certificate, by the proper officer, that in point of fact the owner of the particular lot designated was unknown to him," and this was conclusive of the fact certified, and could not be collaterally called in question in an action brought to recover the tax. *Chambers v. Satterlee*, 40 Cal., 497, 518. For further decisions in California, see *Grotefend v. Ultz*, 58 Cal., 666; *Grimm v. O'Connell*, 54 Cal., 522; *Hearst v. Egglestone*, 55 Cal., 865; *Brady v. Dowden*, 59 Cal., 51; *Hall v. Theisen*, 61 Cal., 524; *San Francisco v. Phelan*, 61 Cal., 617. Although in a proper case land may be assessed to "owner unknown," yet if it be so assessed, and at the same time be assessed to the owner by name, the assessment is void. *Nichols v. McGlathery*, 48 Ia., 189. In Louisiana land cannot be assessed as "unknown" without an honest endeavor first to ascertain the owner. *Rapp v. Lowry*, 30 La. An., 1272. See *Person v. O'Neal*, 28 La. An., 228. So in Alabama. *Oliver v. Robinson*, 58 Ala., 46.

Where one is in possession of land under a parol gift it should be assessed to the donor who is still legal owner. *Mullikin v. Reeves*, 71 Ind., 281. Where land is to be assessed to the person holding and owning the same, it is properly assessed to an occupant who holds the record title, but has given a trust deed of it as security. *Greenwalt v. Tucker*, 8 Fed. Rep., 792. Where land is to be assessed to the occupant, an assessment to a company when it is owned by an individual and occupied by his agent, is void. *Hearst v. Egglestone*, 55 Cal., 865. If the land is without buildings, and only used as a garden, an assessment to the owner may be sustained. *Massing v. Ames*, 37 Wis., 645. See this case for an assessment of the wife's land to the husband sustained. Where the statute required land to be assessed to the owner on a day named, and the land was sold before that day, but bought back afterwards, and the deed which had been given, but not recorded, was destroyed to retest the title, an assessment to the party who had thus sold was held void. *Pitkin v. Parks*, 54 Vt., 301.

² That where land required to be assessed to the owner is assessed to another, the proceedings are void, see *Dunn v. Winston*, 31 Miss., 135; *Abbott v. Lindenbower*, 42 Mo., 162; *Hume v. Wainscott*, 46 Mo., 145; *People v.*

correct one; for any misleading error would be fatal.¹ If land is held by two or more as tenants in common it should either be assessed to all jointly or undivided interests assessed to the owners severally; they cannot be assessed for distinct quantities.² A life tenant should be assessed as owner during the continuance of the life estate.³ If the husband has the care and occupancy of the wife's land, it may be assessed to him as occupant.⁴ Where a statute provides for the assessment of the estates of deceased persons to heirs or devisees without specifying names until they give notice of its division, an assessment to heirs is bad when the property is given to devisees.⁵

Where land is assessed to an occupant who is tenant of the owner, it is sometimes provided by statute that he shall be en-

Castro, 39 Cal., 65; *Himmelman v. Steiner*, 38 Cal., 175; *Bidleman v. Brooks*, 28 Cal., 72; *Kelsey v. Abbott*, 13 Cal., 609; *Yenda v. Wheeler*, 9 Tex., 408; *Hecht v. Boughton*, 2 Wy., 368. By owner is meant the legal, not the equitable, owner. *People v. Seaman's Friend Society*, 87 Ill., 246.

¹*Smith v. Reed*, 51 Conn., 10; *People v. Whipple*, 47 Cal., 591 — both cases of error in the baptismal name. But in Iowa such an error was held not to invalidate the lien on the land. *Kendig v. Knight*, 60 Ia., 29. In Illinois the listing of a railroad right of way to the railroad company, when it was in possession of the construction company, was sustained. *Union Trust Co. v. Weber*, 96 Ill., 346. An assessment to a married woman in her maiden name has been upheld. *Laverne v. New Orleans*, 28 La. An., 677. Under the Indiana statute an assessment is not void because of not being made in the name of the owner. *Cooper v. Jackson*, 71 Ind., 244; *Schrodt v. Deputy*, 88 Ind., 90; *Stilz v. Indianapolis*, 81 Ind., 582; *Peckham v. Millikan*, 99 Ind., 352.

²See *Hayes v. Viator*, 33 La. An., 1162. An assessment to one of two tenants in common was sustained in *Fleischauer v. Hoboken*, 40 N. J., 109.

³*Garland v. Garland*, 73 Me., 97. It is the duty of a tenant for life to pay the annual taxes (*Sidenburg v. Ely*, 90 N. Y., 257; *Deraismes v. Deraismes*, 72 N. Y., 154; *Anderson v. Hensley*, 8 Heisk., 834); but where permanent improvements are assessed, they should be apportioned between him and those who have interests in remainder. *Pratt v. Douglass*, 38 N. J. Eq., 516.

⁴*Paul v. Fries*, 18 Fla., 573. But where they do not live together, and he does not occupy the land, such an assessment would be void. *Smith v. Reed*, 51 Conn., 10. In Wisconsin an assessment of the wife's property to the husband may be upheld. *Enos v. Bemis*, 61 Wis., 656.

⁵*Elliott v. Spinney*, 69 Me., 31. In Kansas, where land descends at once to the heir, the administrator is not bound to pay taxes upon it unless he proceeds to sell it. *Reading v. Wier*, 29 Kan., 429. In New Hampshire a mortgagee in possession is not bound to pay taxes. *Eastman v. Thayer*, 60 N. H., 408.

titled to deduct the taxes paid from the rent. But this is subject to be changed by contract.¹

Separate Assessment of Parcels. It is also generally made imperative that separate and distinct parcels of land shall be assessed separately. This is certainly essential where the lands are resident or seated, and in the occupancy of different persons, each of whom has a right to know exactly what demand the government makes upon him.² A failure to observe this requirement is not a mere "omission, defect or irregularity," which can be overlooked, under a statute which provides that assessments for taxation shall be valid "notwithstanding any omission, defect or irregularity" in the proceedings.³ The like separate assessment is also essential in other cases if the statute requires it. The reasons are sufficiently manifest. If separate parcels of land belonging to different individuals, and presumably of different values, can be assessed together, neither of the owners has any means of determining the amount of tax which is properly chargeable to his property, and consequently no means of discharging his own land from the lien, and of protecting his title, except by paying the whole of a demand some undefined and undefinable portion of which is

¹ See *Hammon v. Sexton*, 69 Ind., 37. It is said that a tenant, having a right by statute to deduct from his rent the taxes paid on the land, can deduct such as the land was chargeable with in its condition as rented, and not such as his improvements afterwards have caused. *Mayo v. Carrington*, 19 Grat., 74.

After the rolls are closed, a transposition made by one assessor without authority is a nullity, and the roll will be considered as if the change had not been made. *St. Charles St. R. Co. v. Assessors*, 31 La. An., 852.

² *Barker v. Blake*, 36 Me., 433; *Greene v. Walker*, 63 Me., 311; *State v. Williston*, 20 Wis., 238; *Roby v. Chicago*, 48 Ill., 130; *People v. Shimmins*, 42 Cal., 121; *Boardman v. Bourne*, 20 Ia., 135; *Ware v. Thompson*, 29 Ia., 65.

³ *Hamilton v. Fond du Lac*, 25 Wis., 490. Compare *Stewart v. Shoenfelt*, 13 S. & R., 360; *Bratton v. Mitchell*, 1 W. & S., 310; *Mitchell v. Bratton*, 5 W. & S., 451; *Russell v. Wertz*, 24 Pa. St., 337; *Miller v. Hale*, 26 Pa. St., 432; *McReynolds v. Longenberger*, 57 Pa. St., 13; *Dietrich v. Mason*, 57 Pa. St., 40; *Rogers v. Johnson*, 67 Pa. St., 43; *Sargeant v. Bean*, 7 Gray, 125. If two parcels are wrongfully assessed together, and one is not taxable, the tax on that, if paid under protest, may be recovered back. *St. Mary's Church v. Tripp*, 14 R. L., 307.

neither in equity nor in law a proper charge against him.¹ Nay, when the two parcels are owned by the same person, if the statute requires a separate assessment, obedience to the requirement is essential to the validity of the proceedings. It cannot be held in any case that it is unimportant to the tax payer whether this requirement is complied with or not. Indeed it is made solely for his benefit; it being wholly immaterial, so far as the interest of the state is concerned, whether separate estates are or are not separately assessed. And where a requirement has for its sole object the benefit of the tax payer, the necessity for a compliance with it cannot be made to depend upon the circumstances of a particular case, and the opinion of a court or jury regarding the importance of obedience to it in that instance. That method of construing statutes would abolish all certainty.²

¹See *Shimmin v. Inman*, 26 Me., 228; *Barker v. Blake*, 36 Me., 433; *Hayden v. Foster*, 13 Pick., 492; *Jennings v. Collins*, 99 Mass., 29; *Crane v. Janesville*, 20 Wis., 305; *Orton v. Noonan*, 25 Wis., 672, 677; *Siegel v. Outagamie Co.*, 26 Wis., 70; *Willey v. Scoville's Lessee*, 9 Ohio, 44; *Douglass v. Dangerfield*, 10 Ohio, 152, 156; *Cooley v. Waterman*, 16 Mich., 466; *Hanscom v. Hinman*, 30 Mich., 419; *Farnham v. Jones*, 32 Minn., 7; *McLaughlin v. Kain*, 45 Pa. St., 113; *Dunn v. Winston*, 31 Miss., 135; *Terrill v. Groves*, 18 Cal., 149; *Howe v. People*, 86 Ill., 288. No omission of the land owner to appeal could validate such an assessment. *Lyman v. People*, 2 Ill. App., 289.

Where land has been regularly platted into city lots, an assessment by the acre as before is bad. *Bruce v. McBee*, 23 Kan., 379; *Hapgood v. Morten*, 28 Kan., 764. What is a sufficient plat when property is described by reference to it, see *People v. Root*, 107 Ill., 581.

²See *Ins. Co. v. Yard*, 17 Pa. St., 331, 333; *French v. Edwards*, 13 Wall., 506, 511; *Walker v. Chapman*, 22 Ala., 116; *Martin v. Cole*, 38 Ia., 141, 153; *Sandwich v. Fish*, 2 Gray, 298, 301; *Challis v. Hekelnkemper*, 14 Kan., 474; *Nason v. Ricker*, 63 Me., 381; *Alleghany Co. Com'rs v. Mining Co.*, 61 Md., 545. It makes no difference that the aggregate tax of an owner of land is not increased by the grouping. See last case. But the grouping of two or more parcels owned by the same person was held in *Russell v. Werntz*, 24 Pa. St., 337, to be only an irregularity, and therefore cured under a statute which provided that "no irregularity in the assessment, or in the process or otherwise, shall be construed or taken to affect the title of the purchaser, but the same shall be declared to be good and legal." But this would not validate the assessment of unseated land on the seated list, and then transferring it to the unseated without notice. *Milliken v. Benedict*, 8 Pa. St., 169.

A non-resident parcel which has never been subdivided cannot be assessed for taxation in parcels. *Thompson v. Burhans*, 61 N. Y., 52.

What are Separate Parcels. Assessors are sometimes embarrassed by the necessity for determining what is to be regarded a separate parcel for the purposes of taxation. "A dwelling-house with the land and appurtenances occupied with it, a warehouse so occupied, a farm or other parcel of real estate let to the same tenant by one and the same lease, parcels detached from each other and used and occupied for different purposes, may respectively be regarded as separate and distinct estates. When this can be done, they must be deemed to be separate and distinct estates, to be distinctly valued and assessed."¹ But in the case of unimproved lands the general understanding appears to be that an assessment as one parcel of that which was purchased by the owner as such is sufficient, though by the government survey it was subdivided, for the purpose of being offered for sale, into several parcels, each of which might have been sold separately. Thus, an assessment of the whole south half of a section has been held good, though it contained four distinct eighty-acre lots.² This is on the assumption that the whole is still owned as one parcel,³ or at least that it is not known to the assessors to have been divided by sale.⁴ But an assessment which divides such a parcel

¹ *Shaw*, Ch. J., in *Hayden v. Foster*, 18 Pick., 492, 497.

² *Atkins v. Hinman*, 2 Gilm., 437, 443. And see *Spellman v. Curtenius*, 13 Ill., 409, where the two halves of a half section were separately described, but assessed together. The assessment and sale of a whole section together was sustained in *Martin v. Cole*, 38 Ia., 141. There is a good deal of discussion in this case as to what is to be regarded as a separate parcel for the purposes of assessment and sale.

³ In *Jennings v. Collins*, 99 Mass., 29, 31, several lots were assessed together to one Packard, who was owner of a part of them only. *Wells, J.*, says: "If the lots had all been the property of Packard at the time the tax was laid, the mere fact that he had divided the land into small lots for the purposes of sale would not require the assessors to make a separate valuation of each lot. But where lands are separated, either by the use or purpose to which they are devoted, or by the mode of their occupation, or are disconnected in location, a tax laid generally upon an entire valuation cannot be made a lien upon each separate parcel, even when they are all owned and occupied by the same person." In California the decisions are that blocks of land in a city may be assessed by blocks when assessed to the owner, even if they have been subdivided into lots. *People v. Culverwell*, 44 Cal., 620; *People v. Morse*, 43 Cal., 534.

⁴ It is usual to provide by statute for the case of lands where different persons claim distinct interests in different portions, allowing each to pay

into the lowest legal subdivisions cannot prejudice the owner where the land is unoccupied and unimproved,¹ and would seem to be unobjectionable. Unimproved water power, it has been held, cannot be taxed independently of the land on which the power is obtained;² and the authorities in general are imperative in holding that an unauthorized division of a tract in the assessment, which tract has no known legal subdivisions, is as fatal as an unauthorized grouping of distinct parcels would be.³

the tax on any portion he will distinctly define; the amount being ascertained by the proportion in quantity which that tax bears to the whole. See *Corbin v. Inslee*, 24 Kan., 154.

¹See *Jennings v. Collins*, 99 Mass., 29, 31. If two town lots are occupied and used as one lot, the buildings thereon being partly on each, they may be sold for taxes together as one lot, their use and nature determining that they are to be regarded as one lot. *Weaver v. Grant*, 39 Ia., 294.

²*Boston Manuf. Co. v. Newton*, 22 Pick., 22. It was held in *Stein v. Mobile*, 17 Ala., 234, that where one holds real estate within a city, and in connection therewith an exclusive right to supply the city with water, this intangible right is subject to valuation and taxation like tangible property. See *Stein v. Mobile*, 54 Ala., 23.

³*Reading v. Finney*, 73 Pa. St., 467; *Wyman v. Baer*, 46 Mich., 418. In *Brown v. Hays*, 66 Pa. St., 229, it appeared that warrant No. 4023, containing one thousand and twenty-six acres, all but sixteen of which was in Polk township, was assessed in Polk by the number, and the taxes paid for several years. Afterwards it was assessed by number in Polk as seven hundred and twenty-six acres, and the remaining three hundred acres in the other township. The owner paid the taxes in Polk, and the remainder was sold. Held, that the payment by the number of the warrant was payment in full, and the sale of the three hundred acres was wholly void. The assessor had no right to divide the tract in Polk into two parcels when not divided by the owner; and the assessment, with a wrong specification of quantity, would not be notice to the owner that the remainder was assessed elsewhere. And see *Williston v. Colkett*, 9 Pa. St., 38, where an assessment of a tract as two hundred acres was held good, though it contained six hundred; the remainder of the description sufficiently identifying it.

If a tax payer lists and values several parcels as one, and they are so assessed, he cannot, nor can his grantee, afterwards object to such assessment. *Albany Brewing Co. v. Meriden*, 48 Conn., 243. See *Lane v. Succession of March*, 33 La. An., 554; *Carter v. New Orleans*, 33 La. An., 816.

A lot cut in two by the opening of a street through it may continue to be assessed as one parcel, but when assessed for street improvements as two, should be treated as two throughout. *Spangler v. Cleveland*, 35 Ohio St., 469. As to the assessment of parts of a building as separate tenements, see *Cincinnati College v. Yeatman*, 30 Ohio St., 276.

Description. In listing the land, it must be described with particularity sufficient to afford the owner the means of identification, and not to mislead him.¹ A description that would be sufficient in a conveyance between individuals would generally be sufficient here. It is, nevertheless, possible for cases to arise in which such a criterion would be an unsafe one to apply. In a deed which one executes for the purpose of conveying a particular description of land, if errors of description occur, they may well be rejected and the deed sustained, if, after rejecting them, a sufficient description remains to identify the land intended; because the erroneous circumstances which were added could not have misled the party conveying, who, all the time, had in mind a particular parcel which the erroneous particulars did not fit.² But the same errors in a description prepared by another might very likely mislead the owner, who would be informed of no error, and who must, from the

¹ Great strictness is sometimes insisted upon in describing land in the assessment, on the idea that the government in taxing is proceeding in hostility to the interests of the persons taxed. See *Blackw. Tax Titles*, p. 124. But this has very little foundation.

The proceedings in the assessment of a tax are not, in any proper sense, hostile to the citizen; they are, on the other hand, proceedings necessary and indispensable to the determination of the exact share which each resident, or property owner, ought to take, and may and ought to be supposed desirous of taking, in meeting the public necessity for a revenue;—proceedings which the willingness of the tax payer cannot dispense with, and which only become hostile when the duty to pay, once fixed, fails to be performed by payment. Then, and then only, do the steps taken by the government assume a compulsory form; until then the reasonable presumption is that government and tax payer will act together in harmony, and that the latter will meet his obligation to pay as soon as the former has performed its duty in determining the share to be paid. See *Kelly v. Herrall*, 20 Fed. Rep., 364, 367; *Nance v. Hopkins*, 10 Lea, 508; *Peru, etc., R. Co. v. Hanna*, 68 Ind., 562; *Sawyer v. Gleason*, 59 N. H., 140; *Herrick v. Amerman*, 32 Minn., 544.

In South Carolina a statute for the assessment of village property has been said not necessarily to mean an incorporated village, and a summer resort may be a village for the purpose. *Martin v. Tax Collector*, 1 Speers, 343. Land over which a street has been laid out may be taxed if the fee remains in the individual and he still occupies. *Denver v. Clements*, 3 Col., 484.

² That a falsity in description affects all subsequent proceedings, see *Yenda v. Wheeler*, 9 Tex., 408; *Wilkins v. Tourtelot*, 28 Kan., 825. But where the assessment for the taxation of lands creates a personal charge, the tax may be collected though the description is bad. *State v. Union*, 36 N. J., 309. See *Law v. People*, 84 Ill., 142; *State v. Edgar*, 26 La. An., 726; *New Orleans v. Cassidy*, 27 La. An., 704.

description alone, discover what land was intended. The same may be said of any imperfection in the description; the owner, if it has been prepared by himself, will read it in connection with his own knowledge of those surrounding circumstances, in the light of which he has framed it;¹ but an equally imperfect description, prepared by another and unaccompanied by any such circumstances, would fail to convey to his mind any idea that his own land was intended. It certainly would be much less likely to do so than where he himself had formulated it.

The purposes in describing the land are, *first*, that the owner may have information of the claim made upon him or his property; *second*, that the public, in case the tax is not paid, may be notified what land is to be offered for sale for the non-payment; and *third*, that the purchaser may be enabled to obtain a sufficient conveyance. If the description is sufficient for the first purpose, it will ordinarily be sufficient for the others also. Several attempts have been made to lay down some general rule as to what is sufficient, and what not, for a description in the listing. "Notice," it is well said, "or at least the means of knowledge, is an essential element of every just proceeding which affects rights of persons or of property. But how can the duty of the payment of taxes be performed without the identity of the subject-matter of the duty being made known to him who is to perform it, by name or description? A thing, whether land or chattel, to be the subject of legal action, must be proceeded against by name or by description, but a name is descriptive only because it has become associated with the person or thing named. A name, therefore, which has never become connected in any manner with any title or possession of land, clearly infers no means of its identification. So the mathematical contents expressed in figures is not a mark of identity peculiar to the land; but, like a common noun, has no immediate or cognate relation to a particular tract. . . . Identity is said to be a matter for the jury. Certainly this is so; but from its very nature, the fact of iden-

¹ If a tax payer has furnished the description himself he is bound by it. *Jeffries v. Clark*, 28 Kan., 448. No one can object to his own tax because the land of another is misdescribed. *Buck v. People*, 78 Ill., 560. See *Chiniquy v. People*, 78 Ill., 570.

tity is dependent on circumstances which attach themselves to the land. It is because the thing described answers to the circumstances of description, we are able to identify it. The evidence of identity is the record which contains the description and fixes the duty. Assessment is, from its legal requirement, and the necessity of preserving its evidence, a written entry, and must depend upon the records of the commissioner's office, and not upon parol testimony, or the private duplicate of the assessor."¹ And, after an examination of cases decided, it is added: "The result of the whole is, that where the assessment wholly fails to lead to identification, so that neither the owner nor the officer can tell that his land is taxed, the duty of payment cannot be performed, and the assessment is void."² The rule thus given is quite as liberal in support of imperfect and inaccurate descriptions as would be applied to conveyances *inter partes*. In another case in the same state, it is said a sale "will pass the title, although assessed in a wrong name or by a wrong number, if otherwise designated and capable of identification. The reason for this is the recognized principle that it is the land, and not the owner, which is chargeable, and to be charged, with the tax. It must, however, be susceptible of identification as the land assessed, otherwise the sale would be void."³ But identification may possibly be made out to the

¹ *Philadelphia v. Miller*, 49 Pa. St., 440, 448, per *Agnew*, J., citing and commenting upon *McCall v. Larimer*, 4 Watts, 351, 355; S. C., 4 W. & S., 133; *Dunn v. Relyea*, 6 W. & S., 475; *Stewart v. Shoenfelt*, 13 S. & R., 360; *Luffborough v. Parker*, 16 S. & R., 351; *Morton v. Harris*, 9 Watts, 319, 325; *Hubley v. Keyser*, 2 P. & Watts, 496; *Strauch v. Shoemaker*, 1 W. & S., 166; *Burns v. Lyon*, 4 Watts, 363; *Harper v. McKeenan*, 8 W. & S., 238; *Russel v. Wernitz*, 24 Pa. St., 337; *Laird v. Hiester*, 24 Pa. St., 452; *Miller v. Hale*, 26 Pa. St., 432; *Cooper v. Brockway*, 8 Watts, 162, 165; *Thompson v. Fisher*, 6 W. & S., 520; *Dunden v. Snodgrass*, 18 Pa. St., 151; *Woodside v. Wilson*, 32 Pa. St., 52. These cases pass upon a great variety of descriptions, some of which are held sufficient, and some are not. See, also, *Kelly v. Sanders*, 99 U. S., 441; *Sherry v. McKinley*, 99 U. S., 496; *Succession of Edwards*, 32 La. An., 457.

² *Philadelphia v. Miller*, 49 Pa. St., 440, 455; *Harris v. Tyson*, 24 Pa. St., 347. See, also, *Glass v. Gilbert*, 58 Pa. St., 266. It is the return of the tract by the assessors which fixes its identity and liability to taxation. *Brown v. Hayes*, 66 Pa. St., 229. In some states, however, provision is made by law for a correction of the descriptions by the county board.

³ *Thompson*, J., in *Woodside v. Wilson*, 32 Pa. St., 52, 54. This statement would, of course, be inapplicable to the case of an assessment of resident

satisfaction of a jury by a description that would be extremely likely to mislead the owner himself; the jury having their attention called to the errors or defects which exist, and the owner not being aware that there are any, but having a right to assume, until notified to the contrary, that all descriptions in the list have accurate application to some particular pieces of property, and fit some others when not appearing to fit his. A more satisfactory rule would seem to be that "the designation of the land will be sufficient if it afford the means of identification, and do not positively mislead the owner,"¹ or be calculated to mislead him.² It is thus expressed in a New York case: "An assessment of non-resident land is fatally defective and void if it contain such a falsity in the designation or description of the parcel assessed as might probably mislead the owner and prevent him from ascertaining by the notices that his land was to be sold or redeemed. Such a mis-

land. When the law requires it to be assessed to the owner, it must be so assessed, as preceding cases show.

An assessment to N. of "land, forty acres in road district No. 21, in the township of Woodbridge," is good where N. owns no other land in the district. *State v. Woodbridge*, 42 N. J., 401. Where land is assessed as six acres in the corner of a tract, it will be taken to be six acres in square form, and the assessment held good. *Immegart v. Gorgas*, 41 Ia., 439. Land assessed as the east end of a block, etc., held to be the east half. *Chiniquy v. People*, 78 Ill., 570. Where the statute provides that for the assessment of railroad property the assessment shall be sufficient "by metes and bounds or other description sufficient for redemption," an assessment of the roadway is sufficient which gives the *termini*, courses and distances. *San Francisco, etc., R. Co. v. State Board*, 60 Cal., 12.

When a part of a city plat has been vacated, the assessment can no longer be made of the land as city lots. *Stebbins v. Challiss*, 15 Kan., 55. Where a plat has been made by some one besides the owner, an assessment by it is bad. *Gage v. Rumsey*, 73 Ill., 473.

¹ *Thompson, J.*, in *Woodside v. Wilson*, 32 Pa. St., 52, 55.

² See *Curtis v. Supervisors of Brown County*, 23 Wis., 167, in which it is denied that a description sufficient as between parties will be sufficient always in an assessment, or that particulars in it which are erroneous can be rejected as surplusage. To the same point is *Dike v. Lewis*, 4 Denio, 237. See, also, *Orton v. Noonan*, 23 Wis., 102, in which it is said words cannot be supplied by intendment. It is to be observed of this case, however, that the words it was proposed to supply would have wholly changed the apparent meaning. A description is said to be sufficient if by it a competent person could identify the land. *Sloan v. Sewell*, 81 Ind., 180. See *Oldtown v. Blake*, 74 Me., 280; *Law v. People*, 80 Ill., 268; *Fowler v. People*, 93 Ill., 116.

take or falsity defeats one of the obvious and just purposes of the statute—that of giving to the owner an opportunity of preventing the sale by paying the tax.”¹ Under this rule each case must depend so much upon its own special facts that little service could be done by giving the decided cases in detail here. Several are given in the note and others are referred to.²

¹ *Ruggles, J.*, in *Tallman v. White*, 2 N. Y., 66, 71. See, also, *Lafferty v. Byers*, 5 Ohio, 458; *Turney v. Yeoman*, 16 Ohio, 24; *Farnum v. Buffum*, 4 Cush., 260; *Amberg v. Rogers*, 9 Mich., 332; *Green v. Lunt*, 58 Me., 15; *State v. Union*, 36 N. J., 309. In *Hill v. Mowry*, 6 Gray, 551, the rule is laid down that a tax deed, taking effect only as the execution of a statute power, should be construed with some strictness, so as to enable the grantee to identify the land, and to enable the owner to redeem it. And it was held that a deed which bounds the land correctly on two sides bounds it on the third by land on which, in fact, it is bounded in part only, and on the fourth by land from which it is separated by the land of a third person, is void for uncertainty.

² Where the only description was “William Bush’s heirs, 2560 acres,” held insufficient. *Bush v. Williams*, *Cooke* (Tenn.), 274. So where the description was “Moses Buffum, house and land,” Buffum not being the occupant. *Farnum v. Buffum*, 4 Cush., 260. Compare *Coombs v. Warren*, 34 Me., 89. So where the description is *part* of a lot without showing how much, or giving boundaries. *Detroit Young Men’s Society v. Detroit*, 3 Mich., 172; *Massie v. Long*, 2 Ohio, 287, 289; *Green v. Lunt*, 58 Me., 518; *Naltner v. Blake*, 56 Ind., 127; *Roberts v. Deeds*, 57 Ia., 820; *Cogburn v. Hunt*, 54 Miss., 675; *Yandell v. Pugh*, 53 Miss., 295; *State v. Elizabeth*, 39 N. J., 689. But a description, as “that part of private claim 61, lying east of the north branch of the river Ecorse,” in a township named, is sufficient. *Gilman v. Riopelle*, 18 Mich., 145. Error in stating the quantity of the land, however great, will not vitiate. *Brown v. Hays*, 66 Pa. St., 229; *Williston v. Colkett*, 9 Pa. St., 88; *Gilman v. Riopelle*, 18 Mich., 145. Omission of the number of a town lot, or the name of the owner, is fatal where the law requires them to be given. *Thacher, Ex parte*, 3 Sneed, 344. Description in the notice of tax sale, as “Tract No. 8, S. D., advertised, 4197,” held wholly insufficient. *Griffin v. Crippen*, 60 Me., 270. Compare *Glass v. Gilbert*, 58 Pa. St., 266, 290. An assessment as definite as the grant under which the land is held is sufficient. *People v. Crockett*, 33 Cal., 150. A description, “one hundred varas square,” with definite boundaries on three sides, is sufficient. *Garwood v. Hastings*, 33 Cal., 216. An assessment of a large tract of land, which describes it by metes and bounds, and then excepts from the tract parcels of the same which have been previously conveyed, but does not describe the excepted portions by metes and bounds, nor in any manner but by a reference to recorded deeds, is void on its face. *People v. Cone*, 48 Cal., 427; *People v. Hyde*, 48 Cal., 431. See, also, *People v. Hancock*, 48 Cal., 631. A description of the land by well understood abbreviations is sufficient, thus: “E. ½, S. W. ¼, Sec. 24, Town 3 South, of Range 7 West,” etc. *Sibley v. Smith*, 2 Mich., 486, 508. See, also, *Long v. Long*, 2 Blackf., 293; *Jordan*,

Valuation. Where the grouping of lands for assessment is inadmissible, the valuation of several parcels in gross is equally so. No useful purpose could be subserved by separate descriptions if the parcels, though separately described, were to be grouped in valuation.¹

It is elsewhere shown² that valuation is in its nature a judicial act, and the assessors in making it are entitled to the

etc., Association, etc., v. Wagoner, 83 Ind., 50; Atkins v. Hinman, 2 Gilm., 437; Olcott v. State, 5 Gilm., 481; Blakely v. Bestor, 18 Ill., 714; Stevens v. Hollister, 18 Vt., 294; Goodell v. Harrison, 2 Mo., 124; Hodgdon v. Burleigh, 4 Fed. Rep., 111; Paris v. Lewis, 85 Ill., 597; Buck v. People, 78 Ill., 560; State v. Newark, 86 N. J., 288. Further, as to what is a sufficient description, the following cases are instructive: Ronkendorf v. Taylor, 4 Pet., 349; Lafferty's Lessee v. Byers, 5 Ohio, 458; Trevor v. Emerick, 6 Ohio, 391; Larabee v. Hodgkins, 58 Me., 412; Griffin v. Crippin, 60 Me., 270; Orono v. Veazie, 61 Me., 431; Currie v. Fowler, 5 J. J. Marsh., 145; Le Fever v. Detroit, 2 Mich., 586; Wright v. Dunham, 13 Mich., 414; Atwell v. Zeluff, 26 Mich., 118, 121; Jaques v. Kopman, 6 La. An., 542; Woolfolk v. Fombene, 15 La. An., 15; Latchman v. Clark, 14 Cal., 181; High v. Shoemaker, 22 Cal., 363; Bosworth v. Danzien, 25 Cal., 296; People v. Flint, 39 Cal., 670; Ainsworth v. Dean, 21 N. H., 400; Bidwell v. Webb, 10 Minn., 59; Bidwell v. Coleman, 11 Minn., 78; St. Peter's Church v. Scott County, 12 Minn., 395; Shaw v. Orr, 30 Iowa, 355; Jefferson Co. Com'rs v. Johnson, 22 Kan., 717; Driggers v. Cassady, 71 Ala., 529; Anderson v. Hancock, 61 Cal., 88; Sullivan v. Davis, 29 Kan., 28; Person v. O'Neal, 82 La. An., 228; Kelley v. Herrall, 20 Fed. Rep., 364; Bowers v. Chambers, 53 Miss., 259; Selden v. Coffee, 55 Miss., 41; Johnson v. Lumber Co., 52 Wis., 458; Vaughan v. Swayzie, 56 Miss., 704; Scheiber v. Kaehler, 49 Wis., 261; Whiting v. Gunderson, 31 Wis., 359; Dolan v. Trelevan, 81 Wis., 359; Jenkins v. Scharpf, 27 Wis., 472; Jefferson City v. Whipple, 71 Mo., 519; Keith v. Hayden, 26 Minn., 212; Bowyer v. O'Donnall, 29 Minn., 135; McMillan v. Wehle, 55 Wis., 685; Judd v. Anderson, 51 Ia., 345; Jenkins v. McTigue, 22 Fed. Rep., 148; People v. Mahoney, 55 Cal., 286; Bird v. Perkins, 33 Mich., 28; Taylor v. Youngs, 48 Mich., 268; Law v. People, 84 Ill., 142; People v. Stahl, 101 Ill., 346; Blair, etc., Co. v. Scott, 44 Ia., 143; Bingham v. Smith, 64 Me., 450; Whitmore v. Learned, 70 Me., 276; Thibodaux v. Kellar, 29 La. An., 508; Hannah v. Collins, 94 Ind., 201; Dane v. Glennon, 72 Ala., 160; People v. Chicago, etc., Co., 96 Ill., 369; Sanford v. People, 102 Ill., 874; Campbell v. Packard, 61 Wis., 88; Stewart v. Coulter, 31 Minn., 885.

¹ People v. Mining Co., 89 Cal., 511; People v. Hollister, 47 Cal., 408. In this last case there was a separate valuation of each parcel in the column with the descriptions, but not carried into the appropriate column. "Value," it is said, "can only be determined by the ordinary selling and buying prices, for cash, at the time." *Caruthers, J.*, in *Brown v. Greer*, 3 Head, 695, 697. This is a criterion which, it is safe to say, is very seldom applied.

² See chapter XXIV.

customary protection which the law accords to officers exercising corresponding judicial functions. The party injured by their errors, committed without fraud or malice, has in general only such remedy as the statute may afford him. And in no proceeding is one to be heard who complains of a valuation which, however erroneous it may be, charges him only with a just proportion of the tax. If his own assessment is not out of proportion, as compared with valuations generally on the same roll, it is immaterial that some one neighbor is assessed too little and another too much.¹ This is a rule which has been applied when assessors are found to have systematically undervalued all the property of their district, though the statute in most positive terms required an assessment at the actual value. The wrong of a disregard of the statute in such a case is a public and not an individual wrong.²

The legislature cannot make the valuations of property for taxation.³ The nearest approach to the exercise of such an authority by the legislature is where it definitely fixes the basis for a local assessment, by the acre, by frontage, etc. But in such cases the considerations which affect benefits are matters of notoriety, and may well be taken notice of by the legislative body when prescribing a rule which, at least in the particular case, is to operate generally and with uniformity. In a majority of the states the rule prescribed by the statutes is that lands and other real estate shall be valued *as such*, irrespective of the separate estates that individuals may have in them. Under such a practice, he who, for the time being,

¹ *Chicopee v. County Commissioners*, 16 Gray, 88. See *Chicago, etc., R. Co. v. Livingston Co.*, 68 Ill., 458; *Pelton v. National Bank*, 101 U. S., 143; *Cummings v. National Bank*, 101 U. S., 153; *Boyer v. Boyer*, 113 U. S., 689. As to actual value, and how it is to be got at, see *State v. Ferris*, 23 N. J., 546; *State v. Randolph*, 25 N. J., 427; *Oswego Starch Factory v. Dolloway*, 21 N. Y., 449; *People v. Dolan*, 86 N. Y., 59, 62; *People v. Ferguson*, 38 N. Y., 89; *People v. Barker*, 48 N. Y., 70.

² *Moss v. Cummings*, 44 Mich., 359. See *Monroe v. New Canaan*, 43 Conn., 309; *Gamble v. East Saginaw*, 43 Mich., 368; *Blanchard v. Powers*, 42 Mich., 619.

In Wisconsin it has been held that assessments intentionally made at one-third the real value are void. *Hersey v. Supervisors*, 37 Wis., 75; *Marsh v. Supervisors*, 42 Wis., 502; *Goff v. Supervisors*, 43 Wis., 55; *Schettler v. Fort Howard*, 43 Wis., 48; *Salscheider v. Fort Howard*, 45 Wis., 519.

³ *People v. Hastings*, 39 Cal., 449.

enjoys the possession of the real estate and the pertainancy of the profits may be charged with the tax.¹ The practice, however, has not been universal; in some states, and particularly in some special proceedings, the statutes have required separate interests to be separately assessed.² When the whole is assessed as an entirety, provision is usually made under which the respective owners may pay their proportions of the tax, and have their respective interests discharged of the lien.³

¹*Turner v. Smith*, 14 Wall., 553; *Atkins v. Hinman*, 2 Gilm., 437, 449; *Parker v. Baxter*, 2 Gray, 185; *Willard v. Blount*, 11 Ired., 624; *Brown v. Austin*, 41 Vt., 263; *Merrick v. Hutt*, 15 Ark., 331; *Briscoe v. Coulter*, 18 Ark., 423; *Blackwell on Tax Titles*, ch. 38 and notes.

²Separate interests in Pennsylvania assessed and sold separately. See *McLaughlin v. Kain*, 45 Pa. St., 113. As to Mississippi, see *Dunn v. Winston*, 31 Miss., 135. As to Kentucky, see *Oldhams v. Jones*, 5 B. Monr., 464. In the case of special assessments it has been more usual to assess distinct interests separately, sometimes, however, providing for a sale of the fee. See *Jackson v. Babcock*, 16 N. Y., 246; *Matter of De Graw St.*, 18 Wend., 568. And see, further, *Williams v. Brace*, 5 Conn., 190. The case of *Jackson v. Babcock*, 16 N. Y., 246, was this: The statute provided for proceedings in court under which, in street-opening cases, where there were distinct interests in lands which were subject to a lien for the assessment, one owner of an interest might proceed in the supreme court against all the others, including unknown owners, for an equitable apportionment of the assessment, and, after advertising for the appearance of the unknown owners, obtain an order for an absolute sale of the fee; the proceeds to be applied, so far as necessary, to the discharge of the assessment. This statute was held to be valid, and effectual to cut off all contingent as well as vested rights.

³There are some cases in which it has been held that the omission of the dollar mark as a prefix to the figures which represent the value of the property in the assessment roll will render the assessment nugatory; there being nothing in its absence by which to determine what the figures indicate. *Braley v. Seaman*, 30 Cal., 610; *People v. Savings Union*, 31 Cal., 132. And see *People v. Empire, etc. Co.*, 33 Cal., 171; *Tilton v. Railroad Co.*, 3 Sawy., 22. The contrary has been held in New Hampshire. *Cahoon v. Coe*, 52 N. H., 518, 524. And see *State v. Eureka, etc., Co.*, 8 Nev., 15; *Chickering v. Faile*, 38 Ill., 342; *Elston v. Kennicott*, 46 Ill., 187, 202; *Sawyer v. Gleason*, 59 N. H., 140; *Jenkins v. McTigue*, 22 Fed. Rep., 148; *Bird v. Perkins*, 33 Mich., 28; *First National Bank v. St. Joseph*, 42 Mich., 526; *New Orleans v. Day*, 29 La. An., 416; *People v. Owyhee Co.*, 1 Idaho, 420.

In Illinois it is decided that a judgment for taxes in which the sums are expressed in figures without a dollar mark prefixed is void for want of certainty. *Lawrence v. Fast*, 20 Ill., 338; *Lane v. Bommelmenn*, 21 Ill., 143; *Epinger v. Kirby*, 23 Ill., 521, 523; *Dukes v. Rowley*, 24 Ill., 210; *Chickering v. Faile*, 38 Ill., 342; *Cook v. Norton*, 43 Ill., 391; *Potwin v. Oades*, 45

As to the methods of arriving at the value, little is to be said. There are no definite rules on the subject unless the statute has prescribed them, but the assessor is to value the property according to his best judgment and with honest purpose.¹

Authentication of the Assessment. The result of the action of the assessors is embodied in an assessment roll or list. The statutes provide how this shall be authenticated, and as the purpose is to supply record evidence that in the performance of their duty the assessors have obeyed the law, compliance with the statutory direction has generally been held imperative.² Where, therefore, the statute required the roll to be signed, and a certificate to be attached, the signing of the certificate was held not to dispense with a signing of the roll, and

Ill., 366; *Elston v. Kennicott*, 46 Ill., 187; *Pittsburg, etc., R. R. Co. v. Chicago*, 53 Ill., 80. These decisions were followed in *Woods v. Freeman*, 1 Wall., 898; *Randolph v. Metcalf*, 6 Cold., 400, 408; *Coombs v. O'Neal*, 1 MacA., 405. The contrary was held in *Gutzwiller v. Crowe*, 32 Minn., 70, distinguishing *Tidd v. Rines*, 26 Minn., 201.

¹ An arbitrary valuation of lands according to locality, and without actual view, is void. *Hersey v. Supervisors*, 37 Wis., 75. See *Woodman v. Auditor-General*, 52 Mich., 28. As to valuing land on navigable waters, see *State v. Carragan*, 37 N. J., 264; *New York, etc., R. Co. v. Yard*, 43 N. J., 632. In making valuations assessors have no business to be influenced by petitions. *Attorney-General v. Supervisors*, 42 Mich., 72. In valuing land which is to be assessed as one parcel, the estimate should be of the whole, and not of portions separately and then added together. *State v. Abbott*, 42 N. J., 111. See *Robertson v. Anderson*, 57 Ia., 165. When property subject to stamp duty is to be valued at the purchase price, the cost of stamp is to be included in the price. *Lehman v. Grantham*, 78 N. C., 115.

See further, *People v. Hastings*, 29 Cal., 449; *Atlantic, etc., R. Co. v. State*, 60 N. H., 133; *Beeson v. Johns*, 59 Ia., 166.

A city may constitutionally be empowered to adopt for city purposes the appraisal of real estate made for general taxation, or to cause a new appraisal to be made. *Jones v. Columbus*, 63 Ind., 421. When the general appraisal is adopted, the council has no power to make changes by way of equalizing. *Ibid.* As to alterations of valuations on the roll, see *People v. S. & C. R. Co.*, 49 Cal., 414.

² See *Warren v. Grand Haven*, 30 Mich., 24; *Grand Rapids v. Blakely*, 40 Mich., 367; *Crooks v. Whitford*, 47 Mich., 283; *McClure v. Warner*, 16 Neb., 447; *McNish v. Perrine*, 14 Neb., 582; *Hallo v. Helmer*, 12 Neb., 87; *Lyman v. Anderson*, 9 Neb., 367; *Morrill v. Taylor*, 6 Neb., 236; *Griggs v. St. Croix Co.*, 20 Fed. Rep., 341; *Tunbridge v. Smith*, 48 Vt., 648.

if that was not signed, no proceedings could be taken upon it.¹ The failure to attach the certificate or other statutory verification would be still more plainly a failure to comply with the statute in its essentials, the verification in express terms being, more obviously, a matter of substance than the signing.² If the statute prescribes a form for the verification, the form should be observed in all essential particulars; the assessor cannot, at discretion, substitute something else. Where, therefore, the statute required the assessors to certify that they had assessed the property at its true value, according to the best of their knowledge and belief, a certificate that they had assessed it "according to the usual way of assessing" was declared void.³ The same was held of a certificate that the assessors had estimated the real estate "at a sum which, for the purposes of the assessment, we believe to be the true value thereof."⁴ It is to be said of the action of the assessors, in these cases, that they had endeavored to make their certificate correspond to the fact; it being notorious that, whatever they may certify, they are not in the practice of estimating property at its true value.⁵ So when the statute required the assessors in an affi-

¹ *Sibley v. Smith*, 2 Mich., 486. See, also, *Colby v. Russell*, 3 Me., 227; *Foxcroft v. Nevens*, 4 Me., 72; *Kelly v. Craig*, 5 Ired., 129; *Johnson v. Elwood*, 53 N. Y., 431; *Walker v. Burlington*, 56 Vt., 131.

As to what is a sufficient signing, see *Darmstetter v. Molony*, 45 Mich., 621.

² *Marsh v. Supervisors*, 43 Wis., 502; *Morrill v. Taylor*, 6 Neb., 236; *Dickison v. Reynolds*, 48 Mich., 158; *Griggs v. St. Croix Co.*, 20 Fed. Rep., 341; *Walker v. Burlington*, 56 Vt., 131; *Tunbridge v. Smith*, 48 Vt., 648; *Reed v. Chandler*, 32 Vt., 285.

A premature verification of the roll has been held void in New York. *Westfall v. Preston*, 49 N. Y., 349. Compare *Dickison v. Reynolds*, 48 Mich., 158. In Mississippi it is held that a statute directing the assessor to add an affidavit to the roll is not so far mandatory that the omission will defeat a tax sale. *Chesnut v. Elliott*, 61 Miss., 569.

³ *Van Rensselaer v. Witbeck*, 7 N. Y., 517. Compare *Parish v. Golden*, 35 N. Y., 462. See *Hogelskamp v. Weeks*, 37 Mich., 422.

⁴ *Clark v. Crane*, 5 Mich., 151. See, also, *Colby v. Russell*, 3 Me., 227; *Foxcroft v. Nevens*, 4 Me., 72; *Johnson v. Goodridge*, 15 Me., 29; *Kelar v. Savage*, 20 Me., 199. See, for similar decisions, *Hinckley v. Cooper*, 22 Hun, 253; *Westfall v. Preston*, 49 N. Y., 349; *State Auditor v. Jackson Co.*, 65 Ala., 142. Compare *Dickison v. Reynolds*, 48 Mich., 158.

⁵ See *Silsbee v. Stookle*, 44 Mich., 461; *Dickison v. Reynolds*, 48 Mich., 158; *Sinclair v. Learned*, 51 Mich., 335.

The verification of the assessment is not void by reason of omitting any part of the statutory form that in the particular case has nothing to which

davit to the assessment roll to state that "they have together personally examined within the year past each and every lot and parcel of land, house, building or other assessable property" within the taxing district, the omission of this affidavit was held fatal.¹ But a failure to observe literally the statutory form will not vitiate the roll if there is substantial compliance.²

Return of Assessment. An assessment is completed when the assessors have performed in respect to it their whole duty

it would be applicable, *e. g.*, bank stock. But it is void if it fails to show that valuation "is the full value which could ordinarily be obtained." *Plumer v. Supervisors*, 46 Wis., 163; *Scheiber v. Kaehler*, 49 Wis., 291.

Where the statute allows three days, but only up to 5 P. M., for correcting assessments, and the assessor's certificate is dated on the third day, the presumption is that he did not attach it prematurely. *Yelverton v. Steele*, 36 Mich., 62.

¹ *Brevoort v. Brooklyn*, 89 N. Y., 123. In Vermont the verification of the annual list does not cure the failure to make oath to the quinquennial list. *Houghton v. Hall*, 47 Vt., 333. In New Hampshire the failure to have the invoice and assessment sworn to according to law has been held not fatal. *Odiorne v. Rand*, 59 N. H., 504. See as to the effect of acquiescence in the neglect of the certificate, *Jefferson Co. Com'rs v. Johnson*, 23 Kan., 717.

A failure to attach a certificate to an assessment was held not fatal where the assessor was himself a member of the board of review, and was required himself to present the assessment to the board. *Darmstetter v. Molony*, 45 Mich., 621.

² *Parish v. Golden*, 35 N. Y., 462; *Buffalo, etc., R. R. Co. v. Supervisors of Erie*, 48 N. Y., 93; *Bradford v. Randall*, 5 Pick., 496; *People v. Mining Co.*, 39 Cal., 511. See *Bangor v. Lancey*, 21 Me., 472. In this case it appeared that the statute required the list to have the official sanction of a majority of the assessors, evidenced by their signatures. The original list was not signed, but a supplementary list referring to it as containing the assessment for the year was duly signed. *Held* sufficient. As to what irregularities will defeat an assessment the following cases may be consulted: *Wiley v. Scoville's Lessees*, 9 Ohio, 44; *Shimmin v. Inman*, 26 Me., 228; *Smith v. Davis*, 30 Cal., 537; *Huntingdon v. Central Pacific R. R. Co.*, 2 Saw., 503; *Albany City National Bank v. Maher*, 19 Blatch., 175; *Bradley v. Ward*, 58 N. Y., 401. What will not avoid: *Gulf R. R. Co. v. Morris*, 7 Kan., 210; *Smith v. Leavenworth Co.*, 9 Kan., 296; *Hallo v. Helmer*, 12 Nev., 87; *Burlington, etc., R. Co. v. Saline Co.*, 12 Nev., 396; *Marshall v. Benson*, 48 Wis., 558; *Morrill v. Douglass*, 14 Kan., 294; *Bird v. Perkins*, 33 Mich., 28; *McCallum v. Bethany*, 42 Mich., 457; *Miller v. Hurford*, 13 Neb., 13; *McClure v. Warner*, 16 Neb., 447; *Merriam v. Coffee*, 16 Neb., 450.

A statute that an assessor shall not be allowed to contradict or impeach any certificate made by him is valid. *Plumer v. Supervisors*, 46 Wis., 163; *Marshall v. Benson*, 48 Wis., 558. All legal presumptions favor an assessment. *Richmond, etc., Co. v. Com'rs of Alamance*, 84 N. C., 504.

under the statute.¹ If their determination is to be entered of record, they have judicial control of the whole subject until the entry is made, and may reconsider valuations and any other matters involved in the final decision.² When nothing more remains to be done by them, the assessment is to be disposed of as the statute may provide. In some states this will be by delivery to a board of review; or, if no such board is provided for, then to the officer or board by whom the tax is to be apportioned upon it.³ Where the assessors are required to certify it to the auditor, to be entered upon his duplicate, the certificate must be in writing, and the want of it cannot be supplied by parol.⁴ If the statute names a time for the return it should be complied with; but whether a failure in strict compliance would be fatal must depend upon whether the regulation is one for the protection of the tax payer or merely for order, regularity or official convenience.⁵

Shifts to evade taxation. The federal revenue laws abound in provisions for circumventing and punishing frauds upon the revenue, and state legislation is not without enactments of similar nature. But it is not uncommon to encounter in the administration of tax laws shifts and devices, not amounting to legal fraud, but which nevertheless have in view the same purpose; to avoid a just share in the burdens of public taxation. Sometimes, but not always, it is possible to defeat such attempts when the facts are known.

A man may lawfully change his residence from one municipi-

¹ As to when it is to be considered completed in New York, see *Mygatt v. Washburn*, 15 N. Y., 316; *People v. Suffern*, 68 N. Y., 321. In Nebraska, *Jones v. Seward Co.*, 10 Neb., 154.

² *State v. Silvers*, 41 N. J., 505. See *State v. Crosley*, 36 N. J., 425. This cannot be universally true. If by statute or otherwise a day of review is fixed at which parties may appear and be heard, the purpose of the hearing would be defeated if valuations might be increased by the assessors afterwards without opportunity for tax payers again to appear.

³ See *Wells v. Smyth*, 55 Pa. St., 150; *Norridgewalk v. Walker*, 71 Me., 181.

⁴ *State v. Thompson*, 18 S. C., 538. See *Dent v. Bryce*, 16 S. C., 1. Compare *Darmstetter v. Molony*, 45 Mich., 621.

⁵ In Mississippi it has been held that a failure to return the assessment in the legal time would render it and any sale made under it void. *Stovall v. Connor*, 58 Miss., 188; *Mitchum v. McInnis*, 60 Miss., 945; *Fletcher v. Trewalla*, 60 Miss., 968.

pality to another at pleasure; and though the purpose in changing be to avoid taxation in the town he removes from, yet the fact cannot be taken notice of for the purpose of continuing his taxation in that town.¹ A man has a right to exchange money, which is taxable, for United States securities which are not taxable, even though the sole purpose in the exchange is to avoid the tax.² And if he gives his note for United States securities for the like purpose, he is nevertheless entitled to be allowed the amount of the note in reduction of his assessment.³ In each of these cases the party is only exercising a right which the law allows to him; he may choose his own place of residence at pleasure, and he may select, as seems most for his interest, between taxable and non-taxable property; and it is no concern of others, or even of the state which by its laws allows the choice, what may be the motive on which he acts.

Where, however, under the revenue laws land is taxable and also a mortgage upon it, if one from whom money is obtained, instead of taking a mortgage for the amount, takes an absolute conveyance and gives back a lease with a stipulation to sell back the land on repayment of the money and interest—the whole transaction being obviously only a loan and the taking of security therefor,—the land may still be taxed to the borrower and the lender taxed as mortgagee.⁴ And where a tax payer borrowed \$1,000 from a resident of another county, and deposited in the lender's hands securities to the amount of \$12,000, it was held that if this was done in good faith and merely to secure payment of the debt, the securities were not taxable in the county of the borrower's residence; but if they were transferred for the purpose of avoiding taxation, then the transaction was in bad faith and a fraud on the revenue of the county, and the securities might be taxed at the borrower's home as if the transaction had not taken place.⁵ But this conclusion in each case was reached by the court claiming and exercising the right to look beyond the surface facts and in-

¹ *Draper v. Hatfield*, 124 Mass., 53; *Thayer v. Boston*, 124 Mass., 132. See *Union S. B. Co. v. Buffalo*, 82 N. Y., 351.

² *Stilwell v. Corwin*, 55 Ind., 433. See *Ogden v. Walker*, 59 Ind., 460.

³ *People v. Ryan*, 88 N. Y., 142.

⁴ *Waller v. Jaeger*, 39 Ia., 228; *Patrick v. Littell*, 36 Ohio St., 79; *Lappin v. Nemaha Co.*, 6 Kan., 403.

⁵ *Poppleton v. Yambill Co.*, 8 Or., 337.

quire into the real nature of the transaction in question, that it might be dealt with as it was in fact, and not as it had for improper purposes been made to appear.¹

So it has been held in Mississippi that, where the capital of a banking corporation, used in its daily business and necessary to its profitable conduct, was converted, a few days before the assessment, into non-taxable securities, in which form it would not be available for daily use, and the express purpose was to evade taxation and then immediately reconvert into money when the day of assessment was passed, the capital was still taxable under the law as if the conversion had not taken place, the court saying: "There still remains power in the county to investigate whether the holding is actual and *bona fide*, or colorable only and fraudulent. If held in the latter aspect, and as a mere representative of property temporarily concealed, which is to be uncloaked as soon as the visit of the tax assessor shall have been made, the courts will look through the sham and measure the rights of the parties by the real nature of the transaction."² A similar decision has been made in Nebraska.³

When a party seeks affirmative relief in equity his motives may always be inquired into for the purpose of determining whether his case is deserving of favor; and, therefore, affirmative relief against a tax may sometimes be refused when, perhaps at law, it would not be enforceable. Where a resident withdrew his money from deposit the day before that for making the assessment, converted it into United States notes, and then as soon as the day was past deposited these notes in bank to his general credit, the whole being a palpable device to avoid taxation, but was nevertheless taxed upon the money, and brought suit in equity to restrain collection, his bill was dismissed with little ceremony, the court remarking that a court of equity would not use its extraordinary powers to promote any such scheme as the plaintiff had devised, to escape his proportionate share of the burdens of taxation. If he had any remedy, he must find it in a court of law.⁴

¹See *People v. Albany Ins. Co.*, 92 N. Y., 458.

²*Holly Springs, etc., Co. v. Supervisors*, 52 Miss., 281, 289.

³*Jones v. Seward Co.*, 10 Neb., 154.

⁴*Mitchell v. Commissioners*, 91 U. S., 206, affirming same case, 9 Kan., 344. See *Albany City Bank v. Maher*, 19 Blatch., 175, 182.

Review of assessments. Where a statutory board is provided for, which is to review the work of the assessors, the purpose may be either to examine individual assessments with a view to the correction of errors and inequalities, or to examine the assessments as a whole with a view to determine whether they are relatively equal as between different parts of a district within which a tax is to be laid, and if not, to make them so by increasing those which are too low or diminishing those which are too high. This process is called equalization, and is resorted to in order to make the valuation of counties proportionate when a state tax is to be levied, and those of townships and cities proportionate when a county tax is to be levied.

Powers of Board. These tribunals are mere creatures of the statute, and must look to it for all their powers.¹ A presumption of correct action will attend what they do, and give *prima facie* support to their conclusions when apparently warranted by law,² but this presumption is not conclusive in any case.

Meetings of Board. As in other cases of boards composed of two or more persons, these must act in regular meetings,³ and all the members must have opportunity to attend.⁴ To the legality of any meeting not in terms required by the statute, there must therefore be special notice to all the members:⁵ though if all attend without notice and proceed to business it may be sufficient.⁶ A board cannot delegate its authority to

¹ See *State v. Allan*, 43 Ill., 456; *People v. Nichols*, 49 Ill., 517; *Darling v. Gunn*, 50 Ill., 424; *McKee v. Supervisors of Champaign*, 53 Ill., 477; *Coolbaugh v. Huck*, 86 Ill., 600; *Avery v. East Saginaw*, 44 Mich., 587; *State v. Washoe Co.*, 14 Nev., 140; *Sioux City, etc., R. Co. v. Washington Co.*, 3 Neb., 30; *Kimball v. Merchants', etc., Co.*, 89 Ill., 611; *Royce v. Jenney*, 50 Ia., 676; *Getchell v. Supervisors*, 51 Ia., 107; *Dickey v. Polk Co.*, 53 Ia., 237; *Taylor v. Moore*, 39 Ia., 605; *State v. Carragan*, 37 N. J., 264; *State v. Anderson*, 38 N. J., 173.

² *Tainter v. Lewis*, 29 Wis., 375; *Monroe v. New Canaan*, 43 Conn., 309.

³ See *ante*, pp. 257-259.

⁴ But if all have due notice of a meeting, it is not necessary all should attend in order to render the proceedings valid. *People v. Lothrop*, 3 Col., 428. No valid meeting can be held out of the state. *Marion Co. Com'rs v. Barker*, 25 Kan., 258. Further as to meetings, see *Wolfe v. Murphy*, 60 Miss., 1; *Gillett v. Lyon Co.*, 30 Kan., 166; *Hallo v. Helmer*, 12 Neb., 87.

⁵ See *Dundy v. Richardson Co. Com'rs*, 8 Neb., 508.

⁶ See *ante*, pp. 257-259.

a part of its members,¹ though it may make use of committees to hear complaints or to consider anything falling within its jurisdiction, and report to the board for final action.² A meeting which the statute requires to be held on a particular day may be adjourned from day to day as the business may require.³ The board should keep a record of all its doings,⁴ and where the statute requires that the record shall be signed by all the members, their signatures are indispensable.⁵

Changing Individual Assessments. The valuations by the assessors are conclusive upon boards of review except as the statute may otherwise provide,⁶ and they cannot therefore release a tax or its lien, or change individual assessments, when not expressly empowered to do so.⁷ If the board has authority to equalize and also to change assessments, its power in respect to one of these subjects is not exhausted by a hearing and decision on the other only;⁸ and on the other hand, if it has authority over but one, it does not lose it by assuming to act upon the other.⁹

A board to review assessments is in effect a board of assessors, and if by law all assessors must be elected by the people, the members of the board must be so chosen.¹⁰ In deciding the members may act on their own knowledge,¹¹ though they

¹ *Wiley v. Flournoy*, 80 Ark., 609.

² *Porter v. Rockford, etc., R. Co.*, 76 Ill., 561; *Beers v. People*, 83 Ill., 488; *Halsey v. People*, 84 Ill., 89. See in general, *People v. Hadley*, 76 N. Y., 337.

³ *Halsey v. People*, 84 Ill., 89. See *St. Louis Co. Com'rs v. Nettleton*, 23 Minn., 356.

⁴ *Hecht v. Boughton*, 2 Wy., 368; *Yelverton v. Steele*, 36 Mich., 62; *Maxwell v. Paine*, 53 Mich., 30.

⁵ *State Auditor v. Jackson Co.*, 65 Ala., 142; *Perry County v. Railroad Co.*, 65 Ala., 391.

⁶ *Respublica v. Deaves*, 8 Yeates, 465.

⁷ *State v. Cent. Pac. R. Co.*, 9 Nev., 79; *McConkey v. Smith*, 73 Ill., 313; *San Francisco, etc., R. Co. v. State Board*, 60 Cal., 12; *Wells v. State Board*, 56 Cal., 194.

⁸ *State v. Ormsby Co.*, 7 Nev., 392.

⁹ *Paul v. Pacific R. Co.*, 4 Dill., 35.

¹⁰ See *People v. Raymond*, 37 N. Y., 428; *Houghton v. Austin*, 47 Cal., 646; *Adsit v. Leib*, 76 Ill., 198.

¹¹ *Kansas, etc., R. Co. v. Ridley Co.*, 20 Kan., 141; *Tweed v. Metcalf*, 4 Mich., 579; *Case v. Dean*, 16 Mich., 12; *Bellinger v. Gray*, 51 N. Y., 610;

are not at liberty to do this arbitrarily and in disregard of evidence produced before them.¹

The courts have been particularly careful to see that revisory tax tribunals² did not change assessments to the prejudice of tax payers who, under the circumstances, had no reason to look for or anticipate any such change. If the tax payer himself does not appeal, he has a right to suppose that the assessment against him will be allowed to stand as made. If authority is conferred upon the board of review to change assessments under any specified circumstances, the existence of those circumstances is a condition precedent to their action. An illustration is afforded by a case in New York. A city council had authority to correct descriptions of lands returned for non-payment of taxes or assessments; but this, it was held, gave them no right to put to a description of land a new name, as that of the owner, when the effect, if valid, would be to make the tax a personal charge against him. Such a change in the assessment, if it could be supported, would deprive the person assessed of the statutory right to notice, and of the opportunity to apply for correction secured to those named in the original roll.³ Where a statutory board of review holds

Wells v. State Board, 56 Cal., 194; St. Louis, etc., R. Co. v. Surrell, 88 Ill., 535; State v. Severance, 55 Mo., 378; Hannibal, etc., R. Co. v. State Board, 64 Mo. 294. See State v. Crosley, 86 N. J., 425; Monroe v. New Canaan, 43 Conn., 309.

¹ Fratz v. Mueller, 35 Ohio St., 397; Milwaukee, etc., Iron Co. v. Schubel, 29 Wis., 444.

Where, after valuation by assessors, the party taxed is permitted by law to make affidavit of the actual value of his property, this is only evidence to be considered, and not conclusive, unless made so by statute. People v. Barker, 48 N. Y., 70.

² A court, when exercising a statutory authority to review assessments, exercises a special and limited jurisdiction. *Hand, J.*, in Woodruff v. Fisher, 17 Barb., 224, 232. In Oregon, the decisions of the assessors and county clerk, constituting a board of review, are made reviewable in the supreme court. Rhea v. Umatilla County, 2 Ore., 298, 300; Shumway v. Baker County, 3 Ore., 246.

³ Bennett v. Buffalo, 17 N. Y., 383. Compare Overing v. Foote, 43 N. Y., 290, 294, where this is said to be a "close case." Where the revisory board orders a change made in the assessment, the assessor, it seems, may be compelled to make it in a *certiorari* proceeding. Keck v. Keokuk County, 37 Ia., 547. In New York the power of assessors over the roll after its completion and notice thereof is limited to acting upon complaints by parties

stated meetings, with power to increase assessments, everybody is notified of the fact, and is warned to attend if he deems it important; and it may possibly be held under such circumstances that special notice of the raising of a particular assessment need not be given.¹ But as an increase in an assessment is uncommon, and the tax payer will seldom anticipate it, and will not be likely to attend upon the review except for the purposes of a reduction, it seems safer and more just to hold, as has generally been done, that the tax payer should have personal notice of any purpose to increase the assessment made against him.²

Equalization. Equalization of assessments has, for its general purpose, to bring the assessments of different parts of a

conceiving themselves aggrieved. They cannot raise assessments even when the amount has been fixed by clerical error. *People v. Forrest*, 30 Hun, 240; affirmed, 96 N. Y., 544, citing *Westfall v. Preston*, 49 N. Y., 352; *Overing v. Foote*, 65 N. Y., 263. See *Coolbaugh v. Huck*, 86 Ill., 600.

Where a special assessor is provided for through appointment of the board of supervisors, and a review of his work by the board is directed, but evidently only to determine as between him and the state whether he has performed his duty, a tax payer cannot complain if the review is not had. *Wolfe v. Murphy*, 60 Miss., 1.

¹*State v. Lindell Hotel Co.*, 9 Mo. Ap., 450, citing *Porter v. R. R. Co.*, 76 Ill., 569; *State Railroad Tax Cases*, 92 U. S., 575, 617. Compare *Avery v. East Saginaw*, 44 Mich., 587. As to what is reasonable notice when notice is required, see *Spring Valley Water Works v. Schottler*, 62 Cal., 69.

²*Philips v. Stevens Point*, 25 Wis., 594; *Matheson v. Mazomanie*, 20 Wis., 191; *Cleghorn v. Postlewaite*, 43 Ill., 428; *Darling v. Gunn*, 50 Ill., 424; *Griswold v. School District*, 24 Mich., 262; *Patten v. Green*, 13 Cal., 325; *Sioux City, etc., R. R. Co. v. Washington County*, 3 Neb., 30; *Leavenworth County v. Lang*, 8 Kan., 284; *Kansas Pacific R. R. Co. v. Russell*, 8 Kan., 538; *McConkey v. Smith*, 73 Ill., 313; *National Bank v. Cook*, 77 Ill., 622; *Relfe v. Life Ins. Co.*, 11 Mo. Ap., 374; *Clark v. Mulford*, 43 N. J., 550; *South Platte Land Co. v. Buffalo County*, 7 Neb., 253; *State v. Northern Belle, etc., Co.*, 12 Nev., 89; *Griffith v. Watson*, 19 Kan., 23; *Los Angeles v. Railroad Co.*, 49 Cal., 638; *People v. Ward*, 105 Ill., 620.

Where, on appeal from assessments, the appellate board has power to increase valuations on giving ten days' notice to the tax payer, notice to his tenant is not sufficient. *State v. Drake*, 33 N. J., 194. Where an appeal for correction only lies at the instance of a person assessed, the appellate board cannot increase the assessment. *Appeal of Des Moines, etc., Co.*, 48 Ia., 324; *German Am. Bank v. Burlington*, 54 Ia., 609.

If a party conceives himself aggrieved by action of the board, he may appeal to it at once to give him the relief he thinks himself entitled to. *Ingersoll v. Des Moines*, 46 Ia., 553.

taxing district to the same relative standard, so that no one of the parts may be compelled to pay a disproportionate part of the tax.¹ To accomplish this purpose town assessment rolls are equalized by county courts, boards of supervisors or commissioners, and the aggregate of the county assessments by a state board established for the purpose.² This is not done by changing individual assessments, but by fixing the aggregate sums for the several districts at what, in the opinion of the board, they should be, so that general taxes may be levied according to this determination, instead of on the assessor's footings. These boards act judicially in equalizing,³ and their decision is conclusive. They are commonly composed of popular representatives, and they act upon their own judgment of what is equal and just.³ They are not bound to give notice to taxpayers before raising the assessment of a district except as the statute may provide for it.⁴ In raising or reducing the assessment of a district, it is sufficient for the board to designate a percentage of increase or reduction.⁵ A failure of the board to sit from day to day as directed by the statute will not invalidate the taxes if, in fact, full opportunity to be heard and make objections was given to all.⁶

In some states the state board of equalization is made a

¹ As to the equalization and the necessity therefor, see *County Commissioners v. Parker*, 7 Minn., 207; *Tweed v. Metcalf*, 4 Mich., 579; *Tallmadge v. Supervisors of Rensselaer*, 21 Barb., 611; *State v. Allen*, 43 Ill., 456; *People v. Nichols*, 49 Ill., 517. As to how equalization is made in Illinois, see *Mix v. People*, 72 Ill., 241. In Colorado, *People v. Lothrop*, 3 Col., 608. As to increasing valuations in California, see *People v. Dunn*, 59 Cal., 328. In Illinois, *Buck v. People*, 78 Ill., 560. In Iowa, *Harney v. Supervisors*, 44 Ia., 203.

² *New York v. Davenport*, 92 N. Y., 604, citing *Bellinger v. Gray*, 51 N. Y., 610, and other cases.

³ See *Wells v. State Board*, 56 Cal., 194; *Case v. Dean*, 16 Mich., 12.

⁴ *Hallo v. Helmer*, 12 Neb., 87. See *Gilbert v. Lyon Co.*, 30 Kan., 166.

⁵ *Hubbard v. Winsor*, 15 Mich., 146.

⁶ *Wolfe v. Murphy*, 60 Miss., 1. As to what is sufficient to make the equalization formally correct, see *Silsbee v. Stockle*, 44 Mich., 561. If a board of equalization raises the assessment without jurisdiction, its action being void, there is a good defense at law to the tax upon the increase. *State v. Washoe Co.*, 14 Nev., 149; *Coolbaugh v. Huck*, 86 Ill., 600; *Avery v. East Saginaw*, 44 Mich., 587. If, without authority, a municipal board reduces the assessment of some property, its action is void. *Sherlock v. Winnetka*, 68 Ill., 530.

special board of assessors for railroad property, and it is to apportion the valuation between the several counties through or into which the roads run.¹ Such boards are also sometimes given power to add omitted persons or property for taxation or assessment.²

Extending the tax. The subjects of taxation having been properly listed and a basis for apportionment established, nothing will remain to fix a definite liability but to extend upon the list or roll the several proportionate amounts, as a charge against the several taxables. When that is done, but not until then, will a liability for any particular sum be fixed.³ When the sum to be raised is settled, and the assessment is completed, the calculation of the percentage of the tax and the determination of the sum chargeable to each taxable are clerical acts, and may be performed by any one.⁴

¹Their authority is exclusive of that of the county boards. *People v. Sacramento Co.*, 59 Cal., 321. Where the state board finds that assessors have disobeyed the constitutional requirement to assess at the fair cash value and have assessed at half the value only, they may assess railroad property in like proportion. *Law v. People*, 87 Ill., 385. See *Bureau Co. v. Railroad Co.*, 44 Ill., 229; *Chicago, etc., R. Co. v. Livingston Co.*, 68 Ill., 458.

Where in taxing a railroad the value is apportioned among the counties, a provision that the auditor shall not thus apportion the value until after equalization is mandatory. *State Auditor v. Jackson Co.*, 65 Ala., 142; *Perry County v. Railroad Co.*, 65 Ala., 391.

²See *Wallace v. Jaeger*, 39 Ia., 228. Property omitted from the roll may still be taxed though it has since changed hands. *New Orleans v. Railroad Co.*, 85 La. An., 679.

³*Greenough v. Fulton Coal Co.*, 74 Pa. St., 486, 500.

⁴*State v. Maginnis*, 26 La. An., 558. When a railroad tax is measured by gross receipts, determined by the annual report of the company, the computation is ministerial, and may be made by a clerk. *Phila. & Reading R. Co. v. Commonwealth*, 104 Pa. St., 86.

CHAPTER XIII.

THE COLLECTOR'S WARRANT.

Necessity for. Before the officer who is designated by law for the duty of collecting the taxes can lawfully proceed to do so, he must have his warrant for the purpose, in due form of law.¹ This, in different states, may be the assessment roll or list, with the tax extended upon it, or it may be a duplicate of the list with a like extension, or it may be either of these, with a formal warrant attached, particularly indicating what are his duties under it, and commanding their performance.² Whatever the statute provides for, in this regard, the collector must have, and he is a trespasser if he proceeds to compulsory action without it.³ Upon this point the decisions are numerous and uniform. In a case arising under a statute which required that a warrant should be attached to the tax duplicate, the following remarks have been made: "The authority of a collector of taxes to collect is his warrant. The duplicate is but a memorandum of the amount he is to collect from the parties therein named respectively. Without a warrant, the collector becomes a trespasser as soon as he intermeddles with the property of the tax payer. There must also be a law authorizing the issue of a warrant, and some person appointed to issue it, and it must conform to the law authorizing it, and be issued by the proper person designated by law, or it is no protection to a collector."⁴ No question is made anywhere of the correctness of this doctrine.

¹ *Taft v. Barrett*, 58 N. H., 447; *Pearson v. Canney*, 64 Me., 188; *Donald v. McKinnon*, 17 Fla., 746.

² The tax roll is void if made out before the tax is voted. *Gale v. Mead*, 4 Hill, 109.

³ *Blackwell on Tax Titles*, 168, and cases cited. In the absence of a warrant the due performance of all other acts prescribed by statute cannot make out a valid sale for taxes. *Donald v. McKinnon*, 17 Fla., 746.

⁴ *Hilbish v. Horner*, 58 Pa. St., 93, citing *Pearce v. Torrence*, 2 Grant's Cases, 82; *Stephens v. Wilkins*, 6 Pa. St., 260. And see *Chalker v. Ives*, 55 Pa. St., 81; *Falconer v. Shores*, 37 Ark., 386. The same doctrine is declared under a different law, in *Slade v. Governor*, 3 Dev., 365; *Kelley v. Craig*, 5 Ired., 129. And see *Brown v. Wright*, 17 Vt., 97. If a warrant for collec-

Statutory requisites. Whatever may be the requisites for the warrant under the statute, care must be taken that they be observed. One of the most important of these is that it be directed to the proper officer. Where the law has indicated one officer to perform the duty of collection, the officer who issues the warrant is without power to designate a different one; and if even by inadvertence the process were to be directed to the sheriff when the lawful collector is the township treasurer, or *vice versa*, it would be void on its face.¹ But the naming of the collector's predecessor in the address instead of the collector himself is an immaterial error,² and so in the case of a township is the omission of the name of the township if it elsewhere appears in the warrant.³ In Maine, where the statute gave a form to be followed "in substance," it was held that the omission of that part of the form which directed the treasurer to levy distress in default of payment was an omission of matter of substance which rendered the warrant nugatory, and the treasurer might refuse to execute it.⁴ In Vermont it is said that a collector to justify his attempt to make collection must show a legal tax, a legal list, and that his process is legal;⁵ but in Vermont, as elsewhere, all mere informalities even in this important process will be overlooked;⁶ and an error in the date of the warrant will be held immaterial.⁷ In New Hampshire also the warrant is deemed sufficient if in substance the statute prescribing the form is followed.⁸ And in Maine the omission from the warrant of the words, "In the name of the state of Maine," which are a part of the

tion not required by law is signed and attached to a highway list, this is a sufficient signing of the list. *Hogelskamp v. Weeks*, 37 Mich., 422.

¹ *Stephens v. Wilkins*, 6 Pa. St., 260; *Cannell v. Crawford Co.*, 59 Pa. St., 196; *Dinsmore v. Westcott*, 25 N. J. Eq., 470. Where a tax is imposed for police purposes the execution of the tax warrant may by law be committed to some other officer than the one named as collector of taxes in the constitution. *Youngblood v. Sexton*, 82 Mich., 406.

² *Wilson v. Seavey*, 88 Vt., 221.

³ *First Nat. Bank v. St. Joseph*, 46 Mich., 526.

⁴ *Bachelder v. Thompson*, 41 Me., 539. See *Pearson v. Canney*, 64 Me., 188.

⁵ *Clove Springs Iron Works v. Cone*, 56 Vt., 603.

⁶ *Chandler v. Spear*, 22 Vt., 388; *Spear v. Braintree*, 24 Vt., 414; *Goodwin v. Perkins*, 39 Vt., 596; *Wing v. Hall*, 47 Vt., 182.

⁷ *Bellows v. Weeks*, 41 Vt., 590.

⁸ *Bailey v. Ackerman*, 54 N. H., 527.

statutory form, is held of no moment.¹ In Massachusetts, where the statute provides that "the assessors shall commit the tax list, with the warrant under their hands, to the collector for collection," a failure to attach them, if both are delivered to the collector, is immaterial.² And in the same state an error in the command of the warrant, by which the collector was directed to arrest the person taxed within twelve days, instead of fourteen, as it should have been, after demand of the tax, if the same should not be paid, etc., will not vitiate the warrant, nor become material, unless the direction to arrest is acted upon.³ In Connecticut, it is very properly held that if the warrant is not attached to the tax list when its command is to collect of the persons "named in the annexed list," there is nothing to which these words can apply, and the command of the warrant is nugatory, so that the collector can take the property of no one by virtue thereof.⁴ An error in the direction to the collector by which he is commanded to account to the wrong officer is immaterial; this being a matter that does not concern the tax payers.⁵ The same is true of a failure to limit by the warrant the time within which the treasurer shall collect the tax.⁶ In Illinois, it is said that the omission from the warrant of a power to distrain in case of non-payment will not so far vitiate it as to excuse the failure to pay and entitle the person taxed to have relief in equity.⁷ In Maine, a warrant exempting from distress for non-payment other property in addition to the exemptions allowed by law has been held to confer upon the officer no authority and to impose upon him no duty.⁸ And probably in any state it would be held as it

¹ *Mussey v. White*, 3 Me., 290. In other states a constitutional provision that all process shall run "in the name of the people," etc., is held not applicable to a collector's warrant. *Tweed v. Metcalf*, 4 Mich., 579; *Wisner v. Davenport*, 5 Mich., 501; *Curry v. Hinman*, 11 Ill., 420; *Scarritt v. Chapman*, 11 Ill., 443; *Sprague v. Birchard*, 1 Wis., 457.

² *Barnard v. Graves*, 13 Met., 85.

³ *Barnard v. Graves*, 13 Met., 85, citing *King v. Whitcomb*, 1 Met., 328.

⁴ *Picket v. Allen*, 10 Conn., 146.

⁵ *Clemons v. Lewis*, 36 Vt., 673. Compare *Tweed v. Metcalf*, 4 Mich., 579.

⁶ *Walker v. Miner*, 32 Vt., 769. Such a warrant may be defective as between the collector and the public he acts for, but the defect does not invalidate any action taken to collect the tax under it. *Ibid.*

⁷ *Union Trust Co. v. Weber*, 96 Ill., 346.

⁸ *Boothbay v. Giles*, 64 Me., 403.

has been in Illinois, that if the warrant is for the collection of a municipal tax which is void because the ordinance which assumed to impose it was not authorized by law, the warrant itself is void also.¹

Signing. The warrant should be properly signed; but it is sufficient that it be signed by a majority of a joint board of assessors;² and if signed by supervisors as required by law, the signing is sufficient though they fail to add to their names their official titles.³

In Iowa a warrant is not required, the authority to collect being conferred by the statute itself when the proper tax list is made out and delivered.⁴ Probably this is true of some other states.

Different rolls for different taxes. It is not always the practice to have one assessment and tax roll for the state taxes and another for the local taxes. On the contrary, for what may be called the *general* taxes of the municipality, it is customary to provide that, when voted, they shall be certified to such state or county officer or board as is authorized to issue the tax warrant for state or county taxes, and by such officer or board shall be spread upon the same roll or list, though in a separate column, and be collected by authority of the same warrant. The regulation may be the opposite of this: that the state taxes shall be certified to county or town officers, and by them spread upon the roll. Such provisions do not give the state or county functionaries any power to review, revise or set aside the local action, but they must levy what has been voted, and may be compelled to do so.⁵

¹Butler v. Nevin, 88 Ill., 575.

²Sprague v. Bailey, 19 Pick., 486.

³Sheldon v. Van Buskirk, 2 N. Y., 473.

⁴Parker v. Sexton, 29 Ia., 421; Rhodes v. Sexton, 33 Ia., 540; Litchfield v. Hamilton Co., 40 Ia., 66; Chicago, etc., R. Co. v. Carroll Co., 41 Ia., 153; Tallman v. Cooke, 43 Ia., 330. And see Hogelskamp v. Weeks, 37 Mich., 422.

⁵Where the law gives a city full authority to vote money for the support of the poor, etc., and requires the supervisors to "cause the same to be raised, assessed and collected," the supervisors have no discretion to refuse on the ground that funds for the like purposes have previously been misapplied. *Ex parte* Common Council of Albany, 3 Cow., 358. Compare Will-

Delivery of warrant. A provision of statute that the officer or board making out the warrant shall deliver it to the collector by a day named is only directory.¹ But any such delay as would leave the collector insufficient time for compulsory proceedings under the statute would of course preclude their being taken.

Exhausting authority. The issue of a void tax warrant would not exhaust the authority to issue a valid one. In some states by statute, or by a customary course of procedure, when one valid process does not result in the collection of all the tax, another may issue.² For personal taxes which remain uncollected suits are sometimes provided for, especially where the failure to collect is in consequence of a removal of the party taxed from the treasurer's jurisdiction.

Blending taxes. A very common provision of statute, where several taxes are to be spread upon the same roll, is that they shall be kept separate and placed in distinct columns on the roll. This advises the tax payer of the nature of the several demands that are made upon him, and enables him to pay or tender the amount of any one the justice and legality of which he concedes, and to decline to pay any other if he considers it unwarranted. Such provision is mandatory, and if not obeyed, the taxes cannot be enforced.³ A custom to

iams v. School District, 21 Pick., 75. Sometimes the auditing of accounts is made by law equivalent to the vote of a tax. See *People v. Supervisors of Queens*, 1 Hill, 195. Where different rolls are required for different taxes, the placing of a tax on the wrong roll is fatal to the tax. *Folkerts v. Power*, 42 Mich., 283.

¹ *Alvord v. Collins*, 20 Pick., 418; *Hubbard v. Winsor*, 15 Mich., 146; *Smith v. Crittenden*, 16 Mich., 152. The case of *Cardigan v. Page*, 6 N. H., 182, is *contra*.

² See *Eddy v. Wilson*, 43 Vt., 362. The warrant is sometimes extended or renewed, under statutes providing therefor. See *Griswold v. School District*, 24 Mich., 262. The extension is for the benefit and convenience of the collector, not of the tax payer. The latter cannot complain if the officer makes his return before the expiration of the extended time. *Drennan v. Beierlein*, 49 Mich., 272. The issuing of a new warrant while the period of extension of the old one is unexpired, if both the new and the old are attached to the roll, will be immaterial: a levy being then good if either warrant is valid. *Bird v. Perkins*, 33 Mich., 28.

³ *Thayer v. Stearns*, 1 Pick., 482; *Case v. Dean*, 16 Mich., 12; *People v. Moore*, 1 Idaho, N. S., 662. See *Silsbee v. Stockle*, 44 Mich., 561. It would

blend them cannot make the roll valid.¹ But separating the taxes when the statute does not require it will not affect the roll; as this deprives no one of any right whatever.² And no doubt the rule as to the effect of blending taxes might be changed by statute, as in some states has been done.

Excessive taxes. All statutes are mandatory which expressly or by implication limit the amount of taxes which may be levied. When these are exceeded by a sum which is spread upon the whole roll, the whole levy is void.³ The levy is in excess of the jurisdiction of the officers, and will be as deficient in the legal competency to make out a valid charge as if made without any authority whatever. This would not defeat a separate tax lawfully placed in a separate column on the roll, but it would invalidate whatever is blended with the excessive levy, and incapable of being separated.

Excess in a levy may happen from a sum which has been voted for an unauthorized purpose being included with others that are authorized, or from imposing more than is permitted for lawful purposes, or from the addition of unauthorized

be otherwise in Illinois under a statute of that state. See *Thatcher v. People*, 79 Ill., 597. What blending not fatal in New Jersey, see *State v. Saalmann*, 37 N. J., 156.

¹*State v. Falkinburge*, 15 N. J., 320; *Camden & Amboy R. R. Co. v. Hillegas*, 18 N. J., 11. But now it is provided by statute in New Jersey that no assessment of taxes shall be set aside on *certiorari* because the state and local taxes are blended together. See *State v. Saalmann*, 37 N. J., 156.

²*Wall v. Trumbull*, 16 Mich., 228. Compare *Torrey v. Milbury*, 21 Pick., 64.

³*Commonwealth v. Savings Bank*, 5 Allen, 428, 430. See *Stetson v. Kempton*, 18 Mass., 272; *Libby v. Burnham*, 15 Mass., 144; *Joyner v. School District*, 3 Cush., 567; *School District v. Merrills*, 12 Conn., 437; *Hubbard v. Brainard*, 35 Conn., 563; *First Ecclesiastical Society v. Hartford*, 38 Conn., 274; *Elwell v. Shaw*, 1 Me., 339; *Huse v. Merriam*, 2 Me., 375; *Lacy v. Davis*, 4 Mich., 140; *Gerry v. Stoneham*, 1 Allen, 319; *Goodrich v. Lunenburg*, 9 Gray, 38; *Stone v. Bean*, 15 Gray, 42; *Kemper v. McClelland*, 19 Ohio, 308; *Mason v. Roe*, 5 Blackf., 98; *Hutchins v. Doe*, 3 Ind., 528; *Drew v. Davis*, 10 Vt., 506; *Johnson v. Colburn*, 36 Vt., 693; *Wells v. Burbank*, 17 N. H., 393; *Kinsworthy v. Mitchell*, 21 Ark., 145; *Bucknall v. Story*, 36 Cal., 67; *Tucker v. The Justices*, 34 Ga., 370. As to levy of excessive fees, see *Mosher v. Robie*, 11 Me., 135; *Buell v. Irwin*, 24 Mich., 145; *Prindle v. Campbell*, 9 Minn., 212. See *Marsh v. Supervisors*, 42 Wis., 502; *Edwards v. Taliaferro*, 34 Mich., 13; *Hammontree v. Lott*, 40 Mich., 190; *State v. Gosper Co. Com'rs*, 14 Neb., 22; *Workman v. Worcester*, 118 Mass., 168; *Goldsmith v. Rome R. R. Co.*, 62 Ga., 468.

charges, or from errors of the officers, whereby either the aggregate is made too large, or individuals are charged more than their lawful proportion. In the latter case the individual taxes which were unjustly increased would alone be void; in the others the whole levy. The excess, however, may be insignificant and inappreciable in an individual tax, and when it is so, it should be disregarded, on the maxim *de minimis lex non curat*. A case where the excess was but one dollar in \$450,000, the whole levy, is plainly one for the application of this maxim.¹ But the maxim is one to be applied with caution. It has been said of it in a case where a tax was but slightly in excess of authority: "The maxim is so vague in itself as to form a very unsafe ground of proceeding or judging; and it may be almost as difficult to apply it as a rule in pecuniary concerns as to the interest which a witness has in the event of a cause; and in such case it cannot apply. Any interest excludes him. The assessment was therefore unauthorized and void. If the line which the legislature has established be once passed, we know of no boundary to the discretion of the assessors."² The like rule has been adopted in another case, which has held that any addition perceptibly increasing an individual tax avoids it.³

In any case where a party comes into equity for relief against a tax, it will be as proper to make relief depend upon his paying what is just in a case in which the levy was excessive as in any other.⁴ But a tax sale for the excessive tax must

¹ *Workman v. Worcester*, 118 Mass., 168. See *Thatcher v. People*, 79 Ill., 597.

² *Mellen*, Ch. J., in *Huse v. Merriam*, 2 Greenl., 375, 376.

³ *Case v. Dean*, 16 Mich., 12. But an unintentional error may not have this effect. *Kelley v. Corson*, 8 Wis., 182; *O'Grady v. Barnhisel*, 23 Cal., 287, 296. See *State v. Newark*, 25 N. J., 399. In Iowa there is a statute that a tax sale shall be upheld if any portion of the tax for which the sale was made was legal. See *Parker v. Sexton*, 29 Ia., 421. Where part is legal and part is illegal the former will be sustained if they are capable of being distinguished. See *O'Kane v. Treat*, 25 Ill., 557; *Briscoe v. Allison*, 43 Ill., 291; *State v. Allen*, 43 Ill., 456; *Allen v. Peoria, etc., R. R. Co.*, 44 Ill., 85; *People v. Nichols*, 49 Ill., 517; *Mix v. People*, 72 Ill., 241; *State v. Plainfield*, 38 N. J., 93. And as to sale on judgment for taxes, see *Reeve v. Kennedy*, 43 Cal., 643. An excess inserted to cover possible contingencies in collecting, held not to render assessors liable in trespass where they had acted in good faith, and only erred in judgment. *Colman v. Anderson*, 10 Mass., 105.

⁴ *Connors v. Detroit*, 41 Mich., 128; *Neenan v. Smith*, 60 Mo., 292. If the law limits the amount to be levied to one per cent., and three per cent. is

be void; at least unless some statute expressly provides to the contrary.¹ And the levy at an excessive percentage upon the assessment cannot be sustained by showing that the valuation was greatly too low, and that the rate would not have been excessive had the valuation been in accordance with the statute.²

levied, it is said the levy to the legal limit may be upheld. *McPherson v. Foster*, 43 Ia., 48. Compare *Worthen v. Badger*, 32 Ark., 496. It has been held in Kansas that a slight addition to the roll may be made to provide for contingencies in collection, and if it proves too much the tax will not be void in consequence. *Marion Co. Com'rs v. Harvey Co.*, 26 Kan., 181.

¹*Silsbee v. Stockle*, 44 Mich., 561.

²*Wattles v. Lapeer*, 40 Mich., 624.

CHAPTER XIV.

THE COLLECTION OF THE TAX.

Summary remedies necessary. Very summary remedies have been allowed, in every age and country, for the collection by the government of its revenues. They have been considered a matter of state necessity. Without them it might be possible for a party which had been defeated in its efforts to obtain possession of the government in the constitutional way, to cripple the government for the time being, and possibly to break it up altogether. If the state might be deprived of the resources for continuing its existence and performing its regular functions until a revenue could be collected by the processes provided for the enforcement of debts owing to individuals, it would be continually at the mercy of factions and discontented parties. Obviously this could not be tolerated. It has been shown in the preceding chapters that the protective principles of the common law are not supposed to be violated by a resort to summary proceedings in these cases. Summary processes are not necessarily unjust,¹ though they would be so if they deprived the party of a hearing, or if they precluded the opportunity for a patient and deliberate examination of the questions upon which his rights depend, before such rights could be finally concluded and cut off. But it is not the design of legitimate tax legislation to do this in any case. It may depart widely in its methods from those resorted to for the enforcement of rights at the common law, but the fundamental rules of justice will be observed, and, in theory at least, revenue laws will be careful for the protection of individual rights.

The law must prescribe remedies. When a tax is duly and properly levied it is to be collected after some method prescribed by law. For the most part the taxes levied by the states are collected of the persons taxed, or enforced against the property in respect to which they are imposed. In a few cases, however, in which no injustice could result from such a

¹ *McMillen v. Anderson*, 95 U. S., 37.

course, the state may reach the party taxed by indirection, and collect in the first instance from some one else, who in turn will become collector from the person on whom the tax is really imposed. The reason for this is, that in such cases it is more convenient to the state, and perhaps makes more certain the collection; and it could be resorted to only when the case is such that injustice could result to no one. A case of the kind is where a tax is imposed on the dividends or other receipts of shareholders from the profits of corporations, or upon their shares, and the corporation is required to make the payment, which it would then deduct from the payments to be made to shareholders.¹ There is no doubt of the right to do this, except as to payments to be made to non-residents, nor even as to them if the statute under which their interests were acquired provided for the levying and collection of taxes in that manner.² The state may, also, in some cases have in its own hands the means of enforcing the tax without calling upon any one; as where it taxes the salaries of its own officers, or any fund or sum of money in its own treasury to be paid to individuals; in which case, under appropriate legislation, the tax may be deducted before payment is made. So a court, having a fund in charge on which a tax is owing, may, as the representative of the sovereignty, direct the payment to be made, without raising any question of the means of enforcement by process.³

¹ *Maltby v. Reading R. R. Co.*, 52 Pa. St., 140; *Haight v. Railroad Co.*, 6 Wall., 15; *National Bank v. Commonwealth*, 9 Wall., 353; *United States v. Railroad Co.*, 17 Wall., 322; *Minot v. Railroad Co.*, 18 Wall., 206; *Ottawa, etc., Co. v. McCaleb*, 81 Ill., 556; *New Orleans v. Savings, etc., Co.*, 81 La. An., 826; *Baltimore v. City Passenger R. Co.*, 57 Md., 31; *St. Albans v. National Car Co.*, 57 Vt., 68. In Maryland an action lies directly against the corporation to collect the tax. *American Coal Co. v. Allegany County*, 59 Md., 185. Payment, it seems, may be enforced by *mandamus*. *Barney v. State*, 42 Md., 480; *McVeagh v. Chicago*, 49 Ill., 318. But a collector with a warrant against the shareholder cannot enforce payment by the corporation. *First National Bank v. Fancher*, 48 N. Y., 524. And when the shares are taxed as such, though the tax is to be paid by the corporation, it cannot, *it seems*, be enforced against its assets after it becomes insolvent. *Lionberger v. Rowse*, 43 Mo., 67; *Relfe v. Life Ins. Co.*, 11 Mo. Ap., 374. See, further, *ante*, p. 231.

² See *ante*, p. 389.

³ *Succession of Du Puy*, 33 La. An., 258. It is a principle of the common law that all contracts and arrangements made for the defeat or evasion of

Methods of collection. A sovereignty will provide such methods for the collection of its revenue as are suitable to the various taxes laid, and its discretion is only limited by constitutional principles.

Farming Out the Revenues. This is a method suited only to arbitrary governments and unenlightened people. It may be said in general to consist in putting the collection of the revenues under general rules for the determination of individual taxes, but without any specific listing, into the hands of contractors, who are to return to the treasury a certain net result, retaining the remainder for their profit. Such a system, by making it the personal interest of those who are to administer the tax laws to render them as productive as possible, might increase the public revenues both by inducing a more vigilant search for subjects of taxation, and by insuring more strict enforcement of collections;¹ but it is so much liable to abuse and oppression as to be generally condemned. In America it would not even be proposed, much less tolerated.

the revenue laws of a country are illegal, and the courts will give the parties no remedy in respect to them. *Clugas v. Penaluna*, 4 T. R., 466; *Wamell v. Reed*, 5 T. R., 599; *Cope v. Rowlands*, 2 M. & W., 149; *Smith v. Mawhood*, 14 M. & W., 452; *Favor v. Philbrick*, 7 N. H., 326, 340; *Harris v. Runnels*, 12 How., 79. See, also, *Bancroft v. Dumas*, 21 Vt., 456; *Alexander v. O'Donnell*, 12 Kan., 608; *Howard v. First Independent Church*, 18 Md., 451. It is necessary, perhaps, that both parties should have knowledge of the intent to violate the law; for if one be innocent, there is no reason why the guilty intent of the other shall cause him to suffer. See *Biggs v. Lawrence*, 3 T. R., 454; *Lightfoot v. Tenant*, 1 B. & P., 551, 556; *Clugas v. Penaluna*, 4 T. R., 466; *Kreiss v. Seligman*, 8 Barb., 439; *Ritchie v. Smith*, 6 M., G. & Scott, 462; *Pellecat v. Angell*, 2 Crompt., M. & R., 311; *Foster v. Thurston*, 11 Cush., 322; *Webster v. Munger*, 8 Gray, 584; *Cambioso v. Maffitt*, 2 Wash. C. C., 98; *Armstrong v. Toler*, 11 Wheat., 258. The principle does not apply to contracts made in evasion of the laws of a foreign country, but it does apply to all contracts made abroad to be performed here. See cases above cited. Also *Holman v. Johnson*, 1 Cowp., 841. And compare *Dater v. Earl*, 3 Gray, 482, with *Cambioso v. Maffett*, 2 Wash. C. C., 98.

¹ On this ground Bentham defended it. Works, Edinburgh ed., vol. 2, p. 241. Some idea of the oppression of which such a system is susceptible may be had from the fact that in France, just preceding the revolution which dethroned Louis XVI., it was estimated that, of the taxes extorted from the people, not more than one-fifth was received into the public treasury.

Collection by Suit. On a preceding page it has been shown that taxes are not debts in the ordinary sense,¹ and that therefore a suit will not in general lie for their recovery. This rule, however, is not universal; for sometimes a right to bring suit is expressly given,² and where it is the statute must be closely followed, and any conditions which are named must be observed.³ Sometimes, also, the implication of an intent to give a remedy by suit may be so strong as to be conclusive; as where the statute provides for a tax, but is silent as to the method of collection.⁴

Where a suit for collection is allowed, the general statute of limitations will be applicable unless the statute provides otherwise.⁵ It will be a good defense to the suit that the tax for

¹ *Ante*, p. 15.

² This may be done as to taxes laid before the law was passed giving the right. *York v. Goodwin*, 67 Me., 260.

³ Where the statute gives a right to bring suit after return of the tax unpaid, it must be strictly followed, and a suit will not lie without such return. *McCallum v. Bethany*, 42 Mich., 457. Where the statute made the tax roll *prima facie* evidence of the legality and regularity of the assessment of the tax, and provided that, in a suit thereon, judgment should be rendered against the person taxed unless he proved payment, it was held that the defendant might nevertheless disprove the *prima facie* case of liability. *Wattles v. Lapeer*, 40 Mich., 624. See *San Francisco v. Phelan*, 61 Cal., 617. The right to sell property to enforce payment of a tax depends upon the legal liability of the owner to pay the tax and a legal default in making payment. *Green v. Craft*, 28 Miss., 70. As to non-residents, see *New York, etc., R. Co. v. Lyon*, 16 Barb., 651.

⁴ See *Territory v. Reyburn*, McCahon, 134; *State v. Williams*, 8 Tex., 384; *Houston, etc., R. Co. v. State*, 39 Tex., 149; *Perry Co. v. Railroad Co.*, 58 Ala., 546; *Slack v. Ray*, 26 La. An., 674; *Rutledge v. Fogg*, 3 Cold., 554; *Memphis v. Looney*, 9 Bax., 130. Further as to the right to collect by suit, see *Savings Bank v. United States*, 19 Wall., 227; *Johnston v. Louisville*, 11 Bush, 527. And as to irregularities in the warrant, see *United States v. Tilden*, 9 Ben., 368. Where the statute provided a special remedy for the collection of a personal tax by suit, and a mode of reviewing the judgment, it was held that the party was confined to this mode of review. *Washington Co. v. German American Bank*, 28 Minn., 360. If a contractor or his assigns are alone authorized to sue, the pleadings must show that the plaintiff is one or the other. *Bays v. Lapidge*, 52 Cal., 481. As to what the collector must show who resorts to a summary proceeding for the collection of a tax in Louisiana, see *Clinton, etc., R. Co. v. Tax Collector*, 30 La. An., 626.

⁵ Taxes against an estate in Maine are a preferred claim, and may be collected without being proved before commissioners. *Bulfinch v. Benner*, 64 Me., 404. In Massachusetts suit must be brought therefor within two years from the time the administrator filed his bond, or it will be barred, unless

any reason is illegal, but mere irregularities may be overlooked, as they would be in a suit to recover back the amount after payment.¹ Interest will not be recoverable unless expressly given by statute,² nor can any recovery be had without proof of such proceedings as are essential to the making out of a legal tax and a default in payment.³ The collection is to be made of the party taxed, though he may have parted with the property in respect of which he was assessed,⁴ or even though the property may have been accidentally destroyed.⁵

the case comes within some statutory exception applicable to creditors generally. *Rich v. Tuckerman*, 121 Mass., 222. See, as to Indiana, *Henderson v. Whiting*, 56 Ind., 131. In Nevada, California and Alabama, the statute of limitations applies in suits by the state for taxes, and also in suits by the municipalities. *State v. Mining Co.*, 14 Nev., 220; *San Francisco v. Jones*, 20 Fed. Rep., 188; *Perry Co. v. Railroad Co.*, 58 Ala., 546.

¹ *State v. Nor. Belle M. Co.*, 15 Nev., 385; *Houston Co. Com'rs v. Jessup*, 22 Minn., 552. Inequalities in the assessments is no defense. *Potosi v. Casey*, 27 Mo., 372. But fraud may be. *State v. Cent. Pac. R. Co.*, 7 Nev., 99; *Western R. Co. v. Nolan*, 48 N. Y., 513. And it is always a defense that the party was not subject to the taxing jurisdiction. *McCrillis v. Mansfield*, 64 Me., 198. But it is no defense to a legal tax that the party has paid others which were illegal. *Railroad Co. v. Alamance Co.*, 83 N. C., 259; *Railroad Co. v. Brunswick Co.*, 72 N. C., 10; *Bridge Co. v. New Hanover Co.*, 72 N. C., 15; *Railroad Co. v. Brogden*, 74 N. C., 707; *Wayne v. Savannah*, 56 Ga., 448.

² *Danforth v. Williams*, 9 Mass., 324; *ante*, p. 17.

³ *Lockhart v. Houston*, 58 Tex., 817; *Thompson v. Gardner*, 10 Johns., 404; *St. Anthony, etc., Co. v. Greeley*, 11 Minn., 321. Compare *Kinsworthy v. Mitchell*, 21 Ark., 145; *Garbaldi v. Jenkins*, 27 Ark., 453.

⁴ *Everson v. Syracuse*, 29 Hun, 485.

⁵ *Farrell v. United States*, 99 U. S., 221. A land owner having died insolvent with taxes in arrear, crops raised on the land by the family the next season cannot be taken for such taxes. *Gregory v. Wilson*, 52 Ind., 233.

The statute gave a suit for taxes against any one who should remove out of the precinct after assessment. This applied to the case of one who left, but with the intention of returning after six months. *Houghton v. Davenport*, 23 Pick., 235. But one cannot be made liable for a tax assessed after he has removed from the municipality, even though the vote granting the money was had while he was a resident. *Ware v. First Parish*, 8 Cush., 267.

In Alabama a tax may be collected by garnishing the creditor of the delinquent. *State v. McAllister*, 60 Ala., 105. The right to bring suit is not taken away by a new constitutional provision for collection in another mode so long as the statutes which allow suit remain unrepealed. *New Orleans v. Wood*, 34 La. An., 732. In Michigan a collector bringing suit for a tax must do so within the life of his warrant. *Putnam v. Fife Lake*, 45 Mich., 125. In Pennsylvania he may sue after the warrant has expired, and at his option

Enforcement by Arrest of the Person. We refer here to arrest as the ordinary proceeding, and not in the course of prosecution for a penalty or forfeiture. The early state laws authorized process against the body of the person taxed, as an ordinary process for the enforcement of all taxes which were a personal charge. But commonly it was not allowed to be resorted to unless on search the officer was unable to find property.¹ It is a harsh remedy, and these statutes have very generally been repealed. Where arrest is allowed, the officer must be sure of his process and follow the statute strictly, or he may make himself a trespasser.²

In the case of license taxes it is still customary to provide for arrest and imprisonment as a means of enforcing payment,³ and municipalities are empowered to pass ordinances for that purpose. But general words in a city charter, not expressly conferring the power, will not be sufficient to give the authority.⁴

he may pay the tax himself and then bring suit. *Shriver v. Cowell*, 92 Pa. St., 262.

The following is a case of some interest: The state was enjoined in 1862 from collecting from a corporation certain taxes. In 1878 the state took proceedings to collect taxes from the same corporation; the right to collect resting on the same ground as in 1862. *Held*, that the matter was not *res adjudicata*. "The parties are bound so far as regards the subject-matter then involved, but are at liberty to raise anew the same legal questions in a case arising subsequently, even although the facts may be substantially alike." *Lake Shore, etc., R. Co. v. People*, 46 Mich., 193.

A county having authority to sue for taxes has authority to compromise and receive less than the whole, and if it shall do so, and then proceed to collect, the proceedings will be enjoined. *St. Louis, etc., R. Co. v. Anthony*, 73 Mo., 431; citing *Supervisors v. Birdsall*, 4 Wend., 453; *Supervisors v. Bowen*, 4 Lans., 31.

¹ *Lothrop v. Ide*, 18 Gray, 93; *Hall v. Hall*, 3 Allen, 5. See *In re Nichols*, 54 N. Y., 62. Arrest after return day sustained. *Bassett v. Porter*, 4 Cush., 487. As to relief from arrest, see *Aldrich v. Aldrich*, 8 Met., 102.

² *Boardman v. Goldsmith*, 48 Vt., 403. Where a person is arrested, detention to compel the payment of illegal fees makes the collector liable. *Wilcox v. Gladwin*, 50 Conn., 77.

³ *Commonwealth v. Byrne*, 20 Grat., 165 (citing *Barrett v. Porter*, 4 Cush., 487; *Daggett v. Everett*, 19 Me., 373; *Rising v. Granger*, 1 Mass., 47; *Appleton v. Hopkins*, 5 Gray, 530; *Kingman v. Glover*, 3 Rich., 27). And see *post*, chapter XIX.

⁴ *St. Louis v. Green*, 7 Mo. App., 468. See *St. Louis v. Sterneberg*, 4 Mo. App., 453. Perhaps it may be otherwise if the state collects its taxes in this mode. See *Slack v. Ray*, 26 La. An., 674.

A constitutional provision inhibiting imprisonment for debt has no application to the case of a license tax.¹

Distress and Sale of Chattels. To authorize the collector to distrain goods and chattels for the satisfaction of a tax, the officer must have for the purpose such a warrant as is provided by law, and the law must give authority for the seizure.²

A distress warrant is in the nature of an execution,³ and therefore seems at first blush a very arbitrary process, since it issues, under most of our tax laws, without any previous judicial determination of liability. But, as has already been said, this does not deprive a party aggrieved of his remedy. It only makes his remedy wait the superior urgency of government necessities. It has been well said of collection by distress: "This method of collecting taxes is as well established by custom and usage as any principle of the common law. A similar practice prevailed in all the colonies from the first dawn of their existence; it has been continued by all the states since their independence, and had existed in England from time immemorial. Indeed, it is necessary to the existence of every government, and is based upon the principle of self-preservation."⁴ This is conclusive of the right to provide for it."

But it has sometimes been deemed necessary, after giving the ordinary remedy by distress, to go further. That remedy will not justify any invasion of the rights or any interference with the property of others than the very persons upon whom

¹ *Charleston v. Oliver*, 16 S. C., 47.

² A municipal corporation cannot provide for such a warrant by ordinance, without statutory authority for the purpose. *Bergen v. Clarkson*, 6 N. J., 352.

³ *Virden v. Bowers*, 55 Miss., 1.

⁴ *State v. Allen*, 2 McCord, 55. See, also, *Murray's Lessee v. Hoboken, etc., Land Co.*, 18 How., 272; *Harris v. Wood*, 6 T. B. Monr., 641, 643; *McCarrol v. Weeks*, 5 Hayw., 246; *Willis v. Wetherbee*, 4 N. H., 118; *New Orleans v. Cannon*, 10 La. An., 764.

As to when a tax is *due* in Ohio, see *Hoglen v. Cohan*, 30 Ohio St., 436. It is no excuse for the non-payment of a tax in full that in like instances the collector, without authority and of his own motion, has remitted a part of the tax. *New Orleans v. Meister*, 33 La. An., 646.

The power to distrain may be made to extend to realty. *Springer v. United States*, 102 U. S., 586. The fact that a remedy by distress is given will not, unless the statute is explicit, take away any existing right to collect taxes by suit. *Dubuque v. Railroad Co.*, 39 Ia., 56.

the tax is imposed. If the property of another is distrained, the officer may be sued in trespass, or the property may be taken from him on writ of replevin.¹ Under pretense of this right it has been found possible seriously to embarrass the officer in the performance of his duties, by means of unfounded claims, or those the officer believes to be such. To preclude this, statutes have, in some cases, been passed, taking away the ordinary remedies against the collector, and leaving the claimant to some other remedy. Some of these statutes, which merely prohibit replevin being brought against the officer, are referred to elsewhere. The New York Revised Statutes authorized the collector to seize and sell not only goods and chattels of the party taxed, but any goods and chattels in his possession, and declared that "no claim of property made by any other person shall be available to prevent a sale." This statute was enforced without question of its validity.² A similar statute in Michigan was strongly contested as not being due process of law, and was upheld by a divided court.³ In New Jersey a tax collector may be authorized to seize on a tax warrant the tenant's goods for a tax assessed against the landlord in respect of the leased premises.⁴ In Pennsylvania a statute has been enforced which empowered the collector to distrain the property of an occupier of land wherever found, for the satisfaction of a tax assessed in respect to the land against the owner.⁵

So it has been held competent by law to make a purchaser of land, who enters into possession, chargeable personally with

¹ A chattel belonging to one man cannot be taken for a tax against another, even though the latter had been owner, and was still in possession. *Daniels v. Nelson*, 41 Vt., 161. Property in the custody of the law cannot be seized for taxes. *Prince George Co. v. Clarke*, 36 Md., 206; *Yuba Co. v. Adams*, 7 Cal., 35.

² *Sheldon v. Van Buskirk*, 2 N. Y., 473. No point was made of the constitutional competency of such legislation.

³ *Sears v. Cottrell*, 5 Mich., 251.

As to the liability of a railroad company formed by the consolidation of two, to pay the tax on the defunct roads, see *Bailey v. Railroad Co.*, 22 Wall., 604.

⁴ *Morrow v. Dows*, 28 N. J. Eq., 459.

⁵ *McGregor v. Montgomery*, 4 Pa. St., 237. The warrant is no lien upon personalty until actual seizure. *Moore v. Marsh*, 60 Pa. St., 46.

the tax previously assessed.¹ These are illustrations of what we must admit are harsh proceedings, but which nevertheless are sometimes allowed by statute.²

Property seized for taxes will be taken subject to any prior

¹ *Henry v. Horstick*, 9 Watts, 412. See, also, *Smeich v. York County*, 68 Pa. St., 439. But an express statute would be requisite to create such a liability. *Atlantic, etc., R. R. Co. v. Cleins*, 2 Dill., 175. See *Blodgett v. German, etc., Bank*, 69 Ind., 153; *Volger v. Sidener*, 86 Ind., 545. Where property, after alienation, is allowed by the vendor to remain on the tax books of the county, and he fails to avail himself of the means provided by law to have the assessment corrected, he is liable for such taxes, and they may be recovered by suit. *County Commissioners v. Clagett*, 31 Md., 210. Where, on a tax warrant issued by assessors having jurisdiction, and fair on its face, bank shares are sold, the cashier of the bank is justified in issuing new certificates to the purchaser, who, thereby, becomes entitled to the dividends, whether the tax was rightfully assessed or not. *Smith v. Northampton Bank*, 4 Cush., 1.

² A purchaser of property on which taxes are due and unpaid does not thereby become personally liable for their payment unless by statute. *Biggins v. People*, 96 Ill., 381. A statute declaring that goods and chattels on lands assessed shall be deemed to belong to the person to whom they are assessed will not apply to property transiently there for the owner's purposes: *e. g.*, the engine and cars of a railroad company. *Lake Shore, etc., R. Co. v. Roach*, 80 N. Y., 839. In Pennsylvania personal property remaining on land after the land has been assigned for the benefit of creditors is liable to be seized for taxes against the land assessed either before or after the assignment. *Wright v. Wigton*, 84 Pa. St., 163.

No lien on personalty is created in Illinois until the tax books are placed in the collector's hands. *Gaar v. Hurd*, 92 Ill., 315; *Ream v. Stone*, 102 Ill., 359. And it is not then a lien on specific property, but upon all the personalty of the owner, subject to all prior valid existing liens. *Cooper v. Corbin*, 105 Ill., 224. In Idaho it is said a lien is merely to secure the public, and if after judgment for a tax an appeal is taken and an appeal bond given to secure the final judgment, the lien is vacated. *People v. Preston*, 1 Idaho, 874. Goods assigned for the benefit of creditors after the tax is assessed cannot be seized for the tax in the hands of the assignee, unless the statute gives a lien. *Lyon v. Guthard*, 52 Mich., 271. But in Iowa taxes assessed against goods which pass to the hands of an assignee for creditors are entitled to priority by statute, without any demand or levy, and the assignee at his peril must provide for and pay them. *Huiscamp v. Albert*, 60 Ia., 421. In the same state, however, a mortgagee of goods who takes possession before they have been seized for taxes, and who sells for the satisfaction of his demand, either in person or through a receiver appointed by a court, is entitled to the proceeds as against the tax collector. *Marsh v. Bird*, 23 Fed. Rep., 180. Where a tax is assessed on personalty in the hands of an assignee for creditors, the assignee must pay them as between himself and a mortgagee of the assigned realty, although by statute such taxes are a lien on realty. *Brooks v. Eighmey*, 53 Ia., 276.

lien existing in favor of individuals; and it therefore becomes important to know at what time the lien for taxes will attach. And this will depend on whether the statute directly or by implication prescribes a rule for the case. If it does not, the lien will attach from the time the goods are distrained; not from the time of assessment, or even of the delivery of the tax warrant to the officer.¹

What property shall be subject to distress the statute itself will determine; and it may or may not be the same which is subject to execution on judgments.² If the distress for any reason is returned to the owner, without being in any manner appropriated to the discharge of the tax, the tax is not paid, and may be distrained for a second time.³

It is very proper that a demand of the tax should be made a prerequisite to the levy by distress;⁴ and it is not often that

¹See *Tompkins v. Railroad Co.*, 18 Fed. Rep., 344.

In Illinois the lien attaches when the tax books, with the proper warrant authorizing collection, are delivered to the collector. *Gaar v. Hurd*, 92 Ill., 315; *Binkert v. Wabash R. Co.*, 98 Ill., 205; *Ream v. Stone*, 102 Ill., 359. If this is after an attachment has been levied, but before sale under it, the attachment is not displaced. *Gaar v. Hurd*, *supra*.

"The law of Georgia creates a general lien which attaches at the time when the property is liable by law to taxation upon all the property of the citizen." *Gledney v. Deavors*, 8 Ga., 479, 482. See, also, *Freeman v. Mayor of Atlanta*, 66 Ga., 617, as to city lien.

While the owner in Iowa is bound to pay the taxes on his land whether listed in his name or not, he is not bound to pay the taxes on personalty erroneously listed to another. *Brownlee v. Marion Co.*, 53 Ia., 487.

²In Kansas promissory notes and mortgages may be seized on a tax warrant. *Blain v. Irby*, 25 Kan., 499. As to collection by distress of a school tax when by a division of a school district after a tax is levied, the property liable is found to be in the new district, see *McKay v. Batchellor*, 2 Col., 591.

³*Farnsworth Co. v. Rand*, 65 Me., 19. In general it is the seizure of goods which creates a lien unless the statute expressly gives one. *McKay v. Batchellor*, 2 Col., 591. In Georgia, if property is in custody of the law, the state lien for taxes overrides all others except the judicial costs. *Georgia v. Atlantic, etc., R. Co.*, 8 Woods, 434.

⁴See *Hoozer v. Buckner*, 11 B. Monr., 183. Such a demand is not essential before levy of distress unless the statute requires it. *Ives v. Lynn*, 7 Conn., 504. Where demand is a step in the establishment of a lien, it cannot be dispensed with, and it ought to be for the specific amount to be paid. *United States v. Pacific R. Co.*, 4 Dill., 71. As to the necessity for strict compliance with the statute, see *Villey v. Jarreau*, 33 La. Ar., 291. See further as to the sufficiency of a demand, *Himmelman v. Townsend*, 49 Cal., 150; *Same v. Booth*, 53 Cal., 50.

statutes are passed which are so little regardful of the rights of the citizen as to authorize distress without the persons taxed being at least called upon, and given the opportunity to pay without the expense and annoyance of a levy. A requirement by statute of demand or personal notification is imperative, and distress without it would be illegal.¹ Statutes regarding notice, and limiting the time within which sale of the distrained property shall be made, are also imperative, and the officer becomes a trespasser *ab initio*, if he proceeds to a sale in disregard of them.² In short, in those cases in which

¹ *Cones v. Wilson*, 14 Ind., 465, 466. The collector's authority must be strictly pursued. *Bishop v. Lovan*, 4 B. Monr., 116. Where the sheriff was to distrain for taxes, if on presenting an account of the taxes and offering a receipt they were not paid, a distress without these was illegal. *Hoozer v. Buckner*, 11 B. Monr., 183, 184. See to the same point, *Johnson v. McIntire*, 1 Bibb, 295; *Atkinson v. Amick*, 25 Mo., 404; *Thompson v. Rogers*, 4 La., 9; *Burd v. Ramsey*, 9 S. & R., 109; *St. Anthony, etc., Co. v. Greely*, 11 Minn., 325; *Bonnell v. Roane*, 20 Ark., 114; *Moulton v. Blaisdell*, 24 Me., 283; *Ives v. Lynn*, 7 Conn., 504; *Harrington v. Worcester*, 6 Allen, 576. A demand at the last and usual place of abode of a non-resident in the town, if he has no agent there, is sufficient to justify a subsequent seizure and sale of his goods under the statute which requires that "the collector shall, before distraining the goods of any person for his tax, demand payment thereof of such person, if to be found within his precinct." *King v. Whitcomb*, 1 Met., 328. Where the law required supervisors, before issuing duplicate and warrant for the collection of road taxes, to give notice to all persons rated for such taxes, by advertisement or otherwise, to attend at such times and places as such supervisors may direct, so as to give such persons full opportunity to work out their respective taxes, *held*, to be mandatory and a condition precedent. *Miller v. Gorham*, 38 Pa. St., 309.

Where a city charter provides for thirty days' publication of a notice to pay taxes, but allows other legal notice, a publication for one day, coupled with due public posting, has been held sufficient. *Brunswick v. Finney*, 54 Ga., 317.

² The statute required property seized for taxes to be sold within four days. Keeping it longer was held to make the officer a trespasser *ab initio*. *Brackett v. Vining*, 49 Me., 356. Sale void which is made after the time thus limited. *Pierce v. Benjamin*, 14 Pick., 356; *Noyes v. Haverhill*, 11 Cush., 338; *Lefavour v. Bartlett*, 42 N. H., 555. As to defects in a notice of sale that do not avoid it, see *Barnard v. Graves*, 13 Met., 85; *Scott v. Watkins*, 22 Ark., 556; *Lyle v. Jaques*, 101 Ill., 644; *Rawson v. Spencer*, 113 Mass., 40. Where the statute provides for notice, the party cannot be in default until he has received it. *Smith v. State*, 43 Ala., 344. A premature levy by a collector without sufficient cause renders him liable in trespass. *Veit v. Graff*, 37 Ind., 253. Where the collector is required to appoint a time and place to receive payment of the tax, if the tax payer when called

property is to be sold for taxes without judicial process, it is indispensable that all the proceedings — except such as may be mere formalities of no importance to the tax payer — be in strict compliance with the law.¹ It would be idle to undertake to give in this place any statement of the very diverse statutory requirements of the different states. The principles above stated are of general application and will be sufficient to determine the rule of legal liability and of official duty in most cases.²

upon expresses a purpose not to pay at all, the collector need not name time and place for the purpose, but may levy at once. *Downer v. Woodbury*, 19 Vt., 329; *Wheelock v. Archer*, 26 Vt., 380; *Hurlbut v. Green*, 42 Vt., 316. In Vermont it is decided that provisions in a statute requiring the collector to keep a distress four days before advertising, and to advertise six days, do not restrict him to this exact time, though he may not sell in less. *Clemons v. Lewis*, 36 Vt., 673. See *Harriman v. School District*, 35 Vt., 311. That a levy on personalty is *prima facie* a satisfaction of a tax, see *Henry v. Gregory*, 29 Mich., 68. In Indiana there seems to be a lien for taxes on personalty from the time when the duplicate comes to the collector's hands. *Barker v. Morton*, 19 Ind., 146. And this would not be divested in favor of an execution subsequently issued. *Evans v. Bradford*, 35 Ind., 527; *McNiel v. Farneman*, 37 Ind., 203.

A sale for taxes at ten in the morning, when the sale had been adjourned to one in the afternoon, is void and makes the officer a trespasser. *Buzzell v. Johnson*, 54 Vt., 90. In Maine the property seized need not be sold in the same town if proper reasons exist for removing it into another. *Carville v. Additon*, 62 Me., 459. When the collector, after selling enough to pay the tax and expense of sale, sells other property distrained, he will be a trespasser *ab initio* only in respect to the articles sold in excess of the necessity. *Seekins v. Goodale*, 61 Me., 400, explaining *Williamson v. Dow*, 32 Me., 559.

A collector has no right to redeliver to the owner property seized for a tax, on receiving from the owner a bond conditioned that the property shall be returned to him if the tax is judicially determined to be good. Such a bond would be void. *Hardesty v. Price*, 3 Col., 556. See, for the same principle, *Morgan v. Hale*, 12 W. Va., 713; *McWilliams v. Phillips*, 51 Miss., 196. In this last case it is held that a note taken by the collector for taxes is void.* But see *Pay v. Shanks*, 56 Ind., 554, which seems opposed to the Colorado case above cited.

¹ *Ward v. Carson, etc., Co.*, 18 Nev., 44; *Emerson v. Thompson*, 59 Wis., 619.

² Where by statute taxes are to be collected as in case of execution, a claim, in the case of a tax against an estate, must be presented for allowance. *Millett v. Early*, 16 Neb., 266.

Garnishment. A creditor who has an execution against a municipal corporation cannot garnish the tax collector or the tax payers as a means of obtaining payment. *Brown v. Gates*, 15 W. Va., 131, which goes fully into the authorities. Tax moneys collected for a judgment creditor cannot be garnished in the hands of the collector. *Droz v. East Baton Rouge*, 36 La. An., 840.

Detention of Goods and Chattels. We refer here, not to the proceedings in which goods are distrained or seized for forfeitures or penalties, but to those under which goods, in respect to which the tax is demanded, are required to pass through the hands of government officers, who are to exact the tax before the owner or consignee is entitled to their custody. Cases of this nature arise under the laws for the collection of customs duties, but do not require special mention. They are fully provided for by the laws of congress.¹

Sale of Lands. To authorize a sale of land for taxes a lien must exist, either created in terms by the statute itself, or established by some official proceedings under the statute. The general rule is that taxes are not a lien unless expressly made so;² and when liens are expressly created, they are not to be enlarged by construction. If, therefore, the statute in terms makes the tax a lien on one species of property, it will not by intendment be extended to any other species.³ And if in terms it makes the tax a lien on all property and rights of property of the person taxed, the lien will be limited to property and rights owned when the tax accrued.⁴ So if the statute makes a distiller's tax a lien on the land on which the distillery is situated, it will not be applied to a case where the owner of a distillery has erected it upon the land of another without the latter's consent.⁵

¹ The destruction of goods in bond by the fault of an officer does not release the owner from the duty of paying the tax thereon. *United States v. Farrell*, 8 Biss., 259.

² *Heine v. Levee Commissioners*, 19 Wall., 655; *Jodon v. Brenham*, 57 Tex., 655; *Tompkins v. Railway Co.*, 18 Fed. Rep., 344; *McNish v. Perrine*, 14 Neb., 583; *Jefferson City v. Whipple*, 71 Mo., 519; *People's Savings Bank v. Tripp*, 13 R. I., 621; *Board of Education v. Old Dominion, etc., Co.*, 18 W. Va., 441; *Albany, etc., Co. v. Meriden*, 48 Conn., 243; *Garrettson v. Scofield*, 44 Ia., 85.

³ *Anderson v. State*, 23 Miss., 459; *Bailey v. Fuqua*, 24 Miss., 497. See *Howard v. Augusta*, 74 Me., 79; *Creighton v. Manson*, 27 Cal., 614.

⁴ *United States v. Pacific R. Co.*, 4 Dill., 71; *S. C.*, 1 McCrary, 1.

⁵ *Gudger v. Bates*, 52 Ga., 285.

In some states the lien of a municipality for taxes is subordinate to the lien of the state. *Hargrove v. Lilly*, 69 Ga., 326. But in others they stand upon an equal footing, and a sale upon one divests the other. See *Justice v. Logansport*, 101 Ind., 326; citing *Denike v. Rourke*, 3 Biss., 39; *Dennison v. Keokuk*, 45 Ia., 266. In still others the state and municipal taxes go upon

But it is not only competent for the state thus to charge the land with the tax, but the legislature may, if it shall deem it proper or necessary to do so, make the lien a first claim on the property, with precedence of all other claims and liens whatsoever, whether created by judgment, mortgage, execution or otherwise, and whether arising before or after the assessment of the tax.¹ When that is done, the lien does not stand on the same footing with an ordinary incumbrance, but attaches itself to the *res* without regard to individual ownership, and if enforced by sale of the land the purchaser will take a valid and unimpeachable title.² In some states the statute is found to go even farther than this, and to give a lien on the land of the person taxed for taxes assessed against him in respect of any of his property, real or personal. The competency of this legislation is unquestionable.³ And in any of

the same roll, and the lien is for all together. In Missouri a sale of land for taxes does not divest the lien of the state for taxes of a previous year. *State v. Werner*, 10 Mo. Ap., 41. *Contra* in Iowa. *Preston v. Van Gorder*, 31 Ia., 250. As to city taxes in Iowa, see *Dennison v. Keokuk*, 45 Ia., 266. And as to railroad taxes, *Crowell v. Merrill*, 60 Ia., 53.

A sale of the land of a bankrupt by his assignee does not divest the lien of the state upon the land for taxes due upon it, even though sold by the assignee free of incumbrance. *Stokes v. State*, 46 Ga., 412.

¹ *Wallace's Estate*, 59 Pa. St., 401; *Dungan's Appeal*, 68 Pa. St., 204; *Ly-decker v. Palisade Tax Co.*, 33 N. J. Eq., 415; *Isaacs v. Decker*, 41 Ind., 410; *Cooper v. Corbin*, 105 Ill., 224; *Trustees v. Trenton*, 30 N. J. Eq., 667; *Patterson v. O'Neill*, 32 N. J. Eq., 386. Under the Delaware statute a tax lien does not become paramount to a mortgage unless levy is made before the mortgage is foreclosed. The assessment alone is not sufficient. *Rhoads v. Given*, 5 Houst. 188.

² *Osterberg v. Union Trust Co.*, 93 U. S., 424; *Spratt v. Price*, 18 Fla., 289. See *Paulson v. Rule*, 49 Ia., 576; *Parker v. Baxter*, 2 Gray, 185; *Dale v. McEvers*, 2 Cow., 118; *Biscoe v. Coulter*, 18 Ark., 423.

³ *Green v. Gruber*, 26 La. An., 694; *Isaacs v. Decker*, 41 Ind., 410; *Peckham v. Millikan*, 99 Ind., 352. See *United States v. Pacific R. Co.*, 4 Dill., 71; *Albany Brewing Co. v. Meriden*, 48 Conn., 244. In Texas the lien on each tract of land is for the taxes assessed against such tract only. *Edmonson v. Galveston*, 53 Tex., 157; *State v. Baker*, 49 Tex., 763; *Jodon v. Brenham*, 58 Tex., 655. This is probably the rule in most of the states.

When by statute taxes on lands are made a lien in preference to all other liens, the failure of the collector to make the tax from personalty when he might will defeat or postpone the lien. *Germania Sav. Bank's Appeal*, 91 Pa. St., 345. And see, for the same principle, *Berwin v. Legras*, 28 La. An., 352. Where a tax judgment combines taxes on a number of parcels, some

these cases a change in ownership would not affect the lien; the law taking no notice of the change.¹

If the statute deals with particular interests in land rather than the land itself, and assesses such interests separately, previous liens will not in general be divested;² though they might

of which are, and others are not, embraced in a mortgage, the latter is not postponed to the judgment. *Kepley v. Jansen*, 107 Ill., 79.

The following are decisions under Louisiana statutes: Certain land was held by the state on failure to find purchasers for two years, and was then sold. Meantime further taxes had been assessed in respect to it against the owner of the record title. Held that these taxes were not a lien as against the purchaser from the state. *Bradford v. Lafargue*, 30 La. An., 432. A sale for a state tax will not divest a lien for a city tax, unless the sale realizes sufficient to pay both. *Bellocoq v. New Orleans*, 81 La. An., 471. See, to the same effect in Iowa, *Dennison v. Keokuk*, 45 Ia., 266. If land is sold for the tax of one year at a time when the tax for the next year has become an incumbrance, this last tax will not be discharged by the sale. *McAlister v. Anderson*, 27 La. An., 425. See a case of extension of the lien by statute in *Dunlop v. Minor*, 26 La. An., 117.

In Louisiana the state has a lien for taxes on land as against the owner to whom the tax is assessed without registry. But registry is essential as against a grantee of the owner after the tax was due. *Adams v. Wakefield*, 26 La. An., 592; *New Orleans Sav. Inst. v. Leslie*, 28 La. An., 496; *Cochran v. Dry Dock Co.*, 30 La. An., 1365. Registry after the grantee has acquired title will be ineffectual as against him. *Jacob v. Preston*, 31 La. An., 514.

Where a statute provides that a ministerial officer, upon sale of property, shall pay all sums due and in arrear for taxes from the party whose property is sold, a tax which has become a lien, but is not yet in arrear, cannot be paid. *Wheeler v. Addison*, 54 Md., 41.

In Rhode Island a tax on a resident for personalty and realty is a lien on all the lands for two years. As to the rule when lands have been aliened, see *Bull v. Griswold*, 14 R. I., 22.

Unless a lien has attached to specific property of a national bank by virtue of a tax levied thereon prior to the bank's insolvency, a collector cannot enforce payment by seizing personalty in the hands of the receiver. *Woodward v. Ellsworth*, 4 Col., 580. See, as to reaching funds in the hands of an assignee by order of court, *Petition of Johnson*, 104 Ill., 50.

¹ *Oldhams v. Jones*, 5 B. Monr., 458; *Covington v. Boyle*, 6 Bush, 204; *Kansas City v. Railroad Co.*, 77 Mo., 180. If land which is subject to a tax lien is alienated, and the land is then sold on execution against the alienee, the sale does not divest the lien of the tax. *Freeman v. Atlanta*, 66 Ga., 617. And see *Mesker v. Koch*, 76 Ind., 68; *Rinard v. Nodyke*, 76 Ind., 180. The fact that the alienor has become bankrupt is of no importance. *Mesker v. Koch*, *supra*. A statutory lien in favor of the state upon a railroad is not divested by a sale of the road under federal process. *Atlanta, etc., R. Co. v. State*, 63 Ga., 483. See *Hartman v. Bean*, 99 U. S., 393.

² *Appeal of Pittsburgh*, 40 Pa. St., 455; *Allegheny City's Appeal*, 41 Pa. St., 60; *Cadmus v. Jackson*, 52 Pa. St., 295.

be even in such cases — at least as far as they affected an interest assessed — if the statute so declared.

The time when the lien will attach to land must be determined by the terms of the statute. Sometimes the statute names a day as that from and after which the tax shall be a lien; and when that is done, it may determine, as between subsequent purchasers and incumbrancers, the liability for the tax.¹

¹*Harrington v. Hilliard*, 27 Mich. 271. See *Rundell v. Lakey*, 40 N. Y., 513; *Gormley's Appeal*, 27 Pa. St., 49; *Densmore v. Haggarty*, 59 Pa. St., 189; *Baldwin v. Mayne*, 42 Ia., 181.

In Illinois taxes upon real estate are a lien or charge upon the land itself from the 1st day of May in the year they are levied. *Cooper v. Corbin*, 105 Ill., 224. As to taxes on personalty becoming a lien on realty, see *Belleville Nail Co. v. People*, 98 Ill., 399; *Binkert v. Wabash R. Co.*, 98 Ill., 205; *Parsons v. Gas Light Co.*, 108 Ill., 380; *Ream v. Stone*, 102 Ill., 359; *Saup v. Morgan*, 108 Ill., 326.

In Missouri taxes, both state and county, constitute a lien on real estate from and after the first Monday in September. *McLaren v. Sheble*, 45 Mo., 180; *Blossom v. Van Court*, 34 Mo., 390.

In New York there is no lien on real estate for taxes until notice and demand of the tax and neglect or refusal to pay, and no right to seize and sell until there is a failure to find personal estate. *Brown v. Goodwin*, 75 N. Y., 409. See *Barlow v. National Bank*, 63 N. Y., 399.

As to tax liens upon land in Pennsylvania, see *Russell's Appeal*, 59 Pa. St., 401; *Smith v. Simpson*, 60 Pa. St., 168; *Townsend v. Prowattain*, 81* Pa. St., 139; *Philadelphia v. Meager*, 67 Pa. St., 345; *Appeal of Second Nat. Bank*, 85 Pa. St., 528; *Dungan's Appeal*, 88 Pa. St., 414.

In Vermont taxes become a fixed incumbrance on the land on which they are assessed as soon as the officer having the collection in charge proceeds officially so far as to manifest his intention to pursue the land to enforce collection.

In the case of non-residents, taxes become an incumbrance on the land when the constable has made a list of the land and the taxes assessed thereon, and deposited the same in the town clerk's office for record. *Hutchins v. Moody*, 34 Vt., 438.

As to Nebraska see *Wilhelm v. Russell*, 8 Neb., 120; *Pettit v. Black*, 8 Neb., 52; *Miller v. Hurford*, 12 N. W. Rep., 833.

The following are decisions as to the liability to taxes under special agreements: A clause in a mortgage that the mortgage moneys should be paid "without any deduction, defalcation or abatement to be made of anything for or in respect to any taxes," held to refer to taxes on the land and not on mortgage security. *Clopton v. Phila., etc., R. R. Co.*, 54 Pa. St., 356. A covenant to pay "all assessments for which the premises shall be liable" will embrace an assessment only authorized by a law passed after the covenant. *Post v. Kearney*, 2 N. Y., 394. One who conveys by warranty after an assessment is completed is liable on his covenant for a tax laid in pursuance of this assessment. Held, therefore, the vendee who had paid it

Where no time is thus expressly named the lien should attach at the time when by an extension of the tax upon the roll a particular sum has become a charge upon a particular parcel of land.¹

Municipal corporations, it need hardly be said, have no authority to create liens, by ordinance or otherwise, when none has been expressly conferred upon them.²

Suit to Enforce a Lien. It is not uncommon to provide by statute for the enforcement by suit, either in the law courts or in equity, of the lien for taxes. When suit is thus provided for, mere delay in instituting it has been held not to extin-

might recover the amount of the vendor on an agreement of the latter to repay "in case he was legally liable to pay it." *Rundell v. Lakey*, 40 N. Y., 513. A vendee taking possession under a contract to pay taxes should pay those for the current year if they were not a lien when he went in. *Atchison, etc., R. Co. v. Jaques*, 20 Kan., 639. A covenant to pay all taxes and duties held to cover an assessment provided for by a subsequent law. *Simonds v. Turner*, 120 Mass., 328.

¹See *Hutchins v. Moody*, 30 Vt., 655; *Same v. Same*, 34 Vt., 493; *Post v. Leet*, 8 Paige, 337; *Kern v. Towsley*, 45 Barb., 150; *Dowdney v. New York*, 54 N. Y., 186; *Cochran v. Guild*, 106 Mass., 29. Compare *Holmes v. Taber*, 9 Allen, 246; *Driggers v. Cassady*, 71 Ala., 529. In California, a lien for taxes relates to the time of the assessment. *Reeve v. Kennedy*, 43 Cal., 643. In Connecticut, it seems that taxes are not a lien on real estate so long as there is personalty from which it may be made. *Briggs v. Morse*, 42 Conn., 258. In Iowa, a tax on personalty may become a lien on real estate acquired subsequent to the assessment. If it becomes delinquent, it is brought forward on the books for a subsequent year, the same as if it were assessed against the land. *Cummings v. Easton*, 46 Ia., 183. If not thus brought forward it ceases to be a lien. *Jiska v. Ringgold Co.*, 57 Ia., 630.

The purchaser at a sheriff's sale of lands subject to a lien for taxes does not become personally liable for the taxes, and they cannot be collected from his personalty unless perhaps from emblements which were attached to the land. *Blodgett v. German, etc., Bank*, 69 Ind., 153; *Foresman v. Chase*, 68 Ind., 500; *Volger v. Sidener*, 86 Ind., 545.

²*Philadelphia v. Greble*, 38 Pa. St., 339. As to what will give the power, see *Eschbach v. Pitts*, 6 Md., 71. The lien cannot exist where the statutory steps have not been taken, and a simple allegation in a proceeding to enforce a lien, that the taxes are due and unpaid, is not sufficient to show a lien. *Louisville v. Bank of Kentucky*, 3 Met. (Ky.), 148. As to the liability of land for personal assessments in Indiana, see *Bodertha v. Spencer*, 40 Ind., 353.

A judgment creditor cannot garnish funds derived from taxation while they are in process of collection. *Underhill v. Calhoun*, 63 Ala., 216.

guish the lien.¹ But where a tax is a mere debt with a lien for its security, if lapse of time bars the debt, the lien is gone also.²

In considering this remedy by suit, it is to be kept in mind that it exists only by force of the statute.³ The statute must therefore be carefully followed in the proceedings,⁴ and if there are taxes for which no lien exists they must not be united in a

¹*Swan v. Knoxville*, 11 Humph., 130, 132. An act of congress made a tax a lien on land for two years. *Held* that this did not preclude the land being sold for the tax after the two years had expired, the title not having changed. *Holden v. Eaton*, 7 Pick., 15. Where by law taxes are a lien on land, but subject to be divested by a subsequent judicial sale, except as to any sum which the proceeds of the sale should be insufficient to pay, a sale sufficient *prima facie* to pay all taxes, and the bringing the money into court, divests the tax lien, though the money is not applied to the satisfaction of the taxes. *Smith v. Simpson*, 60 Pa. St., 168. A personal action brought for a tax does not divest the lien. *Eschbach v. Pitts*, 6 Md., 71. If a time is limited by statute for proceedings to enforce a lien, it is sufficient if they are begun within the time, and they may proceed to judgment afterwards. *Randolph v. Bayne*, 44 Cal., 366; *Dougherty v. Henarie*, 47 Cal., 9; *Himmelman v. Carpenter*, 47 Cal., 42. Where the statute provided that "taxes assessed on real estate shall constitute a lien thereon for two years after they are committed to the collector," this is held to mean the first committing to the collector, and the time is not extended by the recommitting to a subsequently appointed collector. *Russell v. Deshon*, 124 Mass., 342. That a statute giving a lien is to be strictly construed, see *Creighton v. Manson*, 27 Cal., 613; *United States v. Pacific R. Co.*, 4 Dill., 71.

A personal judgment against the land owner will not discharge a lien on lands. *People v. Stahl*, 101 Ill., 346.

²*San Francisco v. Jones*, 20 Fed. Rep., 188. See *Sherwin v. Savings Bank*, 187 Mass., 444.

³*Caress v. Foster*, 62 Ind., 145; *Brown v. Fodder*, 81 Ind., 491; *Bowen v. Striker*, 87 Ind., 317; *Montgomery v. Aydelotte*, 95 Ind., 144; *Preston v. Roberts*, 12 Bush, 570; *People v. Biggins*, 96 Ill., 481; *Board of Education v. Old Dominion, etc., Co.*, 18 W. Va., 441, citing *Cooper v. Savannah*, 4 Ga., 68; *Alexander v. Helber*, 35 Mo., 834; *People v. Latham*, 53 Cal., 886. See *Peet v. O'Brien*, 5 Neb., 360.

In Missouri it seems that in a statutory suit to enforce a tax lien the proceedings are not void because only the owner of a life estate is made a party, but a valid judgment may be obtained as against him. *Hogan v. Smith*, 11 Mo. Ap., 314. There is no constitutional objection to providing for the enforcement of a tax by foreclosure of the lien instead of by sale of property. *Pritchard v. Madren*, 24 Kan., 486.

⁴*Webb v. Bidwell*, 15 Minn., 479; *Clegg v. State*, 42 Tex., 605. See *Jefferson City v. McCarty*, 74 Mo., 55; *Whipple's Case*, 71 Mo., 519.

suit to enforce a lien for others.¹ Equity cannot give assistance when the statute has provided another remedy, but the officer will be left to follow it.² The right to enforce a municipal tax cannot be assigned by the municipality so as to enable the assignee to institute proceedings for its enforcement;³ nor can tax executions against lands be transferred to a person who has paid the taxes to the state.⁴

In Tennessee it seems that the chancery courts have inherent jurisdiction for the enforcement of liens for taxes, and a statute creating a new remedy, without expressly repealing the old, will be understood as giving a cumulative remedy.⁵

Payment or Tender of Tax. If the owner, or any other person entitled to make payment of a tax, shall do so, the lien will not only be thereby absolutely discharged, but authority to proceed further against the property will be at an end.⁶ The per-

¹Howard v. Augusta, 74 Me., 79. The benefit of the lien does not inure to the benefit of public creditors. Barkley v. Levee Com'rs, 98 U. S., 258.

²People v. Biggins, 96 Ill., 481.

³Board of Education v. Old Dominion, etc., Co., 18 W. Va., 441. See McNerny v. Reed, 23 Ia., 410; State v. Wingfield, 59 Ga., 202. This of course assumes that there is no statute authorizing it.

⁴Johnson v. Christie, 64 Ga., 117. Executions in tax suits are to be served as in other cases. Georgia v. Atlanta, etc., R. Co., 3 Woods, 434. It is held in Missouri that a statute requiring a suit to enforce the lien to be brought against the owner of the land means the record owner. State v. Sack, 79 Mo., 661. See Vance v. Corrigan, 78 Mo., 94.

⁵State v. Duncan, 3 Lea, 679. See Nashville v. Cowan, 10 Lea, 209; Memphis v. Looney, 9 Bax., 130; Edgefield v. Brien, 3 Tenn. Ch., 673.

⁶Dougherty v. Dickey, 4 W. & S., 146; Hunter v. Cochran, 3 Pa. St., 106; Montgomery v. Meredith, 17 Pa. St., 42; Ankeny v. Allbright, 20 Pa. St., 157; Laird v. Heister, 24 Pa. St., 452; Jackson v. Morse, 18 Johns., 441; Den v. Terrell, 3 Hawks, 283; Rowland v. Doty, Har. Ch., 3; Johnstone v. Scott, 11 Mich., 232; Rayner v. Lee, 20 Mich., 384; Curry v. Hinman, 11 Ill., 420; Morrison v. Kelley, 22 Ill., 610; Jones v. Burford, 26 Miss., 194; Brown v. Day, 78 Pa. St., 129; Davis v. Hare, 32 Ark., 386; Walton v. Gray, 29 Ia., 440; Sprague v. Coenen, 30 Wis., 209; Wallace v. Brown, 22 Ark., 118; Bennett v. Hunter, 9 Wall., 326. This held to be so, though not made to the officer who had the tax list and to whom payment should have been made. Jones v. Dils, 18 W. Va., 759.

It has been held that if a purchaser of land is given, by the proper officer, a certificate that there are no back taxes, he is protected in relying upon it, although the officer is mistaken. Jiska v. Ringgold Co., 57 Ia., 630; Breisch v. Coxe, 81 Pa. St., 336. See Hickman v. Kempner, 35 Ark., 505. But if it

sons who, besides the owner, would be entitled to make payment, would include any who may have been assessed for the tax, and any others whose interests would be injuriously affected by a sale, either because of liens they may have, or of contract relations;¹ and any one having the right may depute another to make it for him. Whether any third person may make payment is not so clear; but as the state is only interested in obtaining the revenue it has called for, it would seem that, before any sale, and consequently before any rights of third parties have intervened, any mere volunteer may pay the tax if he chooses; and the payment would be effectual, so far, at least, as to terminate the lien of the tax upon the land;² though if the statute undertook to give the person making the payment rights in the land by reason thereof, the payment might not be effectual to confer such rights; for no one can assume to stand in the place of the owner for the purpose of performing an act which the owner himself sees fit not to perform, and claim thereby to establish rights against the owner or his property by what, under such circumstances, would be an officious intermeddling. It has therefore been held that the lien which the statute gives to one who pays a tax on land attaches only in case the person paying had an interest, either personally or as agent;³ though if he were a mere intermeddler, and the owner should subsequently claim the benefit of the payment, there would be no injustice in holding that he thereby adopted the act of payment with all the statutory consequences.⁴ The

is no part of the officer's duty to give information respecting payments, his mistake in saying there is no back tax will not preclude its collection. *Elliott v. Dist. Columbia*, 3 MacA., 396. Payment after a sale is of no avail, even though made in ignorance of the sale. *Jones v. Welsing*, 52 Ia., 220.

¹ See *Bennett v. Hunter*, 18 Grat., 100; Same Case in error, 9 Wall., 326; *Tacey v. Irwin*, 18 Wall., 549. As to what is such color of title as to give one a right to pay taxes, see *Brown v. Day*, 78 Pa. St., 129. As to the proof of payment see *Coxe v. Deringer*, 78 Pa. St., 271.

² See *Reading v. Finney*, 73 Pa. St., 467; *Martin v. Snowden*, 18 Grat., 100; *Kinsworthy v. Austin*, 23 Ark., 375. If the officer, by his own fault, receives the tax on the wrong description, and applies it, the payment nevertheless will preclude a sale of the description on which the party applied to pay. *Hickman v. Kempner*, 35 Ark., 505.

³ *Peay v. Field*, 30 Ark., 600.

⁴ *Goodnow v. Stryker*, 61 Ia., 261.

officer who received the payment would himself be precluded from raising any question of its sufficiency.¹

Payment is an act *in pais*, which may be proved not only by the record, but by the original receipt;² and it may also be made out by any other evidence which satisfies a jury of the fact.³ But payment cannot be shown in opposition to a judicial finding; at least as between the parties thereto and their privies.⁴

A tax collector has no authority to receive anything in payment of taxes but such money as at the time is legal tender or at least passes current.⁵ He has no right to receive the promissory notes of individuals,⁶ and a bank check is only conditional payment, and the tax will remain in force if the check is dishonored.⁷ But a collector who accounts for a tax in his return, on the promise of the party liable that he will pay him,

¹ Iowa, etc., *Co. v. Guthrie*, 53 Ia., 383.

² *Johnstone v. Scott*, 11 Mich., 232; *McReynolds v. Longenberger*, 57 Pa. St., 13; *Deen v. Wills*, 21 Tex., 642; *Seigneuret v. Fahey*, 27 Minn., 60. But if one has to prove the legality of the tax, the production of the receipt does not prove it. *Clark v. Blair*, 14 Fed. Rep., 812. A mistake in the receipt may be shown. *Wolf v. Philadelphia*, 105 Pa. St., 25.

³ *Dennett v. Crocker*, 8 Greenl., 239; *Hammond v. Hannin*, 21 Mich., 374; *Mathews v. Buckingham*, 22 Kan., 166; *Leitzbach v. Jackman*, 28 Kan., 524; *Rand v. Schofield*, 43 Ill., 167; *Cook v. Norton*, 61 Ill., 285; *Adams v. Beale*, 19 Ia., 61. An agent has a right to pay taxes for his principal, and if tax officers adopt a rule that they will not receive taxes from an agent, this excuses the agent from making tender. *United States v. Lee*, 106 U. S., 196; *Atwood v. Weems*, 99 U. S., 183; *Hills v. Exchange Bank*, 105 U. S., 319. Payment held to be provable by the collector in opposition to his official return. *Davis v. Hare*, 32 Ark., 386.

⁴ *Gaylord v. Scarff*, 6 Ia., 179; *Cadmus v. Jackson*, 52 Pa. St., 295; *Wallace v. Brown*, 22 Ark., 118. But doubtless even a judicial finding may be set aside for fraud on a proper showing in such a case. See *Wallace v. Brown*, *supra*.

⁵ *McLanahan v. Syracuse*, 18 Hun, 259; *Staley v. Columbus*, 36 Mich., 38; *Richards v. Stogsdel*, 21 Ind., 74. Where, however, the township treasurer received worthless orders in payment of a tax, and the township received them from him and then brought suit against the person taxed, but the statute only provided for suit in case a personal tax could not be collected, it was held the suit was not maintainable. *Staley v. Columbus*, 36 Mich., 38.

⁶ *Dickson v. Gamble*, 16 Fla., 687.

⁷ *Kahl v. Love*, 37 N. J., 5. And this even although a receipt was given at the time in reliance upon which a person has bought the land. *Ibid.* See *Alkan v. Bean*, 8 Biss., 83.

may recover on the promise;¹ and perhaps even on an implied promise if the tax was a personal demand.² In some states by statute the collector is allowed to account for the tax himself, and then make use of the state's process to compel payment.³ In other states he is simply allowed to bring suit against the party who should have paid.⁴

Tender of the tax by any one who has a right to make payment is effectual to prevent a sale, whether the tender is accepted or not.⁵ But a tender, in order to be effectual, must be of the full amount of any single tax; it cannot be of anything less, unless the statute makes provision for payment of a part by itself, as it does sometimes for the benefit of tenants in common or owners of distinct portions of the premises taxed.⁶ But where different taxes are brought together for the purposes of a sale for all, the tax payer has a right to pay any one separately, and to contest others.⁷

¹ *Elson v. Spraker*, 100 Ind., 374.

² See *McCracken v. Elder*, 34 Pa. St., 239; *Shriver v. Cowell*, 92 Pa. St., 262; *Pontiac v. Axford*, 49 Mich., 69. Compare *Wallace's Estate*, 59 Pa. St., 401; *Dickson v. Gamble*, 16 Fla., 687.

³ See *Jacks v. Dyer*, 31 Ark., 334. But in such case the process would not be free from judicial interference under a statute making it so in the first instance. *White v. State*, 51 Ga., 252.

As to the application of payments made at different times, see *Fuller v. Grand Rapids*, 40 Mich., 395.

⁴ Where a statute authorizes a collector to bring suit for the recovery of a tax with which he stands charged in his settlement, he cannot do so by way of enforcing a lien, for the lien is gone when he settles for the tax. He can only recover a personal judgment. *Schaum v. Showers*, 49 Ind., 285.

⁵ *Schenck v. Peay*, 1 Dill., 267; *Loomis v. Pingree*, 43 Me., 299; *Kinsworthy v. Austin*, 23 Ark., 375; *Tacey v. Irwin*, 18 Wall., 549; *Jones v. Burford*, 26 Miss., 194. When the owner of lands went to the proper office to pay the taxes, and a list was made out for him from which by mistake a road tax was omitted, and he paid all the list called for, it was held that for all purposes of a sale this was equivalent to full payment; that the owner was not bound to take notice of subsequent steps to a sale, and a sale would be without jurisdiction. *Breisch v. Coxe*, 81 Pa. St., 336.

⁶ *Hunt v. McFadgen*, 20 Ark., 277; *Heft v. Gephart*, 65 Pa. St., 510; *Crum v. Burke*, 25 Pa. St., 377. If the tax payer wishes to contest any part of the tax less than the whole, he should tender the whole and then bring his suit. *Julien v. Ainsworth*, 27 Kan., 446.

If a tax is subject to a penalty for delay in payment, but is actually received without the penalty, a sale cannot afterwards be made for the penalty. *Bracey v. Ray*, 26 La. An., 710.

⁷ *Iowa, etc., Co. v. Carroll County*, 39 Ia., 151; *Olmsted Co. v. Barber*, 31 Minn., 256.

Return of "No Goods," etc. Where a tax against lands is assessed to a resident, and is a personal charge against him, the statutes, with almost unvarying uniformity, have made the personal property of the person taxed the primary fund for the satisfaction of the tax, and have given a remedy for enforcing payment from it. Until that remedy has been exhausted, no authority exists to go further. It is also customary to allow a certain time after the levy of a tax on non-resident or unseated lands, before any proceedings are taken against the land. To authorize further proceedings in either case, there must be the proper official evidence that in the one case the remedy against the personalty is exhausted, and in both that the taxes are still unpaid.¹ This evidence will consist of such official return, affidavit, or other document by the collector, as the statute may indicate, and it must be made in due form of law and at the proper time. A return made prematurely is void,² though it be but a single day before the time; for it shortens to that extent the period allowed to the tax payer for making payment without further cost, and thus deprives him of a legal right.³ So a return is void which fails to set forth all the facts that the statute requires shall be shown by it.⁴ If the collector is required to demand the tax, his return, it would seem, should show that he has done so; if he is required to make collection by distress and sale of goods, if any can be found to levy upon, there should be such a showing of diligent

¹ See *Thatcher v. Powell*, 6 Wheat., 119; *Jones v. McLain*, 28 Ark., 429; *Scales v. Alvis*, 12 Ala., 617; *Francis v. Washburn*, 5 Hayw., 294; *Schaeffer v. People*, 60 Ill., 179; *St. Anthony, etc., Co. v. Greely*, 11 Minn., 321; *Kelley v. Craig*, 5 Ired., 129; *Harrington v. Worcester*, 6 Allen, 576; *Huntington v. Brantley*, 33 Miss., 451; *Sharp v. Johnson*, 4 Hill, 92; *Ring v. Ewing*, 47 Ind., 246. No title can be made to lands on a sale for taxes if personalty is not sought for. *Catterlin v. Douglass*, 17 Ind., 213. See *Abbott v. Edgerton*, 58 Ind., 196; *Sharpe v. Dillman*, 77 Ind., 280; *Morrison v. Bank of Commerce*, 81 Ind., 835; *Volger v. Sidener*, 86 Ind., 545; *Johnson v. Hahn*, 4 Neb., 139; *Kittle v. Shervin*, 11 Neb., 65; *Davis v. Minge*, 56 Ala., 121.

In Illinois a tax lien is not divested by the failure of an officer to make due return nor by the appointment of a receiver of the property. *Union Trust Co. v. Weber*, 96 Ill., 346.

² *Ronkendorf v. Taylor's Lessee*, 4 Pet., 349; *Hickman v. Kempner*, 35 Ark., 505.

³ *Flint v. Sawyer*, 30 Me., 226; *Hobbs v. Clements*, 32 Me., 67. The return will be presumed to have been made at the proper time unless the contrary appears. *Mix v. People*, 81 Ill., 118.

⁴ See *Succession of Trainor*, 27 La. An., 150, for an analogous ruling.

search for goods, and failure to find them, as would be required of officers to whom executions are committed for service. In other words, the return should show full and complete compliance with all the conditions which, under the statute, are to precede a resort to the land.¹ Such is unquestionably the general conclusion of the authorities;² though probably if the statute were to prescribe a form for the return, which was something less full than would otherwise be requisite, a return in conformity to it would be sufficient.³ But the decisions are justly very rigid in requiring conformity to the statute in the substantial matters of the return,⁴ particularly in the matter of verification, which if omitted or legally defective will leave the return a nullity.⁵ There is special reason for particularity

¹ A recital in a collector's return that, "not knowing of any goods or chattels," etc., is not equivalent to a return that none could be found. *Jones v. McLain*, 23 Ark., 429. But it is sufficient, to throw the burden of proof on the tax payer, to show that there was enough of personalty to satisfy the tax. But where he is to make his return from "the best information he could obtain," he is himself the judge of the sufficiency of the information, and the return is *prima facie* evidence of the facts stated. *Andrews v. People*, 75 Ill., 605. It is constitutional to make a return *prima facie* evidence of delinquency, but not conclusive. *Andrews v. People*, 75 Ill., 605; *Burbank v. People*, 90 Ill., 554.

² *Belden v. State*, 46 Tex., 103; *Johnson v. Hahn*, 4 Neb., 139; *Thompson v. Burhans*, 61 N. Y., 52. As to the requisites of a return in Ohio, see *Stambaugh v. Carlin*, 35 Ohio St., 209. As to what is a sufficient showing of the names of owners of lands, see *Halsey v. People*, 84 Ill., 89. A personal demand may be assumed when the officer returns that "he has not, upon diligent inquiry, been able to discover any goods," etc. *Dickison v. Reynolds*, 48 Mich., 158. No return of "no goods" is requisite in Georgia where the tax to be levied is less than \$100. *Plant v. Eichberg*, 65 Ga., 64. Nor does such a return seem to be required in Maryland. *Dyer v. Boswell*, 39 Md., 465. Nor in New Jersey in respect to the taxes of Newark. *Martin v. Carron*, 26 N. J., 228; *State v. Newark*, 42 N. J., 38.

³ Such has been the ruling of the supreme court of Illinois. *Taylor v. People*, 2 Gilm., 349; *Job v. Tebbetts*, 5 Gilm., 376, 382. Judge *Pope*, the federal district judge, held otherwise. *Mayhew v. Davis*, 4 McLean, 213.

⁴ See *Harmon v. Stockwell*, 9 Ohio, 94; *Harrington v. Worcester*, 6 Allen, 576; *Sharp v. Johnson*, 4 Hill, 92; *Spellman v. Curtenius*, 12 Ill., 409; *Homer v. Cilley*, 14 N. H., 85; *Hannell v. Smith*, 15 Ohio, 134; *Tallman v. White*, 2 N. Y., 66; *Upton v. Kennedy*, 36 Mich., 215. A return not made in the time prescribed by statute, held not to support subsequent proceedings to forfeit the land. *Hopkins v. Sandidge*, 31 Miss., 668, 676; *Weir v. Kitchens*, 52 Miss., 74.

⁵ *Harmer v. Stockwell*, 9 Ohio, 94; *Miner's Lessee v. McLean*, 4 McLean, 138; *Hogelskamp v. Weeks*, 37 Mich., 422; *Cotzhausen v. Kaehler*, 42 Wis.,

here, since the return, if in conformity to the law, is not only a support to subsequent proceedings, but is evidence, also, in favor of the officer himself.¹

Under some tax laws the same officer who collects the taxes is empowered to make sale of the lands of delinquents, though in general that duty is confided to some superior. Where the same officer performs both duties no return is required, though the filing of some official document showing the delinquency is sometimes provided for. Such a document takes the place of a collector's return, and will be governed by the rules above laid down. If none is required by law, the collector is allowed to proceed and sell lands on his own knowledge of the delinquency. How far his proceedings will be open to question afterwards must depend, to some extent at least, on the force given by statute to such report or certificate of sale as he is subsequently required to make, or to the official conveyance.²

The proceedings in making sale of lands for taxes, the privilege of redemption, and the conveyance when redemption is not made, require, and will receive, separate consideration.

Penalties for non-payment. In tax laws penalties are imposed for mere delinquencies, in order to hasten payment, and they are also imposed as a punishment for frauds, evasions and neglect of duty. In some cases, also, special inducements are held out to prompt performance of duty, by making deductions in case of early payment.³

Penalties are more often imposed under federal than under state laws, and under the internal revenue laws and the laws

332. Want of a venue is fatal. *Thompson v. Burhans*, 61 N. Y., 52. But the omission of a word where the error is manifest will be overlooked. *Scheiber v. Kaehler*, 49 Wis., 291. The omission of the affidavit required to the roll in Louisiana does not vitiate the registry. *Succession of Edwards and Wilson*, 32 La. An., 457.

¹ *Bruce v. Holden*, 21 Pick., 187; *Banard v. Graves*, 18 Met., 85; *State v. Van Every*, 75 Mo., 530. See cases cited *ante*, pp. 185, 186. In Illinois the return is *prima facie* evidence to support all prior proceedings. *Chiniquy v. People*, 78 Ill., 570; *Mix v. People*, 81 Ill., 118; *Pike v. People*, 84 Ill., 80.

² As to the conclusiveness of the officer's return, see *ante*, pp. 261, 262. Also *Burbank v. People*, 90 Ill., 554; *Bowen v. Donovan*, 32 Ind., 379; *Davis v. Hare*, 32 Ark., 356. If the collector is to make his return from "the best information he can obtain," he is the sole judge of the sufficiency of the information. *Andrews v. People*, 75 Ill., 605.

³ See *Sprague v. Bailey*, 19 Pick., 436.

imposing customs duties there is special occasion for them.¹ They are sometimes imposed by the taxing officers, and sometimes made recoverable by suit or indictment. We have seen also that under state laws, if a tax payer neglects or refuses to furnish his list for the assessment, a penalty of some sort is imposed; perhaps the deprivation of the right to be heard on the review of the assessment;² perhaps an addition to the tax that would be otherwise imposed.³ But penalties are most often provided under state laws for neglect to pay the taxes in due season, and they consist then in an addition of some definite per cent. to the tax.

There can be no doubt of the right to impose penalties for neglect or refusal to perform duty under tax laws where the law providing therefor gives full opportunity for a hearing;⁴ but whether it would be competent without such a hearing has been questioned in some cases.⁵ But when the penalty is imposed in the course of the proceedings to assess, and by officers who, for that purpose, exercise a *quasi* judicial authority, and where the party is given the opportunity to be heard and to contest his delinquency, either before the assessing officer, or in some form of appeal, the imposition of a penalty does not seem to be out of harmony with the general spirit or general

¹ See a charge to the grand jury by Judge *Benedict* in 6 Blatchford's Rep. App. And for a constitutional question respecting such penalties, see *De Treville v. Smalls*, 98 U. S., 517. See, also, *United States v. Brooklyn, etc.*, R. Co., 14 Fed. Rep., 284.

² See *Winnisimmet Co. v. Chelsea*, 6 Cush., 477; *Otis Co. v. Ware*, 8 Gray, 509; *Lincoln v. Worcester*, 8 Cush., 55; *Porter v. County Commissioners*, 5 Gray, 365; *Lott v. Hubbard*, 44 Ala., 593; *State v. Appgar*, 31 N. J., 358; *Young v. Parker*, 33 N. J., 192. Compare *McCormick v. Fitch*, 14 Minn., 252.

³ See *ante*, p. 358.

⁴ *State v. Moss*, 69 Mo., 495. If the failure to make return of one's taxables is a penal offense, it should appear of record that the party is delinquent and the process against him should distinctly describe the offense. *Evans v. Commonwealth*, 18 Bush, 269. A provision that any property which has escaped taxation for the last preceding year, if still owned by the same person, may be assessed double its value, is constitutional, as it is competent for the legislature to enforce by a penalty the failure to have one's property assessed at the right time. *Biddle v. Oaks*, 59 Cal., 94.

⁵ See *Scammon v. Chicago*, 44 Ill., 269; *Clayton v. Chicago*, 44 Ill., 280; *Burger v. Carter*, 1 McM., 410; *Wauwatosa v. Gunyon*, 25 Wis., 271. Compare *Potts v. Cooley*, 56 Wis., 45.

course of tax proceedings, and perhaps may be sustained on the same principles that support tax laws in general.¹ And if the penalty is for delay in making payment, the occasion for a hearing is not very obvious, since no possible advantage could result from it.² Possibly, however, even in such cases, there might be excuses for non-payment which would justify the interference of the courts. It has been held that if the delay is

¹For cases of penalties imposed in Pennsylvania by the taxing officers, under laws which gave an appeal to the courts, reference may be made to *Drexel v. Commonwealth*, 46 Pa. St., 37; *Commonwealth v. Wyoming Valley Canal Co.*, 50 Pa. St., 410. As to penalties collected by prosecution, see *State v. Welch*, 28 Mo., 600; *Olds v. Commonwealth*, 8 A. K. Marsh., 465; *Lee v. Commonwealth*, 6 Dana, 311; *Alexander v. Commonwealth*, 1 Bibb, 515; *McCall v. Justices*, 1 Bibb, 516; *Chiles v. Commonwealth*, 4 J. J. Marsh., 578; *State v. Manz*, 6 Cold., 557; *Elam v. State*, 25 Ala., 53; *Smith v. State*, 43 Ala., 344. These cases, as well as that of *Delaware Division Canal Co. v. Commonwealth*, 50 Pa. St., 399, recognize the rule that all statutes of this nature must be construed strictly. A municipal corporation cannot impose a penalty for neglect to pay taxes promptly, unless expressly authorized by law to do so. *Augusta v. Dunbar*, 50 Ga., 387. In some cases it has been held that a municipality under a general power to lay and collect taxes may prescribe and collect penalties for non-payment. *Burlington v. Railroad Co.*, 41 Ia., 135; *Slack v. Ray*, 26 La. An., 674; *Morrison v. Larkin*, 26 La. An., 699; *State v. Consolidated, etc., Co.*, 16 Nev., 445.

That the legislature has general power to impose penalties for neglect or evasion of duty in tax cases, see *State v. Huffaker*, 11 Nev., 300; *Ex parte Lynch*, 16 S. C., 32. That equity cannot relieve against them, see *Chicago, etc., R. Co. v. Carroll Co.*, 41 Ia., 153.

²In *Lacey v. Davis*, 4 Mich., 140, a penalty of ten per centum added to taxes remaining unpaid after a certain day was sustained as not being unreasonable; in *Nance v. Hopkins*, 10 Lea, 508, which cites *Myers v. Park*, 8 Heisk., 550, one of twelve per cent., and in *Scott v. Watkins*, 22 Ark., 556, and *Potts v. Cooley*, 56 Wis., 45, one of twenty-five per cent. The right to prescribe a special rate of interest as a penalty for failure in prompt payment was affirmed in *Eyermann v. Blakesley*, 9 Mo. Ap., 231.

See, also, *Craig v. Flanagan*, 21 Ark., 319; *Pope v. Macon*, 23 Ark., 644; *High v. Shoemaker*, 22 Cal., 363; *People v. Todd*, 23 Cal., 181; *Mulligan v. Hintrager*, 18 Ia., 171. In *Butler v. Baily*, 2 Bay, 244, it was held competent to impose double taxes as a penalty for failure to make due return of property to be taxed. But penalties cannot be compounded for one default, nor can they be imposed for the non-payment of an illegal tax. *Worthen v. Badgett*, 32 Ark., 496. Or of an excessive tax. *Pike v. Cummings*, 36 Ohio St., 213. A provision that unpaid taxes shall bear interest at one per cent. a month was held not to apply to taxes due and unpaid for prior years, as the interest and the tax for each year would be so blended that the percentage could not be reckoned on the tax alone. *People v. Peacock*, 98 Ill., 172.

attributable in part to the state itself, which set up title to the land taxed, the collection of a penalty might be enjoined,¹ and in another case it is said that the penalty should not be exacted if the delay came from serious doubt of the validity of the tax.²

Penalties must be plainly imposed or they cannot be exacted,³ and if one is illegal in part it is wholly void.⁴ The laws imposing them must be strictly followed,⁵ and they cannot be given retroactive effect.⁶ If the statute imposing them is repealed the penalties are gone, and a clause reserving to the state all the ordinary remedies for the collection of the taxes assessed will not save them.⁷

Imposing Conditions on the Exercise of Rights. In some instances statutes have attached to the privilege of exercising the elective franchise the condition that taxes should have been paid for the current year, or within some short period preceding. In some states this is a matter of constitutional requirement. If one evades his duty to the government, he may reasonably be denied the privilege of participating in the direction of its affairs; and these constitutional provisions appear to assume that he who, in his own business, acquires nothing upon which he can be taxed, must lack the wisdom and discretion to take part in the business of the state.⁸ In some instances the payment of a tax assessed against one in respect to a chose in action owned by him has been made a condi-

¹ *Litchfield v. Webster Co.*, 101 U. S., 773.

² *Savannah, etc., R. Co. v. Morton*, 71 Ga., 24. For a question of remission of penalties see *Beecher v. Supervisors of Webster*, 50 Ia., 588.

³ *Elliott v. Railroad Co.*, 99 U. S., 573.

⁴ *Railroad Co. v. Stark*, Holmes, 231.

⁵ *Gachet v. McCall*, 50 Ala., 307. See for construction of a statute, *United States v. Brooklyn, etc., R. Co.*, 14 Fed. Rep., 284.

⁶ *Ryan v. State*, 5 Neb., 276.

⁷ *Commonwealth v. Standard Oil Co.*, 101 Pa. St., 119, citing *Rex v. Justices of London*, Burr., 456; *Schooner Rachel v. United States*, 6 Cranch, 329; *Maryland v. Baltimore, etc., R. Co.*, 3 How., 534; *Norris v. Crocker*, 13 How., 429.

⁸ Constitutional provisions of the kind exist in Delaware, Georgia, Massachusetts and Pennsylvania. As to liability of assessors for depriving one of his right to vote by not assessing him, see *Griffin v. Rising*, 11 Met., 339. And see *Re Duffy*, 4 Brewster, 531; *Patterson v. Barlow*, 60 Pa. St., 51.

tion to the maintenance of a suit upon it.¹ In some instances the right to maintain a suit to recover property, which the party claims has illegally been taken from him, has been subjected to the condition that he should first pay the tax for which the property was sold and perhaps all subsequent taxes; but this, we think, has been pushed beyond the constitutional power of the legislature, as we shall endeavor to show hereafter.²

Stamp taxes are collected by requiring stamps to be affixed to some commodity before it can be sold, some written instrument before it can be made use of, and the like. An early law of congress provided for such taxes, and they were imposed again during and since the rebellion. No reasonable objection in principle can be opposed to such taxes, and except

¹ See *Lott v. Dysart*, 45 Ga., 355; *Redwine v. Hancock*, 45 Ga., 364; *Scruggs v. Gibson*, 45 Ga., 509; *Greene v. Lowry*, 46 Ga., 55; and many other cases in the subsequent Georgia reports. As to the requirement in Minnesota that a deed before being recorded shall have indorsed thereon certificates respecting taxes and assessments, see *State v. Register of Deeds*, 26 Minn., 521.

² See *Taylor v. Burdett*, 11 Leigh, 334, in which it was decided to be competent to require evidence of the payment of the taxes as a condition precedent to maintaining a suit for the recovery of the lands taxed. See, also, *Tharp v. Hart*, 2 Sneed, 569. But such a provision is to be strictly construed, and will not be applied to the case of special assessments, unless made applicable in terms. *Glass v. White*, 5 Sneed, 475. See *Williamsburg v. Lord*, 51 Me., 599. In Maine, in a contest between the original owner of land and a tax purchaser, it is held that the former is not required to tender taxes until the latter has made out a *prima facie* case. *Orono v. Veazie*, 57 Me., 517; S. C., 61 Me., 431; *Crowell v. Uteley*, 74 Me., 49; *Straw v. Poor*, 74 Me., 53. Nor need he make a tender where several parcels have been sold together, so that it cannot be determined how much he should pay. *Phillips v. Sherman*, 61 Me., 548, 551. Nor unless the tax has been duly recorded. *Dunn v. Snell*, 74 Me., 22. In *Weller v. St. Paul*, 5 Minn., 95, the right to enact such laws was denied as being inconsistent with the constitutional right of every citizen to "obtain justice freely and without purchase." Similar rulings have been made in Illinois. *Wilson v. McKenna*, 52 Ill., 43; *Reed v. Tyler*, 56 Ill., 288; *Senichka v. Lowe*, 74 Ill., 274. A requirement that no person shall be permitted to question a tax title, without showing payment of all taxes due upon the land, will only be applied to plaintiffs, and not to parties in possession defending against a tax deed. *Curry v. Hinman*, 11 Ill., 420. Power denied to make it applicable. *Conway v. Cable*, 37 Ill., 82.

The constitutionality of one of these laws was strongly questioned by *Appleton*, C. J., in *Dunn v. Snell*, 74 Me., 22, but the point was not decided. See *Lassiter v. Lee*, 68 Ala., 287.

where they were so made use of as to invade the province of state authority, their validity was not seriously questioned.¹

It is competent, in the case of such taxes on business as cannot be collected in advance, to require security for their payment before the business is entered upon.² A privilege tax may be enforced under the penalty that contracts made while it remains unpaid shall be void.³

Forfeiture of property taxed. It is provided by law in some states, that if the taxes assessed against lands shall not be paid by a certain time, and after some prescribed notice, the land shall be forfeited to the state.⁴ The Virginia statute of 1790 may be taken as an illustration. After making provision for the taxation of lands; that the sheriff should make to the auditor of public accounts a return, under oath, of all those the taxes upon which he could find no effects for the satisfaction of,—that certain prescribed steps should be taken for collection the following year, and, if these failed, there should be published in the Virginia Gazette, for three weeks, the names of delinquents, the quantity of land, the situation thereof and the taxes due thereon, it then proceeded to declare that in case the tax on any part of the lands should not be paid for the space of three years, “the right to such lands shall be lost, forfeited and vested in the commonwealth,” etc. This was a more liberal statute, in the time it allowed for payment, than those usually are which provide for such a forfeiture, but the general characteristics of all are alike.

Serious question has been made of the right of the government to take to itself title to lands, under a forfeiture based on a personal default, without a judicial finding that such a default exists. The question was made in the early cases arising under these statutes, and has continued to be made ever

¹ Cases arising under the Virginia stamp tax law of 1812 are reported in Mumford's reports. If the revenue law of a state makes an unstamped note void, it is void everywhere. *Fant v. Miller*, 17 Grat., 47.

² *Mason v. Rollins*, 2 Biss., 99; *United States v. Mathoit*, 1 Sawy., 142.

³ *Anding v. Levy*, 57 Miss., 51; *Decell v. Lewenthal*, 57 Miss., 331. The repeal of the act does not validate a contract. *Ibid.* The tax may be doubled for failure to take out license. *State v. Manz*, 6 Cold., 557.

⁴ Proof of notice to be followed by forfeiture must be strictly made. *Tolman v. Hobbs*, 68 Me., 316.

since, without having yet reached conclusive settlement. One of the most learned and able of the early Virginia judges declared his opinion, under the act of 1790, that the forfeiture could not be perfected so as to divest the title of the former owner without inquest of office.¹ This view was accepted in Kentucky,² and has been assented to in an elaborate opinion by the supreme court of Mississippi, though this was weakened by able dissent.³ Decisions in Minnesota are to the same effect.⁴ But there are respectable authorities to the contrary, among which are now to be reckoned those of Virginia.⁵

Some ground we may safely occupy here without liability to controversy. It is conceded on all sides that an intent to transfer title to the government by forfeiture will not be inferred in any case from language capable of any milder construction.⁶ The courts of Ohio acted upon this view when they held that a statute which declared that, after due record of the default, the land "shall be considered as forfeited to the state of Ohio, and be subject to be disposed of in such

¹ *Tucker, J.*, in *Kinney v. Beverly*, 2 H. & M., 318. The other judges gave no opinion on this point.

² *Barbour v. Nelson*, 1 Litt., 60; *Robinson v. Huff*, 3 Litt., 38. And see *Currie v. Fowler*, 5 J. J. Marsh., 145; *Harlan's Heirs v. Seaton's Heirs*, 18 B. Monr., 312. In *Marshall v. McDaniel*, 12 Bush, 378, it is said that although the statute may require the listing of property for taxation, and as a penalty for failure to list may impose a forfeiture, the forfeiture must be declared by due process of law. The failure to list cannot *ipso facto*, without inquiry or trial, or chance for the defaulting party to be heard, vest title to the land in the state.

³ *Griffin v. Mixon*, 38 Miss., 424. The Missouri statute (1865) did not vest in the state the absolute title to lands which for want of bidders were struck off to the state, but only gave a lien for the taxes. *State v. Heman*, 7 Mo. Ap., 584; 70 Mo., 441. Laws for the forfeiture of lands for non-payment of taxes are to be strictly construed as between the owner and a purchaser from the state. *Tolman v. Hobbs*, 68 Me., 316. If land is imperfectly described in the assessment roll it cannot be forfeited for default in payment. *Re Baton Rouge Water Works*, 34 La. An., 255.

⁴ See *St. Anthony Co. v. Greely*, 11 Minn., 321; *Baker v. Kelley*, 11 Minn., 450; *Hill v. Lund*, 13 Minn., 451.

⁵ *Wild's Lessee v. Serpell*, 10 Grat., 405; *Hale v. Branscum*, 10 Grat., 418; *Flanagan v. Grimmet*, 10 Grat., 421; *Usher v. Pride*, 15 Grat., 190; *Hodgdon v. Wight*, 36 Me., 326; *Adams v. Larrabee*, 46 Me., 516, 519.

⁶ *Fairfax's Devisee v. Hunter's Lessee*, 7 Cranch, 603, 625; *Schenck v. Peay*, 1 Dillon, 267; *Bennett v. Hunter*, 18 Grat., 100; *S. C. in error*, 9 Wall., 326, 336; *Dickerson v. Acosta*, 15 Fla., 614.

manner as any future legislature may direct," did not work an absolute forfeiture, and the owner might redeem afterwards. But this was partly, at least, on the ground that the legislature had never treated this forfeiture as vesting a title in the state for any other purpose than as security for taxes due and owing.¹ That statutes of forfeiture are strictly construed is an elementary principle,² and there are no cases in which the rule requiring a substantial compliance with all the impor-

¹ *Thevenin v. Slocum's Lessee*, 16 Ohio, 519, 532. This case is cited and relied upon in *St. Anthony, etc., Co. v. Greely*, 11 Minn., 321. See, also, *Woodward v. Sloan*, 27 Ohio St., 592. Where lands are to be forfeited to the state on non-payment of the tax and a record of the forfeiture made, a sale of the land as forfeited, when there is no such record, is bad. *Magruder v. Esmay*, 31 Ohio St., 222.

² See *Schenck v. Peay*, 1 Dill., 267; *Lohrs v. Miller's Lessee*, 12 Grat., 452; *Twiggs v. Chevallie*, 4 W. Va., 463; *Scott v. People*, 2 Ill. Ap., 642; *Smith v. People*, 3 Ill. Ap., 380; *Chicago, etc., R. Co. v. Boller*, 7 Ill. Ap., 625.

A subsequent taxing of lands by the state, and the receipt of taxes from the former owner, was held in *Hodgdon v. Wight*, 36 Me., 326, to be no waiver of the forfeiture. The same decision was made in *Crane v. Reeder*, 25 Mich., 303, which was a case of escheat. In that case *Campbell, J.*, discusses at length the question of necessity of inquest of office, and concludes that it is not necessary.

If, under the statute, the title to land condemned relates back to the commencement of proceedings, taxes laid thereon pending the condemnation do not become a charge upon the former owner. *Sherwin v. Wigglesworth*, 129 Mass., 64.

In Illinois, real property is forfeited to the state, within the meaning of the tax law, when "at any regular tax sale, under the revenue act, the collector shall offer the property for sale, and it shall not have been sold for want of bidders." Then it is the duty of the clerk to add to the tax for the current year on such property the back taxes, interest and penalties. Thereafter it becomes unimportant whether a judgment for taxes for a prior year is in strict conformity to statute. The land is subject to the penalties, interest and costs, whether the forfeiture was in due form or not. Nor by paying the current taxes of a year, after forfeiture, can the owner avoid paying the taxes, interest and penalties already added thereto for former years. *Biggins v. People*, 106 Ill., 270. See, further, *People v. Gale*, 93 Ill., 127; *People v. Smith*, 94 Ill., 226; *Belleville Nail Co. v. People*, 98 Ill., 399. In South Carolina, the state must prove its title by forfeiture if it relies upon it. *State v. Thompson*, 18 S. C., 538. In Louisiana, a purchaser after forfeiture from the original owner acquires his right to redeem, but not a right to enjoy a sale by the state. *Geren v. Gruber*, 26 La. An., 604; *Morrison v. Larkin*, 26 La. An., 699; *Garner v. Anderson*, 27 La. An., 338. As to what is meant by forfeiture in that state, and the constitutional right to declare it, see *Morrison v. Larkin*, 26 La. An., 699.

tant provisions of the statute will more rigidly be insisted upon.¹

Where the power of legislation *ipso facto* to work a forfeiture is in question, it is important that there be a clear and precise understanding of what is intended in the use of this word forfeiture. The usual method of enforcing the payment of taxes upon property is by putting the property up at a public sale. No one questions the right to do this, and no one doubts that the sale, if fair and made in compliance with the law, and after all the necessary preliminary steps have been taken, vests a perfect title in the purchaser to the full extent that the statute shall declare. No judicial proceedings are required to perfect the title, and if the purchaser have need of a resort to them, in order to obtain possession, it is only what might occur to any owner of property under any undisputed title. In what important particular does this differ from the case of forfeitures, except that to the proceedings which are to work the forfeiture there is added the one requirement of a public sale? But there are in the sale no elements of an adjudication; it does not stand in the place of one; its purpose is only to bring to the public treasury the tax for which the sale is made. Incidentally in the proceedings a purpose is kept in view, not to sacrifice any farther than shall be necessary the interests of the owner; and to this end notice of the sale is required, with a view to invite competition among bidders. But we are not aware of any constitutional principle that entitles a party to have his duty coerced by a public sale of property, rather than by a forfeiture of it. A sale by a ministerial officer which, as the closing step in administrative action, is to divest the owner of his title, is as much obnoxious to the charge that it deprives him of his freehold without a hearing, as is the legislative forfeiture. Whatever there is of the nature of judicial inquiry lies back of these proceedings in the action of the assessing officers, and, as has already been stated, is the same in both cases. If the owner is condemned without a hearing in the one case, he is in the other.

¹ See *Hopkins v. Sandige*, 31 Miss., 668, 676, in which the delay of a few days after the time fixed by statute for the return of the list was held to defeat the forfeiture. See, also, *Kinney v. Beverley*, 2 H. & M., 318, 331; *Dentler v. State*, 4 Blackf., 258; *Williams v. State*, 6 Blackf., 86.

It may be that a public sale would be most advantageous to the person taxed, because it might leave to him some portion of his property after the tax was satisfied. In the vast majority of cases, however, the sale is of the whole land, and the possible benefit is not had. But there is no imperative principle of government which requires the legislature, in prescribing rules of administration, to fix upon those which would be most for the advantage of a negligent or defaulting citizen. We suppose, on the other hand, that the legislature has very ample discretion to determine the rule on its own view of public policy. If it deems a sale more advantageous to the state than a forfeiture, it will provide for it; otherwise not.

But if by forfeiture is understood the vesting in the state a title which shall be absolute and beyond dispute, the question presented is different. It is impossible that there can be any right to declare such a forfeiture, except as the result of an adjudication to which the owner was a party, which has determined that the default, upon which the forfeiture was based, exists in fact, and that the requisite steps which were to precede the forfeiture have actually been taken. In some judicial tribunal the party whose freehold is seized has a right to a hearing on these questions: a constitutional right, if constitutional protections to property are of any avail. But if by forfeiture is understood only that without sale there shall pass to the state such title as a purchaser would acquire if a sale were to take place, the declaration of forfeiture can, of itself, work no absolute deprivation of right. If the default existed and the tax proceedings are regular, the state has the title; if not, it remains in the person taxed. And, in the absence of any statute changing the burden of proof, it would devolve on the state to prove the regularity of the proceedings, precisely as it would on the purchaser when demanding the land under the deed given on a purchase.¹

¹See *Kinney v. Beverly*, 2 H. & M., 318, 331; *Hopkins v. Sandige*, 31 Miss., 668, 676. See, also, *post*, chapter XVII.

The proceedings for forfeiture, where a judicial prosecution is required, it seems unnecessary to consider. An intent to defraud is made a ground of forfeiture under some of the federal revenue laws. See *United States v. Hogsheads of Tobacco*, 2 Bond, 137; *United States v. Caddies of Tobacco*, 2 Bond, 305; *Henderson's Spirits*, 14 Wall., 44. The statute imposing the

Liability for taxes in special cases: Subrogation. It very often occurs that the state is in condition to collect its taxes, and does collect them, from persons who, as between themselves and others, by reason of contract relations, or other reason, ought not to pay them. In such cases the general rule is that the party who has made payment is entitled to recover in an appropriate suit at law against the party who should have paid. Some of these cases will now be mentioned.

Mortgagor and Mortgagee. Where the land is taxed, the mortgagor should pay the taxes on mortgaged land unless the statute provides otherwise; but if the duty of payment is neglected, the mortgagee may be compelled to pay to save his security from being cut off by sale of the land. Payment in such a case does not constitute a separate debt in his favor against the mortgagor,¹ but entitles him to add the amount to the sum owing on his security, and collect the whole together.² He cannot, however, even on the mortgage, collect it as a separate debt after the mortgage debt is paid.³ And he should not assume that the tax will not be paid by the mortgagor until the latter is in default.⁴

penalty of forfeiture of land and buildings employed in violation of a revenue law, sustained as constitutional. *United States v. McKinley*, 4 Brewster, 246. See *United States v. Spreckens*, 1 Sawy., 84; *Quantity of Tobacco*, 5 Ben., 407.

That there must be full showing of the facts upon which the right of forfeiture depends, see *State v. Thompson*, 18 S. C., 538.

¹ *Vincent v. Moore*, 51 Mich., 618; *Johnson v. Payne*, 11 Neb., 269; *Horri-gan v. Wellmuth*, 77 Mo., 542.

² *Hogg v. Longstreth*, 97 Pa. St., 255; *Faure v. Winans*, Hopk. Ch., 283; *Burr v. Veeder*, 3 Wend., 412; *Quin v. Brittain*, Hoff. Ch., 353; *Mix v. Hotchkiss*, 14 Conn., 32; *Brown v. Simons*, 44 N. H., 475; *Stancliff v. Norton*, 11 Kan., 218; *Eagle Fire Ins. Co. v. Pell*, 2 Edw. Ch., 631; *Marshall v. Davies*, 78 N. Y., 414; *Sidenberg v. Ely*, 90 N. Y., 257; *Barthell v. Syver-son*, 54 Ia., 160; *New Haven Sav. Bank v. Atwater*, 51 Conn., 429. An executor or administrator may pay taxes on property mortgaged to the estate, or a creditor may do so to protect his own interest, and be entitled to reimbursement on foreclosure. *Whittaker v. Wright*, 35 Ark., 511.

³ *Vincent v. Moore*, 51 Mich., 618. See *Manning v. Tuthill*, 30 N. J. Eq., 29. Compare *Horri-gan v. Wellmuth*, 77 Mo., 542; *Nopson v. Horton*, 30 Minn., 268.

⁴ *Pond v. Drake*, 50 Mich., 302. Compare *Brevoort v. Randolph*, 7 How. Pr., 398.

One who at a foreclosure sale buys property which is subject to taxes

Vendor and Vendee. A vendee by executory contract who takes possession under it is liable for the taxes unless the contract otherwise provides, and if the vendor is compelled to pay them, he will be entitled to withhold conveyance until reimbursed.¹ But the vendor is liable for taxes which had become a lien previous to the sale.²

Tenants for Life. It is the duty of a tenant for life to keep the current taxes paid, and any other party who, on his default, is compelled to make payment to protect an interest of his own, may have remedy over for the amount paid.³ Assessments for permanent improvements, however, should be apportioned between the tenant for life and the remainder man.⁴

Tenant in Common. Each tenant in common is bound to pay the tax on his own interest; but if one is compelled to pay upon all, he may charge the interest of his co-tenant with the proportionate part which such co-tenant should have paid.⁵

Payment Under Mistake as to Ownership. The rule as to remedy in cases in which parties have paid taxes under a supposition that they were owners, which afterwards proved to be erroneous, are different in different states. In some states such

cannot, upon paying them, hold the mortgagor for the amount unless by virtue of some contract or a warranty against taxes in the mortgage. *Semans v. Harvey*, 52 Ind., 331.

The mortgagee may assume the taxes to be legally assessed unless notified to the contrary, and his right to indemnification cannot be defeated by a showing that the tax was illegal. *Williams v. Hilton*, 35 Me., 547; *Bates v. People's, etc., Ass'n*, 42 Ohio St., 655.

¹See *Farber v. Purdy*, 69 Mo., 601; *Miller v. Corey*, 15 Ia., 166; *Watson v. Sawyers*, 54 Miss., 64.

²*Rundell v. Lakey*, 40 N. Y., 518. See *ante*, p. 447. As to recovery by the purchaser at a judicial sale of sums paid by him for taxes previously assessed, see *Ellis v. Foster*, 7 Heisk., 131; *Staunton v. Harris*, 9 Heisk., 579; *Childress v. Vance*, 1 Bax., 406. And as to recovery by a purchaser whose purchase proves to be void, of taxes paid while claiming under it, see *Sims v. Gray*, 66 Mo., 613; *Cogburn v. Hunt*, 56 Miss., 718; *Schaefer v. Causey*, 8 Mo. Ap., 142; *Sivley v. Summers*, 57 Miss., 712.

³*Cairns v. Chabert*, 3 Edw. Ch., 312; *Deraismes v. Deraismes*, 72 N. Y., 154; *Sidenberg v. Ely*, 90 N. Y., 257; *Anderson v. Hensley*, 8 Heisk., 835. As to payment in case of a life estate in a fund, see *Spangler v. York Co.*, 13 Pa. St., 322.

⁴*Pratt v. Douglass*, 38 N. J. Eq., 516. See, further, *Plympton v. Boston Dispensary*, 106 Mass., 544.

⁵*Davidson v. Wallace*, 53 Miss., 475.

a payment would not only give the party paying a right of action against the owner of the land, but would also give him a lien upon the land for his security.¹ But there is no general rule to this effect, and in the absence of any statute on the subject the ruling of the federal supreme court would be followed, that ignorance of the law in respect to title and good faith in the payment of taxes will not sustain an action where the payment has been voluntary, without any request from the true owners of the land and with a full knowledge of all the facts.²

Collection as between the state and its municipalities.

Where state levies are collected through the agency of county, city or township officers, it is competent for the state to make the county or other district liable as principal debtor for the quota of the state tax assessed within it.³ Provisions to this effect are common in the statutes. And where the county treasurer is required to give bond to the state for the state taxes to be received by him, the failure to give a sufficient bond will not excuse the county. The state is not to suffer from the laches of its agents in such matters.⁴

¹ *Goodnow v. Moulton*, 51 Ia., 555; *Goodnow v. Litchfield*, 63 Ia., 275, and cases cited. See *Union R., etc., Co. v. Skinner*, 9 Mo. Ap., 189; *Shaefer v. Causey*, 8 Mo. Ap., 142; *Ingersoll v. Jeffords*, 55 Miss., 37; *Thompson v. Savage*, 47 Ia., 522.

² *Homestead Co. v. Valley R. R. Co.*, 17 Wall., 153. See *Clafin v. McDonough*, 38 Mo., 412.

³ *Schuykill County v. Commonwealth*, 36 Pa. St., 524; *People v. Supervisors of St. Clair*, 30 Mich., 388; *Burlington v. Railroad Co.*, 41 Ia., 134; *Brown v. Painter*, 44 Ia., 368. When the state treasurer charges over to a county its proportion of the state tax, the county becomes debtor, and cannot burden the state with any drawback of percentage. *Multnomah Co. v. State*, 1 Oregon, 358.

⁴ See cases cited in the preceding note. In Kansas a county is liable to towns for money collected by a defaulting county treasurer. *Potter County v. Oswayo*, 47 Pa. St., 162. But it is not liable to the town for its quota until the amount has been actually collected. *Guittard v. Marshall County*, 4 Kan., 388. In Michigan a county treasurer collects the liquor tax as agent for the towns, and if he becomes a defaulter a town cannot withhold county moneys to make good the loss. *Marquette v. Ishpeming*, 49 Mich., 244. In Wisconsin the town treasurer, after paying over the state taxes collected by him, if he fails to collect all the taxes specified in his warrant, retains the town taxes and pays over the balance to the county. *Winchester v. Tozer*, 24 Wis., 312. As to the course in New York, see *New York v. Davenport*, 92 N. Y., 604.

CHAPTER XV.

THE SALE OF LANDS FOR UNPAID TAXES.

When made. Lands are sold by the government for taxes, either because the assessments made upon them are not paid within the time allowed by law for their voluntary satisfaction by the owner, or because a personal assessment against the owner remains uncollected by the ordinary process. Whether the sale is to be made for the one reason or for the other, the same principles will govern it, though in some particulars the proceedings will differ.

The land must be liable. As government has no inherent right to deprive the citizen of his property except in pursuance of regular and lawful proceedings, and for a lawful demand, a sale of lands will be void if they were not liable for the tax. If by law they were exempt from taxation, a sale will be void though for a tax actually assessed;¹ and so it will be if made for a tax legally assessed but which in some lawful manner has been discharged.² The description of the land in the proceedings which are to result in a sale should in substance at least conform to that in the assessment, and be sufficient for identification,³ and the statutory power must not, even by a single day, be anticipated in the steps taken.⁴

Necessity for regular proceedings. To the validity of any sale of lands for taxes, it is imperatively necessary that the

¹ *Hobson v. Dutton*, 9 Kan., 477. In general the statutes prescribe the time after delinquency when a sale may be made, and a sale before the time fixed would be void. In Kentucky sales are not made unless the taxes are delinquent for two years. *Nesbitt v. Liggitt*, 10 Bush, 137. Where a precept is required to be issued to the officer as his authority for making sale, there can be no valid sale without such precept. *Langohr v. Smith*, 81 Ind., 495.

Statutes as a rule do not require any formal levy upon lands as a step in the proceedings to a sale. As to what was sufficient under the federal revenue law, see *United States v. Hess*, 5 Sawy., 533.

² *Gould v. Day*, 94 U. S., 405.

³ *Williams v. Central Land Co.*, 32 Minn., 440.

⁴ *Caston v. Caston*, 60 Miss., 475.

land shall have been subject to taxation; that it shall have been actually assessed for taxation and a tax levied, and that, as to all the official proceedings leading up to a sale, there should be at least *prima facie* evidence of substantial compliance with the provisions of law on the subject.

Tax sales are made exclusively under a statutory power. The power which the state confers to assess and levy taxes does not of itself include a power to sell lands in enforcing collection, but the power to sell must be expressly given.¹ The officer who makes the sale sells something he does not own, and which he can have no authority to sell except as he is made the agent of the law for the purpose. But he is made such agent only by certain steps which are to precede his action, and which, under the law, are conditions to his authority. If these fail the power is never created. If one of them fails it is as fatal as if all failed. Defects in the conditions to a statutory authority cannot be aided by the courts; if they have not been observed the courts cannot dispense with them, and thus bring into existence a power which the statute only permits when the conditions have been fully complied with.² Neither, as a general rule, can the courts aid the defective execution of a statutory power; they may do this when the power has been created by the owner himself, and when such action would presumptively be in furtherance of his purpose in creating it; but a statutory power must be executed according to the statutory directions, and presumptively any other execution is opposed to the legislative will, instead of in furtherance of it.³ It is therefore accepted as an axiom when tax sales are under consideration, that a fundamental condition to their validity is that there should have been a substantial compliance with the law in all the proceedings of which the sale was the culmination. This would be the general rule in all cases in which a man is to be divested of his freehold by adversary proceedings; but special reasons make it peculiarly applicable to the case of tax sales.⁴ These reasons are thus

¹ See *McInery v. Reed*, 23 Ia., 410; *Sibley v. Smith*, 2 Mich., 486; *Sharp v. Speir*, 4 Hill, 76.

² See, as to prerequisites in Louisiana, *Succession of Trainor*, 27 La. An., 150.

³ *Guisebert v. Etchison*, 51 Md., 478.

⁴ *Dane v. Glennon*, 72 Ala., 160.

summarized by the supreme court of Maine: "Sales of real estate for the non-payment of taxes must be regarded in a great measure as an *ex parte* proceeding. The owner is to be deprived of his land thereby; and a series of acts preliminary to the sale are to be performed to authorize it on the part of the assessors and collector, to which his attention may never have been particularly called; and experience and observation render it notorious that the amount paid by purchasers at such sales is uniformly trifling in comparison with the value of the property sold. It has therefore been held, with great propriety, that, to make out a valid title under such sales, great strictness is to be required; and it must appear that the provisions of law preparatory to and authorizing such sales have been punctiliously complied with."¹

In Virginia somewhat stronger language has been employed. "These sales and purchases," it is said, "founded on forfeitures, deserve no indulgence from the court. It is therefore the well settled law that he who claims under a forfeiture must show that the law has been exactly complied with."² This language, if strictly taken, is unquestionably more exacting in its requirements than the authorities generally will justify. It is not necessary, we apprehend, in any proceedings so complicated as those in which lands are sold for taxes, that there should be shown an exact and punctilious compliance with all the provisions of law before they can be supported. With many of these provisions, as we have endeavored to show in a preceding chapter, the party interested in defeating such a sale could have no concern whatever. They are not made for his protec-

¹ *Whitman*, Ch. J., in *Brown v. Veazie*, 25 Me., 359, 362. See, also, *Keene v. Houghton*, 19 Me., 368; *Smith v. Bodfish*, 27 Me., 289; *Flint v. Sawyer*, 30 Me., 226; *Payson v. Hall*, 30 Me., 319; *Matthews v. Light*, 32 Me., 305; *Howe v. Russel*, 36 Me., 115; *Stevens v. McNamara*, 36 Me., 176; *Loomis v. Pingree*, 43 Me., 299; *Lovejoy v. Lunt*, 48 Me., 377; *Williamsburg v. Lord*, 51 Me., 599; *French v. Patterson*, 61 Me., 203; *Donald v. McKinnon*, 17 Fla., 746; *Oliver v. Robinson*, 58 Ala., 46; *Gilchrist v. Shackelford*, 72 Ala., 7.

² *Carr*, J., in *Wilson v. Bell*, 7 Leigh, 22, 24. And see *Yancey v. Hopkins*, 1 Munf., 419; *Christy v. Minor*, 4 Munf., 431; *Nalle v. Fenwick*, 4 Rand., 385; *Allen v. Smith*, 1 Leigh, 231, 254; *Chapman v. Doe*, 2 Leigh, 329, 357; *Jesse v. Preston*, 5 Grat., 120; *Martin v. Snowden*, 18 Grat., 100. In California it has been said that the proceedings in these cases are *strictissimi jura*. *Farris v. Coover*, 10 Cal., 589, 632; *Kelsey v. Abbott*, 13 Cal., 609.

tion or benefit, and whether observed or not, they do not affect his interest. A failure to observe them can, therefore, furnish no ground of complaint on his behalf; and it is not perceived that it can constitute for him any just or equitable protection against the demands of the state for its lawful revenues. It is sufficient for his case if the provisions which do concern him have been observed; and if others which are made in the interest of the public are overlooked or disregarded, the public, through its constituted authorities, must be the proper party to complain. This is but reasonable, and this is the rule which is laid down by the authorities.

Onus of proof. At the common law it was necessary that one who claimed to have obtained title to property of another, under proceedings based upon a neglect of public duty, should take upon himself the burden of showing that the duty existed, and had not been performed, and that in the consequent proceedings the law had been complied with by those who had had them in charge. Especially if the proceedings would operate with severity, and be in their effects something in the nature of a forfeiture, the law was strict in its requirement that his evidence should exhibit the proceedings from step to step, and show that each of the safeguards with which the statute had surrounded the delinquent for his protection in this very emergency had been duly observed. And this tenderness for his interests appeared but reasonable. Of what service could it be that safeguards were provided, if observance was not essential; if a careless or incompetent officer might overlook or disregard them with impunity, and deal with the property of the citizen as if his position as an officer of the government vested him with a dispensing authority over legislation, and authorized him to make, in his discretion, a law for the case as he proceeded?

This rule of the common law has not been modified by decisions, and is still recognized and enforced where statutes have not changed it. It may consequently be said to be the general rule that the party claiming lands under a sale for taxes must show affirmatively that the law under which the sale was made has been substantially complied with, not only in the sale itself, but

in all the anterior proceedings.¹ But although the authorities concur in this rule with great unanimity, they are not so entirely in accord when the question regards the strictness required in the showing that shall be made. On this point some of the cases, particularly those which were decided at a very early day, have used language importing a strictness greater than in most cases it would be possible to comply with, and greater than is demanded by any considerations of policy or of justice to the party whose estate is in question. The later cases lay down a more just and reasonable rule, and warrant us in saying that the requirement of a compliance with the law, when the question arises as one of title, is satisfied by obedience to those provisions of the law which are in the nature of conditions to the power to sell, and are not merely *directory* under

¹ *Stead's Ex'rs v. Course*, 4 Cranch, 403; *Parker v. Rule's Lessee*, 9 Cranch, 64; *Williams v. Peyton's Lessee*, 4 Wheat., 77; *McClung v. Ross*, 5 Wheat., 116; *Thatcher v. Powell*, 6 Wheat., 119; *Games v. Stiles*, 14 Pet., 322; *Pillow v. Roberts*, 18 How., 472; *Moore v. Brown*, 11 How., 414; *Early v. Doe*, 16 How., 610; *Parker v. Overman*, 18 How., 142; *Little v. Herndon*, 10 Wall., 26; *Hughey's Lessee v. Horrell*, 2 Ohio, 233; *Holt's Heirs v. Hemphill's Heirs*, 3 Ohio, 232; *Lafferty's Lessee v. Byers*, 5 Ohio, 458; *Thomson's Heirs v. Gotham*, 9 Ohio, 170; *Kellogg v. McLaughlin*, 8 Ohio, 114; *Polk v. Rose*, 25 Md., 153; *Pope v. Headen*, 5 Ala., 433; *Elliott v. Eddins*, 24 Ala., 508; *Garrett v. Wiggins*, 2 Ill., 335; *Fitch v. Pinckard*, 5 Ill., 69; *Doe v. Leonard*, 5 Ill., 140; *Wiley v. Bean*, 6 Ill., 302; *Irving v. Brownell*, 11 Ill., 402; *Spellman v. Curtenius*, 12 Ill., 409; *Marsh v. Chestnut*, 14 Ill., 224; *Goewey v. Urig*, 18 Ill., 242; *Lane v. Bommelmänn*, 21 Ill., 143; *Charles v. Waugh*, 35 Ill., 815; *Norris v. Russell*, 5 Cal., 250; *Keane v. Cannovan*, 21 Cal., 291; *O'Brien v. Coulter*, 2 Blackf., 421; *Williams v. State*, 6 Blackf., 86; *Wiggins v. Holley*, 11 Ind., 2; *Gavin v. Shuman*, 23 Ind., 32; *Ellis v. Kenyon*, 25 Ind., 134; *Jackson v. Shepard*, 7 Cow., 88; *Atkins v. Kinman*, 20 Wend., 241; *Sharp v. Speir*, 4 Hill, 76; *Sharp v. Johnson*, 4 Hill, 92; *Newell v. Wheeler*, 48 N. Y., 436; *Westfall v. Preston*, 49 N. Y., 349; *Hall v. Collins*, 4 Vt., 316; *Bellows v. Elliott*, 12 Vt., 569; *Brown v. Wright*, 17 Vt., 97; *Waldron v. Tuttle*, 3 N. H., 340; *Cass v. Bellows*, 31 N. H., 501; *Hawley v. Mitchell*, 31 N. H., 575; *Annan v. Baker*, 49 N. H., 161; *Scott v. Young Men's Society*, 1 Doug. (Mich.), 119; *Latimer v. Lovett*, 2 Doug. (Mich.), 204; *Scott v. Babcock*, 3 Green (Ia.), 133; *Gaylord v. Scarff*, 6 Ia., 179; *McGahan v. Carr*, 6 Ia., 331; *Morton v. Reads*, 6 Mo., 64; *S. C.*, 9 Mo., 868; *Nelson v. Goebel*, 17 Mo., 161; *Kelly v. Medlin*, 26 Tex., 48; *Cummings v. Holt*, 56 Vt., 384; *Woodbridge v. State*, 43 N. J., 262.

Where a demand before sale is required by statute, the fact of demand is not proved by the recitals in a tax deed. *Lathrop v. Hawley*, 50 Ia., 39.

the rules laid down in another chapter.¹ To require more than this would be needless for any beneficial purpose, and would greatly embarrass, and in innumerable cases defeat, the collection of the revenue.

The requirement that the claimant under a tax sale should show the proceedings to have been regular was entirely according to the natural order of evidence. The original owner would show a *prima facie* right by producing the documents and evidence which demonstrated his original ownership. To overcome this, there must be evidence of a title overriding or extinguishing it; and such a title would not appear in the tax purchaser until the successive steps, taken in compliance with the tax law, and ending in a sale and conveyance, had been shown. To prove merely a sale would be futile, unless the power to make the sale was established; and to prove merely

¹ See chapter IX. In reference to the authority of a sheriff to sell lands for taxes in North Carolina, the result of the cases has been summed up as follows:

"As a general rule, the power of the sheriff, being a naked power uncoupled with any estate of his own, is strictly construed, so that he must conform, in its execution, to the terms of the statute which creates and confers it. But still the main object of the law being to raise revenue for the state, the courts will not exact such a rigid observance of forms as will defeat such primary purpose, but will apply to sales for taxes the same reasonable rules of construction as govern sales under execution for private debts. . . . Innocent purchasers are protected; that is, those who did not, and could not, because of their want of opportunity, know whether the prerequisites to the sale had been complied with or not. But when the violation of the law is known to the purchaser, and more especially when he has procured it, he will receive no protection from the law, and can take no benefit from his purchase. Such a person is not permitted to say that that which the law requires him to do is unimportant in itself, and merely directory, but he must do all the law enjoins upon him, and do it in the manner and at the time prescribed; and doubly incumbent is this duty upon him, if prejudice to another can be the result of failure or delay on his part."

So a failure to obey the statute by the purchaser and to pay *immediately* to the sheriff the purchase money, and to take from him after its registration a receipt, will avoid a sale. *Hays v. Hunt*, 85 N. C., 303.

The holder of a tax deed in Indiana must show that the person liable for the taxes had no personal property to collect from. *Pitcher v. Dove*, 99 Ind., 175, citing *Ward v. Montgomery*, 57 Ind., 276; *Johnson v. Briscoe*, 92 Ind., 367, and other cases.

an instrument purporting to be a conveyance would be even more idle.

Nor was there any special injustice or hardship in the rule of the law which required the tax purchaser to prove the regularity of the proceedings under which he claimed. Whether the interest of the state might not be best subserved by casting the *onus* of showing defects in the title on the adverse claimant, and whether, therefore, on grounds of public policy, it might not be advisable to change the rule accordingly, are questions that stand quite apart from any which concern the claims or rights of the purchaser; but regarding his position only, there was no hardship in calling upon him to give proof of his title by showing a sale made with due authority. A tax sale is the culmination of proceedings which are matters of record; and it is a reasonable presumption of law that, where one acquires rights which depend upon matters of record, he first makes search of the record in order to ascertain whether anything shown thereby would diminish the value of such rights, or tend in any contingency to defeat them.¹ A tax purchaser

¹ That the proceedings on which tax sales depend are to be proved by the records, or by the originals from which the records should be made up, the following cases are authority, if indeed any is necessary: *Job v. Tebbetts*, 10 Ill., 376, 380; *Graves v. Bruen*, 11 Ill., 431, 442; *Schuyler v. Hull*, 11 Ill., 462, 465; *Boston v. Weymouth*, 4 Cush., 538; *Bucksport v. Spofford*, 12 Me., 487; *Adams v. Mack*, 3 N. H., 498, 499; *Blake v. Sturtevant*, 12 N. H., 567; *Pittsfield v. Barnstead*, 40 N. H., 477, 493; *McRory v. Manes*, 47 Ga., 90; *Sheldon's Lessee v. Coats*, 10 Ohio, 278; *Thevenin v. Slocum*, 16 Ohio, 519, 531; *Blodgett v. Holbrook*, 39 Vt., 886; *Iverslie v. Spaulding*, 32 Wis., 394; *Gearhart v. Dixon*, 1 Pa. St., 224; *Diamond Coal Co. v. Fisher*, 19 Pa. St., 267; *Miner v. McLean*, 4 McLean, 138; *Games v. Stiles*, 14 Pet., 322. See *ante*, p. 239. But such records do not import absolute verity like those of courts, and it may be shown in contradiction to their recitals that the facts were otherwise than as there stated. *Diamond Coal Co. v. Fisher*, 19 Pa. St., 267, 273; *Boston v. Weymouth*, 4 Cush., 538, 541; *Blake v. Sturtevant*, 12 N. H., 567; *Graves v. Bruen*, 11 Ill., 431, 443; *Tebbetts v. Job*, 11 Ill., 453; *Schuyler v. Hull*, 11 Ill., 462, 465. Compare *ante*, p. 297. In *Kellogg v. McLaughlin*, 8 Ohio, 114, 116, the record of tax proceedings was held to be conclusive against the party claiming under a tax sale, but not against the party contesting it. In *Miner v. McLean*, 4 McLean, 138, 140, it is said that "parol evidence is not admissible to supply a defect in the record. This well established rule can admit of no exception." See *Blanchard v. Powers*, 42 Mich., 619. In *Coit v. Wells*, 2 Vt., 318, it was decided that the records of the advertisements in the case of road taxes were not evidence at

consequently cannot be, in any strict technical sense, a *bona fide* purchaser, as that term is understood in the law; because a *bona fide* purchaser is one who buys an apparently good title without notice of anything calculated to impair or affect it; but the tax purchaser is always deemed to have such notice when the record shows defects. He cannot shut his eyes to what has been recorded for the information of all concerned, and, relying implicitly on the action of the officers, assume what they have done is legal because they have done it. It is indeed a presumption of law that official duty is performed; and this presumption stands for evidence in many cases; but the law never assumes the existence of jurisdictional facts; and throughout the tax proceedings the general rule is, that the taking of any one important step is a jurisdictional prerequisite to the next; and it cannot therefore be assumed, because one is shown to have been taken, that the officer performed his duty in taking that which should have preceded it.¹ The tax purchaser buys, therefore, under the operation of the rule *caveat emptor*, and under common law rules would get nothing unless he got the land itself; but undoubtedly he has an equity in the event of his title failing, to be reimbursed for his expenditure;² and this the legislature in a number of the states has deemed

all unless they contained all the particulars required by the statute. These cases, however, are not inconsistent with a resort to parol evidence as secondary to that of record when the latter is lost or destroyed.

¹ A tax purchaser comes strictly within the rule *caveat emptor*. If his title fails because the collector failed to give notice of sale, he has no remedy against the collector. *Hamilton v. Valiant*, 30 Md., 139; *Sullivan v. Davis*, 29 Kan., 28; *Casselbury v. Piscataway*, 43 N. J., 353. Neither has he for any error or irregularity which defeats his title a remedy against the town. *Lynde v. Melrose*, 10 Allen, 49. And see *Jenks v. Wright*, 61 Pa. St., 410, 414. Nor has he a remedy against the municipality for whose taxes the sale was made when the statute gives none. *Loomis v. Los Angeles Co.*, 59 Cal., 456. Nor can he have the defective tax proceedings corrected in equity; there being no element of contract in the case as between him and the land owner. *Cogburn v. Hunt*, 56 Miss., 718. See *Logansport v. Humphrey*, 84 Ind., 467; *McWhinney v. Indianapolis*, 98 Ind., 182. Lapse of time will not aid him unless he takes possession under his purchase. *Coxe v. Deringer*, 78 Pa. St., 271. A special agreement made by the board of supervisors at the time of a tax sale to refund the money if the sale proves defective is *ultra vires* and void. *Hyde v. Supervisors*, 43 Wis., 129.

² *Forqueran v. Donnally*, 7 W. Va., 114.

it proper to make provision for. The provisions made differ greatly and it is impracticable to state them here.¹

Presumptions of regularity. When the tax purchaser is left to make his showing, the strictness required in the proof may reasonably be made to depend, to some extent, upon the circumstances. Presumptions are indulged in every class of proceedings; and in some cases presumptions may give an efficient support to evidence which, without them, would be insufficient to establish the necessary facts. Indeed, in some cases, presumptions may supply links which appear to be missing in the testimony. It was once said by an eminent judge in a tax case, that "full evidence of every minute circumstance ought not, especially at a distant day, to be required. From the establishment of some facts it is possible that others may be presumed, and less than positive testimony may establish facts."² Nothing, under some circumstances, could be more just or reasonable. But when that "distant day" arrives, when presumptions are relied upon, it will be found necessary to observe, with some circumspection, what has been the position of the parties, relative to the property claimed, from the time the sale was made.

¹In Ohio a purchaser whose title fails is in some cases given an action against the owner for the tax for which the land was sold and for any subsequent taxes paid. *Chapman v. Sollars*, 38 Ohio St., 378. But a penalty cannot be recovered. *Johnson v. Stewart*, 29 Ohio St., 498. In Michigan the auditor-general is authorized to refund the bids to purchasers in some cases in which titles prove defective; but his right to do so is limited strictly to the cases enumerated in the statute; the state taking no responsibility for the action of officers where the purchaser has the same opportunity for knowing the facts that the state officers have. *People v. Auditor-General*, 30 Mich., 12. In Iowa, while a good faith purchaser from the owner of the tax title gets no title if the tax was void for want of levy (*Early v. Whittingham*, 43 Ia., 162), yet he is to be protected if the tax is valid and he buys without notice of any illegality in the sale. If there was fraud in the sale the owner who had the means of discovering it should suffer therefrom rather than the subsequent purchaser who had not such means. *Van Schaac v. Robbins*, 36 Ia., 201; *Ellis v. Peck*, 45 Ia., 112.

Where the statute provides for refunding to a purchaser whose title fails, the right as to existing sales cannot be taken away by a subsequent statute. *Fleming v. Roverud*, 30 Minn., 273; *State v. Foley*, 30 Minn., 350.

²*Marshall*, Ch. J., in *Stead's Executors v. Course*, 4 Cranch, 403. See, to the same effect, *Freeman v. Thayer*, 33 Me., 76. The fact that a deed was given may be presumed after forty years' time, if the known facts are consistent with it. See *Earley v. Euwer*, 102 Pa. St., 338.

That position may sometimes very reasonably have a controlling influence. If the tax purchaser has made no claim under his title, and has left the original owner to treat the property as his own, it is difficult to understand on what ground any presumption can be built up in aid of the tax title, deriving its force from the lapse of time. "The older it is without any claim being made under it, the weaker it is, and the weaker are all presumptions in its favor."¹ If, on the other hand, he has made claim in practical and effective form by taking possession, and especially if, after the possession was taken, the other party, with full knowledge thereof, has neglected for any considerable period, to assert his own rights, it must be conceded that the claim of the tax purchaser will come before the courts under circumstances entitling it to much greater indulgence.

The reasons for this are manifest. If one who claims to have title to property shall lie by for a long term of years without asserting it, while another is in the enjoyment of that which, if the title is valid, should be enjoyed by himself, it is not a very violent presumption that his supineness is because he is well aware of some defect which would defeat his claim if he were to assert it in legal proceedings. The longer he delays the stronger this presumption becomes; and if the time could ever arrive when, because the claim is old, it could be presumed without defects, it is obvious that it could only be on an indulgence of presumptions that are opposed to reason. That he may lie by because of defects, until the time can arrive when, because of his lying by, it will be presumed that no defects exist, and then be put by the law in possession of that which it is inferable he did not venture to demand before, because he knew or had reason to believe the demand would be ineffectual, is an absurdity so manifest that time need not be wasted in the attempt to make it appear more so.

It is different when the tax purchaser has been in possession.²

¹ *Alexander v. Bush*, 46 Pa. St., 62. See, to the same effect, *Read v. Good-year*, 17 S. & R., 350; *Hole v. Rittenhouse*, 19 Pa. St., 305; *Worthing v. Webster*, 45 Me., 270; *Richardson v. Dorr*, 5 Vt., 9; *Townsend v. Downer*, 32 Vt., 183.

² Possession, recovery against the grantor of defendant in trespass, and payment of taxes, are evidence in favor of a tax deed thirty years old that a surplus bond, the cost of which is receipted in the deed, was given. *Lacka-*

That fact is some evidence that he at least believes his title to have validity; and if those who might dispute it neglect to do so, the inferences will be more or less strong, according to the circumstances, that their action is attributable to the belief that a contest must be ineffectual. It is doubted if in any case, on common law principles, a tax title could be presumed valid before the full period allowed by the statute of limitations for bringing suit had expired. The court of appeals of Virginia decided at an early day that it could not be,¹ and no satisfactory reason has been suggested in any quarter to cast a doubt upon the correctness of this conclusion. Still, presumptions may be very forcible in some cases, where, on the evidence, it is left in doubt whether the tax proceedings have or have not been conducted in conformity to law. If possession has been held under them for a considerable period, though it may not have been for a length of time sufficient to bar suits for the recovery of lands, there may reasonably spring from such possession an inference in favor of legality, of sufficient force to turn the scales on any point left in doubt on the proofs, and to justify a jury, to whom the case is submitted, in drawing the conclusion which supports the possession. The longer the possession has continued, the stronger should be the intendments in favor of the title under which it is held; and although these cannot make valid that which in itself is void, they may, and should, be allowed their weight when a case is to be determined which the evidence has left in doubt. What their weight should be must depend on the circumstances; there can be

wana Iron Co. v. Fales, 55 Pa. St., 90. As to the force of recitals in deeds generally, where there has been possession under them, see *Worthing v. Webster*, 45 Me., 270.

¹ *Allen v. Smith*, 1 Leigh, 231, 255. The validity of a tax sale is not to be presumed from the mere deed of the collector, unaccompanied by extrinsic evidence that the prior proceedings were regular. Nor, in an action of ejectment, will any presumptions be made in favor of the validity of the deed, merely because the party claiming it proves a possession adverse to the title of another party, but for a period short of that prescribed by the statute of limitations. *Townsend v. Downer*, 32 Vt., 183. As to the requisites of a valid sale in general, see *Virden v. Bowers*, 55 Miss., 1; *Coleman v. Shattuck*, 62 N. Y., 348; *Fischel v. Mercier*, 32 La. An., 704.

A tax deed coupled with possession may be sufficient to preclude mere trespassers from contesting the right to possession. *Van Auker v. Monroe*, 38 Mich., 725.

no definite rule of law on the subject which can be applied in all cases.¹

Presumptions could in no case supply the want of a record when the law requires one, and it has never been made; neither

¹ Five years' possession does not warrant a finding in favor of the regularity of proceedings, when their correctness is not shown by the evidence. *Phillips v. Sherman*, 61 Me., 548. See *Pejepescut Proprietors v. Ransom*, 14 Mass., 145. As to what will be overlooked in Pennsylvania under their statute, which declares that no irregularities in the assessment, process or otherwise shall be allowed to affect the title of the purchaser, see *Laird v. Hiester*, 24 Pa. St., 452. As to the force of the presumption in favor of the correctness of official action under that statute, see *Cuttle v. Brockway*, 24 Pa. St., 145; *Heft v. Gephart*, 65 Pa. St., 510. In *Schoff v. Gould*, 53 N. H., 512, the tax proceedings depended on the vote of a meeting, and the question was made upon proof of the warrant for holding it. The court say: "The meeting was held in March, 1841,—more than thirty years ago—and officers were chosen who acted as such, and the jury might have presumed that the warrant remained posted the requisite time. *Bishop v. Cone*, 3 N. H., 513; *Northwood v. Barrington*, 9 N. H., 373; *Petersborough v. Lancaster*, 14 N. H., 372; *School District v. Bragdon*, 23 N. H., 514. In *Cavis v. Robertson*, 9 N. H., 524, it was held that this rule did not apply where the facts were recent and the records might be amended, but would apply where, from the lapse of time, it may be presumed that the officers who made the records are no longer living, or have no recollection of the facts. It does not appear that the officers who made the record are dead, but it is a fair presumption that they have lost recollection of the fact that the notice remained posted."

Where an officer empowered to do so has changed the descriptions of property in the assessment book, and the change has been followed in subsequent proceedings, the presumption must be that the officer's act was warranted. *Beeson v. Johns*, 59 Ia., 166.

The following cases are important, as showing what, under their varying circumstances, was held sufficient evidence of an assessment: *Bratton v. Mitchell*, 7 W. & S., 259; *Crum v. Burke*, 25 Pa. St., 377, 381; *Heft v. Gephart*, 65 Pa. St., 510; *McDermott v. Hoffman*, 70 Pa. St., 31; *McReynolds v. Longenberger*, 57 Pa. St., 13; *Pittsfield v. Barnstead*, 40 N. H., 477. The sale book does not prove an assessment. *Bratton v. Mitchell*, 1 W. & S., 310. Neither do the recitals in the tax warrant. *Hoffer v. Matteson's Ex'rs*, 16 N. J. Eq., 382. If the record of a treasurer's return shows no verification, and the proper office contains no other record, this is sufficient evidence that there was no verification. *Cotzhausen v. Kaehler*, 42 Wis., 332.

Where a statute provides that, in the absence of the township clerk, a justice of the peace may take his place in certain tax proceedings, there can be no presumption that the justice failed to make any necessary qualification for acting. *First Nat. Bank v. St. Joseph*, 46 Mich., 526. If parcels of land are omitted from the tax roll, and there is no evidence how they came to be omitted, the presumption must be that it was for lawful reason. *Perkins v. Nugent*, 45 Mich., 156.

can they help out a record which is so defective as not to answer the requirements of the law.¹ But when it has been once made to appear that a record has existed which is now lost or destroyed, presumptions may justly be allowed great weight in support of the secondary evidence, in proof of the contents of the record, and that it was in compliance with the law.²

Special authority to sell. The various proceedings which usually are required to precede a sale of the lands have been successively mentioned. Whether, when these have been taken, the officer will require any special warrant or process as his authority for proceeding to a sale, must depend upon whether something of that nature is provided for by law. In some of the states a list of delinquent lands is made out and properly certified by the state auditor, or some other designated officer of state, to whom the returns of delinquent taxes have been made, and this list is transmitted to the county or township official who by law is intrusted with the duty of making sales, and constitutes his warrant for doing so. In other states, the statutes make other special provisions for the purpose. Whatever list, certificate or warrant is prescribed by the statute, is to be looked upon as in the nature of process, and it is indispensable that the officer should have it before taking any steps towards making a sale.³ And in all his action he must keep within the command of his warrant and of the law; for his authority will fail to support him when he fails to observe it.⁴ If a special demand for the tax is required to be

¹Coit v. Wells, 2 Vt., 318; Capron v. Raistrick, 44 Vt., 515; Kellogg v. McLaughlin, 8 Ohio, 114; Porter v. Byrne, 10 Ind., 146; Iverslie v. Spaulding, 32 Wis., 394; Moser v. White, 29 Mich., 59.

A record in a tax case not allowed to be contradicted to defeat a tax deed which had been on record for nineteen years. Blanchard v. Powers, 42 Mich., 619. See Gamble v. East Saginaw, 43 Mich., 367.

²Where a record is not found in the proper office, and it is not shown that one was ever in existence, there is no presumption that one was made. Hall v. Kellogg, 16 Mich., 135. See Cass v. Bellows, 31 N. H., 501; Cavis v. Robertson, 9 N. H., 524; Gibson v. Bailey, 9 N. H., 168.

³See Homer v. Cilley, 14 N. H., 85; Hannel v. Smith, 15 Ohio, 134; Kelley v. Craig, 5 Ired., 129; Gossett v. Kent, 19 Ark., 602; Miner v. McLean, 4 McLean, 138; Laugohr v. Smith, 81 Ind., 495; Succession of Trainor, 27 La. An., 150.

⁴Where the statute requires the sale to be made within two years from the date of the warrant, a sale at a later day is void. Usher v. Taft, 33 Me.,

made before a sale, such demand must be made to appear or a sale will be invalid.¹

Notice of sale. The first proceeding usually required of the officer who is to make sale is, that he shall give public notice of his intention to do so. Under different statutes notices in various forms are required, as may be thought most suitable to the case. If the statute fails to specify the character of the notice, doubtless one in writing must be intended;² but a provision so indefinite will not often be met with. Unusual care is required in obeying the directions of the statute regarding notice, as no one who is entitled to notice can be bound by a sale which has been made without it. There is no constitutional provision entitling one to notice in a particular mode; what the statute has made sufficient must be deemed so. In the case of residents, personal notice is sometimes provided for;³ but for non-residents, a notice published in a newspaper

199. See, for the same principle, *Avery v. Rose*, 4 Dev., 549; *Doe v. Allen*, 67 N. C., 346. A sale preceding the day is of course void. *Conrad v. Darden*, 4 Yerg., 307. See *Ott v. Trevacrier*, 21 Ia., 68.

It has been decided that where, by the statute, the proceedings are different in the case of non-residents from what they are in the case of residents, the subsequent proceedings will be invalid unless they follow the assessment. *Merrick v. Hutt*, 15 Ark., 331; *Kinsworthy v. Mitchell*, 21 Ark., 145; *McDermott v. Scully*, 27 Ark., 226; *Garabaldi v. Jenkins*, 27 Ark., 453.

¹ *Lathrop v. Hawley*, 50 Ia., 39.

² *Pearson v. Lovejoy*, 53 Barb., 407.

³ Where the statute required notice to be given to the occupant, if the land was occupied, it was held that one having a paper title to a lot of one hundred and sixty-nine acres, and who, though not on it, cultivated a small piece of it, was entitled to notice, and a sale made without giving it was void. *Leland v. Bennett*, 5 Hill, 286, citing *Comstock v. Beardsley*, 15 Wend., 348; *Bush v. Davison*, 16 Wend., 550. In North Carolina it seems that the mortgagee is regarded as the owner of land mortgaged, so as to be entitled to the notice required to be given to the owner. *Whitehurst v. Gaskill*, 69 N. C., 449; S. C., 12 Am. Rep., 655. Where, in Illinois, a lot was not assessed in any name, a notice was held properly served on the actual occupant. *Gage v. Bailey*, 102 Ill., 11. Where several own land in common, and the statute requires notice to owners, if one is omitted a sale is void. *Thurston v. Miller*, 10 R. I., 358. If the land is only occupied in part and not by the owner, the statutory notice to the occupant must nevertheless be given. *Smith v. Gage*, 12 Fed. Rep., 32. Leaving notice at one's domicile is not personal service upon him. *Peyrie v. Schreiber*, 66 Mo., 38. See, further, *Workingmen's Bank v. Lannes*, 30 La. An., 871.

is generally all that is prescribed.¹ Sometimes the published notice is all that is made requisite even in the case of residents, while other statutes direct that the tax list shall be kept posted in some public place or places for a certain period. Whatever the provision is, it must be complied with strictly. This is one of the most important of all the safeguards which has been deemed necessary to protect the interests of parties taxed, and nothing can be a substitute for it or excuse the failure to give it.² The notice being a prerequisite to the officer's authority, the fact that in the particular case it can be shown that the party concerned was fully aware of the proceedings will be of no avail in supporting them. He is under no obligation to take notice of the proceedings unless duly notified. Mere informalities or unimportant variances in an attempt to comply with the law may not be fatal, but variance in substance cannot be overlooked.

It may be useful to notice some of the cases on the subject.

¹The owner of unseated lands is only entitled to such notice as the statute shall provide for, and he must take notice of the tax proceedings at his peril. *Cuttle v. Brockway*, 32 Pa. St., 45. It is said in Louisiana that it is in the power of the legislature to determine what shall be sufficient to bring parties into court in tax cases, and if a published notice is provided for and given, that is sufficient. *New Orleans v. Cordeviolle*, 10 La. An., 732; *Drainage Co. Case*, 11 La. An., 338.

²*Washington v. Pratt*, 8 Wheat., 681; *Early v. Doe*, 16 How., 610; *Moulton v. Blaisdell*, 24 Me., 283; *Flint v. Sawyer*, 30 Me., 226; *Hill v. Mason*, 38 Me., 461; *Bush v. Davison*, 16 Wend., 550; *Alexander v. Pitts*, 7 Cush., 503; *Blalock v. Gaddis*, 33 Miss., 452; *Reeds v. Morton*, 9 Mo., 868; *Prindle v. Campbell*, 9 Minn., 212; *Jenks v. Wright*, 61 Pa. St., 410. A written notice will not answer where a printed notice is required by statute. *Lagrone v. Rains*, 48 Mo., 536. Nor can posting the list be omitted when required by statute. *Yenda v. Wheeler*, 9 Tex., 408. See *Pitts v. Booth*, 15 Tex., 453; *Himmelman v. Cahn*, 49 Cal., 285; *Brooks v. Satterlee*, 49 Cal., 289; *Clarke v. Rowan*, 53 Ala., 400.

Under a statute in Mississippi it seems that defects in a notice of sale will not defeat the sale. *Virden v. Bowers*, 55 Miss., 1.

As to the requisites of notice in general, see *Hart v. Smith*, 44 Wis., 213; *Tolman v. Hobbs*, 68 Me., 316; *Taft v. Barrett*, 58 N. H., 447. As to time of publication in Kansas, see *Watkins v. Inge*, 24 Kan., 612; *City Railway Co. v. Chesney*, 30 Kan., 199. A notice of sale in the name of A. and B., when the land had always been owned by A. alone, held void. *Denégre v. Gerac*, 35 La. An., 952. When publication of notice is required, a publication on Sunday only is insufficient. *Ormsby v. Louisville*, 79 Ky., 197. Compare *Hastings v. Columbus*, 42 Ohio St., 585.

Where the statute required the notice to contain a particular statement of the taxes on each lot, a notice not containing it was held void.¹ So where the notice was for less than the statutory time, though but for a single day, the proceeding was held to be as fatally defective as if no notice at all had been given.² So where the notice was required to be published for a certain time in the paper of the state printer, and the publication was duly begun, but before completion the paper ceased to be that of the state printer, it was held insufficient.³ So a notice is defective if the collector in appending his name fails to add his name of office, so that it does not appear to be official;⁴ or if given before the person has in fact been sworn into office;⁵ or if delayed after the time prescribed by law for

¹ *Washington v. Pratt*, 8 Wheat., 681. See *Jenks v. Wright*, 61 Pa. St., 410.

² *State v. Newark*, 36 N. J., 288. See *Caston v. Caston*, 60 Miss., 475. A similar ruling was made in *Pope v. Headon*, 5 Ala., 433. And see *Elliott v. Eddins*, 24 Ala., 508; *Flint v. Sawyer*, 30 Me., 226; *Hobbs v. Clements*, 33 Me., 67. Twelve weeks' notice of sale requires eighty-four full days. *Early v. Doe*, 16 How., 610. Where notice is required to be for ten days, Sundays excepted, and it is omitted two days, not Sundays, it is void. *Haskell v. Bartlett*, 34 Cal., 281. So if it be omitted one week day and published Sunday. *San Francisco v. McCain*, 50 Cal., 210; *People v. McCain*, 51 Cal., 360. If the last of the number of days prescribed should be Sunday, the notice should be published Monday. *Alameda, etc., Co. v. Huff*, 57 Cal., 331. See *Falch v. People*, 8 Ill. Ap., 351. As to what is a publication three times for three successive weeks, see *Andrews v. People*, 83 Ill., 529; *Same Case*, 84 Ill., 28; *Ricketts v. Hyde Park*, 85 Ill., 110. And as to proof of publication, *Fisher v. People*, 84 Ill., 491. As to what is a publication for three weeks, see *Loughridge v. Huntington*, 56 Ind., 253. See, further, as to time of publication, *Kellogg v. McLaughlin*, 8 Ohio, 114; *Cass v. Belows*, 31 N. H., 501; *Moore v. Brown*, 4 McLean, 211; *S. C. in error*, 11 How., 414; *Westbrook v. Willey*, 47 N. Y., 457; *Dubuque v. Wooton*, 28 Ia., 571; *Clarke v. Rowan*, 53 Ala., 400; *Hilgers v. Quinney*, 51 Wis., 62; *Eaton v. Lyman*, 33 Wis., 34; *Steuart v. Meyer*, 54 Md., 454; *Renshaw v. Imboden*, 31 La. An., 661; *Pennell v. Monroe*, 30 Ark., 661.

³ *Bussey v. Leavitt*, 12 Me., 378. Compare *Pope v. Headon*, 5 Ala., 433; *Lyon v. Hunt*, 11 Ala., 295; *Sharp v. Johnson*, 4 Hill, 92; *Cambridge v. Chandler*, 6 N. H., 271. A change in the name of the paper in which the notice is required to be published will not affect the notice. *Isaacs v. Shattuck*, 12 Vt., 668. Where a city common council is required to give notice in a paper to be designated, the designation must be made by the council. *Appeal of Powers*, 29 Mich., 504.

⁴ *Spear v. Ditty*, 9 Vt., 282. See *Broughton v. Journeay*, 51 Pa. St., 81.

⁵ *Langdon v. Poor*, 20 Vt., 13. See *Hannel v. Smith*, 15 Ohio, 134.

its publication.¹ And the notice is bad if it differs from the assessment in giving the name of the person to whom the land is taxed;² or if it fails to give the name of the person taxed when the statute requires it;³ or if the description of the land is insufficient;⁴ or if the place for holding the sale is so vaguely stated as not to give the requisite information;⁵ or if the year for which the sale is to take place is incorrectly given.⁶

As regards all such cases, the law is well summed up in a case in which the statute required the notice to state the "amount of taxes assessed," and the notice given was incorrect in this particular. "The advertisement did not state the amount of the tax assessed on the land, but stated a wholly different amount, and for all legal purposes might as well have contained no statement whatever of the amount of the tax. To comply with the statute the exact amount must be given. A deviation, however small, must be fatal, because a rule of law

¹ *Hill v. Mason*, 38 Me., 461. Compare *Brackett v. Vining*, 49 Me., 356; *Kelly v. Craig*, 5 Ired., 129; *Magee v. Commonwealth*, 46 Pa. St., 358; *Pierce v. Benjamin*, 14 Pick., 356; *Noyes v. Haverhill*, 11 Cush., 838.

² *Bettison v. Budd*, 21 Ark., 578, citing *Wait v. Gilmore*, 2 Yeates, 330; *Shimmin v. Inman*, 26 Me., 232. And see *Alvord v. Collin*, 20 Pick., 418; *Workingmen's Bank v. Lannes*, 30 La. An., 871.

³ *Sargent v. Bean*, 7 Gray, 125; *Workingmen's Bank v. Lannes*, 30 La. An., 871; *Milner v. Clarke*, 61 Ala., 258.

⁴ Such a defect could not be aided by any information imparted by the auctioneer to the bidders at the sale. *Ronkendorf v. Taylor*, 4 Pet., 349. As to the requisites of description see *Vaughan v. Stone*, 55 Ia., 213; *Gachet v. McCall*, 50 Ala., 307; *Milner v. Clarke*, 61 Ala., 255; *Barton v. Gilchrist*, 19 W. Va., 223; *Poindexter v. Doolittle*, 54 Ia., 52; *Thibodaux v. Keller*, 29 La. An., 508; *Garrick v. Chamberlain*, 97 Ill., 620. A description said to be bad "if from it a purchaser could not obtain sufficient knowledge of the identity of the land to form an intelligent judgment of its value." *Nason v. Ricker*, 63 Me., 381.

In some states the description in the notice is required to follow that in the assessment. See *Rougelot v. Quick*, 34 La. An., 123. As to description in Iowa, see *Iowa, etc., Co. v. County of Sac*, 39 Ia., 124; *Chicago, etc., R. Co. v. Carroll County*, 41 Ia., 153; *Shawler v. Johnson*, 52 Ia., 472.

⁵ *Workingmen's Bank v. Lannes*, 30 La. An., 871; *Ex parte Tax Sale*, 42 Md., 196.

⁶ *Knowlton v. Moore*, 136 Mass., 32. It seems, however, that if the notice is for a sale for the taxes of several years when only one year's tax was delinquent, it may be sustained as a good notice for the one year. *Thweatt v. Black*, 30 Ark., 732.

cannot be made to fluctuate according to the degree or extent of its violation."¹

The most important of the usual requisites of notice of sale are that it shall give a proper description of the land to be sold,² and a statement of the time and place when and where the sale will be made. The requisites for a description in the assessment roll have been heretofore given. In the notice, as in the assessment, there is precisely the same necessity that the description shall be sufficiently definite to identify the land, in order that the owner may be apprised of the peril to which his interests are exposed.³ What has been said regarding the description under the head of assessment is consequently applicable here. The cases referred to in the margin discuss other defects, or alleged defects, in notices of sale, and may be useful for reference.⁴ Consent of the owner of land to a defective publication of notice, it has been held, would not bind him, as

¹ *Bigelow, J.*, in *Alexander v. Pitts*, 7 Cush., 503. The amount of the tax was \$3.30; that stated in the notice was \$4.12. Compare *Clarke v. Strickland*, 2 Curt. C. C., 439. That an immaterial variation in the notice from that required by the statute may be overlooked, see *Ogden v. Harrington*, 6 McLean, 418; *Scott v. Watkins*, 22 Ark., 556; *Hodgson v. Burleigh*, 4 Fed. Rep., 111.

² Where land is not so described in the assessment as to be identified the defect cannot be cured by an accurate description in the report of sale. *Morristown v. King*, 11 Lea, 669.

³ See *Farnum v. Buffum*, 4 Cush., 260; *Eastman v. Little*, 5 N. H., 290; *Williams v. Harris*, 4 Sneed, 333; *Bidwell v. Webb*, 10 Minn., 59; *Bidwell v. Coleman*, 11 Minn., 78; *Hodgdon v. Burleigh*, 4 Fed. Rep., 111; *Oliver v. Robinson*, 58 Ala., 46; *Crane v. Randolph*, 30 Ark., 579.

⁴ *Porter v. Whitney*, 1 Greenl., 306; *Shimmin v. Inman*, 26 Me., 228; *Hobbs v. Clements*, 32 Me., 67; *Greene v. Lunt*, 58 Me., 518; *Smith v. Messer*, 17 N. H., 420; *Pierce v. Richardson*, 37 N. H., 306, 314; *Langdon v. Poor*, 20 Vt., 13; *Hughey v. Horrell*, 2 Ohio, 231; *Styles v. Weir*, 26 Miss., 187; *Sutton v. Calhoun*, 14 La. An., 209. If the statute gives a form for a notice, it is sufficient to follow it, even though it does not specially name the place of sale: that being otherwise fixed. *Clark v. Mowyer*, 5 Mich., 562. Mr. Blackwell says: "Where the form is prescribed by the statute, that form must be strictly and literally followed; the court will not admit the substitution of a different one." *Blackw. on Tax Titles*, 223. True, if it is different in substance; but to say that the statute form must be *literally* followed is stating a more strict rule of compliance than we can find authorities to justify. The publication of notice, not in the regular issue of a paper, but in extra sheets, is insufficient, unless these are sent to all the subscribers.

he cannot, in that manner, confer an authority upon an officer of the law, nor can he pass a title to his freehold by mere waiver.¹ Proof of giving the notice should be duly made of record, and it ought to show what the facts are, so that any one inspecting the record may know that the statute has been complied with. An affidavit, or a return, which undertakes to state merely the legal conclusion that "due notice" was given, or "legal notice," or "notice as required by the statute," or to make any other general allegation of a similar nature, ought not to be received as sufficient evidence that the law has been complied with. It is, in fact, evidence only of the officer's opinion that he has performed his duty.²

Time and place of sale. The sale must be made at the very time and place provided by law for that purpose.³ In this regard, the utmost strictness is required, since otherwise the whole purpose of the notice, both as regards information to the public and protection to the owner of the land, will be defeated. A sale inside a building, when the law requires it to be at the outer door, has been held to be void.⁴ So a sale either before or after the time which has been named for the purpose is wholly without warrant of law, and cannot be sus-

Davis v. Simms, 4 Bibb, 465; *Tully v. Bauer*, 52 Cal., 487; *Zahradnicek v. Selby*, 15 Neb., 579.

An erroneous statement of the time to redeem, not being required by the statute, will not invalidate the sale. *Ex parte Tax Sale*, 42 Md., 196.

¹ *Scales v. Alvis*, 12 Ala., 617.

² *Gilbert v. Turnpike Co.*, 8 Johns. Cas., 107; *Cheatham v. Howell*, 6 Yerg., 311; *Gwin v. Vanzant*, 7 Yerg., 143; *Nelson v. Pierce*, 6 N. H., 194; *Wells v. Burbank*, 17 N. H., 393; *Lovejoy v. Lunt*, 48 Me., 377; *Briggs v. Whipple*, 7 Vt., 18; *Farnum v. Buffum*, 4 Cush., 260; *People v. Highway Commissioners*, 14 Mich., 528; *Games v. Stiles*, 14 Pet., 322. As to the strictness of proof required in showing notice, see *County Commissioners v. Clarke*, 36 Md., 206; *Jarvis v. Silliman*, 21 Wis., 607; *Iverslie v. Spaulding*, 32 Wis., 394; *Pierce v. Sweetzer*, 2 Ind., 649. Evidence of the officer, in general terms, that a sale was made in exact pursuance of the statute, is not sufficient without specifying what was done. *Jesse v. Preston*, 5 Grat., 120.

³ *Richards v. Cole*, 31 Kan., 205

⁴ *Rubey v. Huntsman*, 32 Mo., 501; *Vasser v. George*, 47 Miss., 713, 721. See *State v. Rollins*, 29 Mo., 267; *McNair v. Jenson*, 33 Mo., 312. As to what is to be deemed a "public place" for the purposes of a sale in New Hampshire, see *Cahoon v. Coe*, 57 N. H., 556.

tained.¹ If, however, an adjournment from day to day is authorized, in order to complete a sale after it has been begun, perhaps a reasonable presumption that the sale was begun in season, and adjourned as thus provided, should uphold a sale appearing to have been made afterwards, in the absence of any showing to the contrary.² Where it is provided by statute that, if lands duly advertised are not sold because of restraining orders, they may, on the dissolution of the orders, be sold on ten days' notice, a deed, otherwise regular, showing a sale made

¹ *Wilkins' Heirs v. Huse*, 10 Ohio, 139; *Hope v. Sawyer*, 14 Ill., 254; *Dougherty v. Crawford*, 14 S. C., 628; *Plympton v. Sapp*, 55 Ia., 195; *Vernon v. Nelson*, 33 Ark., 748. The sheriff has no general power to sell for taxes, but only to sell at the time and place fixed by law. *Hogins v. Brashers*, 13 Ark., 242; *Merrick v. Hutt*, 15 Ark., 331; *Bonnell v. Roane*, 20 Ark., 114. Where the regular time for sale is the first Monday of March, but a sale at another time may be ordered by the county court, a deed reciting a sale at another time, but reciting no order, has been held void on its face. *McDermott v. Scully*, 27 Ark., 226; *Spain v. Johnson*, 31 Ark., 314. So has a sale not begun on the day fixed by law. *Prindle v. Campbell*, 9 Minn., 212; *Park v. Tinkham*, 9 Kan., 615; *Entrekin v. Chambers*, 11 Kan., 368; *Sheehy v. Hinds*, 27 Minn., 259. A sale made before the day fixed by law is a nullity. *Gomer v. Chaffee*, 6 Col., 814; *Harkreader v. Clayton*, 56 Miss., 383; *McGehee v. Martin*, 53 Miss., 519. "The proper time for the sale is the time stated in the publication of the delinquent list made in conformity with the statute:" and, if the publication is illegal, the deed is void. *Tully v. Bauer*, 52 Cal., 487. As to time for sale in Massachusetts, see *Kelso v. Boston*, 120 Mass., 297.

² See *Burns v. Lyon*, 4 Watts, 363; *Bestor v. Powell*, 2 Gilm., 119; *Lacy v. Davis*, 4 Mich., 140; *Hurley v. Street*, 29 Ia., 429; *Love v. Welch*, 33 Ia., 192; *Easton v. Savery*, 44 Ia., 654. Where a collector's sale was advertised at a particular time and place, and the collector's return states it to have been held in the town and on the day designated, it will be presumed, in the absence of proof to the contrary, that it was held at the precise time and place specified. *Spear v. Ditty*, 8 Vt., 419. In Connecticut, it seems; a tax collector need not specify in his return the day on which the sale was made. *Pickett v. Allen*, 10 Conn., 146. In Iowa a tax deed showing that the land was sold at an adjourned sale, without reciting the causes justifying it, is at least *prima facie* evidence that the sale was properly held, and that a proper cause for adjournment existed. *Lorain v. Smith*, 37 Ia., 67.

A sale is void if made after the life of the warrant has expired. *Kelly v. Herrall*, 23 Fed. Rep., 364. So it is void if the advertisement of sale is begun sooner than authorized by law. *Person v. O'Neal*, 32 Ia. An., 228.

In Iowa, by statute, a deed is made conclusive evidence of compliance with the statute in respect to time of sale. *Shawler v. Johnson*, 52 Ia., 473. If the sale is not made when it should have been it may be made afterwards. *Litchfield v. Hamilton Co.*, 40 Ia., 66.

on a day more than ten days after the first advertised day, is *prima facie* given on a sale duly made.¹

Competition at the sale. The sale must be a public sale, with opportunity for open competition.² This is a universal requirement; and it may seriously be questioned whether the legislature possesses the power to provide for the extinguishment of the owner's title by a secret or private sale. The sale itself is a proceeding to perfect a statutory forfeiture. The legislature has probably authority to declare a forfeiture of property taxed, for delinquency in making payment; but in such an act the sovereign power of the state is pushed to the very limit, and it is believed that a statute which comes short of such a declaration, and leaves the title still in the owner, could not provide for divesting him of it by means of administrative proceedings secretly taken, and of which neither actual nor constructive notice was to be given him. A public sale is the usual and proper course; and this, in order to constitute any protection to the owner, must be so made as to invite competition. And, as having an important influence on this subject, the courts have been compelled to take notice of fraudulent practices, which are almost as common as tax sales themselves. "I am aware," says one learned judge, "that there is much management and fraudulent perversion of the law about pur-

¹Patterson v. Carruth, 13 Kan., 494; Morrill v. Douglass, 17 Kan., 291; Jordan v. Kyle, 27 Kan., 190.

²Jenks v. Wright, 61 Pa. St., 410; Miller v. Corbin, 46 Ia., 150; Stevens v. Williams, 70 Ind., 536. In Kansas it is held that a payment by one who buys at private sale does not divest the lien of the tax. Harris v. Drought, 24 Kan., 524. Where an officer, after announcing that a sale would be continued from day to day, failed to resume the public sale, and only sold as persons from time to time came to the office, and this was continued during eight months, held that such sales were void because essentially private, and the deeds were not conclusive evidence that the sales were public and legal. Butler v. Delano, 42 Ia., 350; Chandler v. Keeler, 46 Ia., 596; Bullis v. Marsh, 56 Ia., 747; Truesdell v. Green, 57 Ia., 215. If in fact no sale at all is made, but after adjournment lands are simply marked sold to purchasers, the proceeding is void, and a subsequent purchaser, without knowledge of the invalidity, would nevertheless get no title. Truesdell v. Green, 57 Ia., 215. If one hands to the officer making the sale a slip indicating the description he wishes, and it is privately entered as sold to him, this is no sale. Young v. Rheinecker, 25 Kan., 366. See Besore v. Dosh, 43 Ia., 211.

chasing at treasurer's sales. It is our duty to discountenance it."¹ "Over a sale of this description," says another, "the owner has no control; he cannot refuse a bid, or adjourn the sale, or fix a sum below which the property shall not be struck down. The sale is managed by the agent of the state. The owner is not consulted. The highest bidder becomes the purchaser, although the sum bid be less than a hundredth part of the value of the property."² Acres for cents is the rule; the purchasers who congregate at the sale are usually speculators anticipating enormous profits on their investments; and competition in purchases is usually the last thing they desire. The persons in default will, in many cases, be poor and friendless; at any rate they will not be present; and the officer will commonly be found sufficiently disposed to be complaisant to the interests of those who are at hand. It is not surprising, therefore, if in some instances it is discovered that he has accommodated them to an extent that practically excludes all competition.³ It is still more common, perhaps, that purchasers in a friendly way arrange among themselves that no competition shall take place, and that the harvest shall be equitably apportioned between them. All such arrangements are a fraud upon the law and upon those whose protection is had in view when a public sale is provided for. "It is essential to the validity of tax sales, not merely that they should be conducted in conformity with the requirements of the law, but that they should be conducted with entire fairness. Perfect freedom from all influences likely to prevent competition in the sale should in all cases be strictly exacted. The owner is seldom present, and is generally ignorant of the proceeding until too late to prevent it. The tax usually bears a very slight proportion to the value of the property; and thus a great temptation is presented to parties to exclude competition at the sale, and to prevent the owner from redeeming when the sale is made. The proceeding, therefore, should be closely scrutinized, and whenever it has been characterized by fraud or unfairness should be set

¹ *Burnside, J.*, in *Donnel v. Bellas*, 11 Pa. St., 341, 351.

² *Dudley v. Little*, 2 Ohio, 504.

³ As in *Brown v. Hogle*, 30 Ill., 119, where the treasurer, in proceeding to make sale, permitted favored persons to go through his list and select out in advance the lands they would purchase.

aside, or the purchaser be required to hold the title in trust for the owner."¹ Such is the language of the supreme court of the Union in a case in which the purchaser of land at a tax sale had contrived to prevent competition by the representation that the owner would defeat the sale by redemption. The court, very properly and justly, held the sale to be void as a fraud, following in this regard an early case in Ohio, where a combination between bidders to preclude competition was also held fatal to the sale.²

A sale, however, is not necessarily void because of the absence of competition, if it is publicly made and no devices are resorted to in order to prevent bidding.³ And it is not necessarily illegal because a principal and his agent are both bidding,⁴ or because one man is bidding for two with an understanding that bids for one are not to be bids against the other.⁵ But any act on the part of the officer which tends to prevent fair competition will be fatal to the sale,⁶ and so will the absence of competition if brought about by the tacit understanding of bidders,⁷ or by their agreement to take turns in bidding.⁸ But the invalidity in these cases is not absolute as in case of a sale without jurisdiction; it is rather a cause for avoiding the sale than a cause which *ipso facto* defeats it; and if before the proper remedy is sought the land comes to the hands of a *bona fide* purchaser who was ignorant of the fraud, he will be protected in his title.⁹ Perhaps also the purchaser at the sale should be protected if he did not participate in the fraud and was unaware of it.¹⁰

¹Field, J., in *Slater v. Maxwell*, 6 Wall., 268, 276. See, also, *Kerwer v. Allen*, 81 Ia., 578.

²*Dudley v. Little*, 2 Ohio, 504.

³*Beeson v. Johns*, 59 Ia., 166.

⁴*Jury v. Day*, 54 Ia., 578.

⁵*Pearson v. Robinson*, 44 Ia., 413.

⁶*Townsend, etc., Bank v. Todd*, 47 Conn., 190.

⁷*Johns v. Thomas*, 47 Ia., 441; *Singer Manuf. Co. v. Yarger*, 12 Fed. Rep., 487.

⁸*Springer v. Bartle*, 46 Ia., 688.

⁹See *Sibley v. Bullis*, 40 Ia., 429; *Watson v. Phelps*, 40 Ia., 482; *Huston v. Markley*, 49 Ia., 162; *Martin v. Ragsdale*, 49 Ia., 589.

¹⁰In *Case v. Dean*, 16 Mich., 12, it was decided that such a combination between bidders would not defeat the title of a purchaser who was not a party to, nor shown to be aware of it. See, also, *Martin v. Cole*, 38 Ia., 141.

Officer not to buy. In order that there may be free competition, it is essential that the officer who makes the sale should act as salesman only, and not become interested in the purchases. He cannot be allowed to occupy the inconsistent positions of purchaser and seller, in which his cupidity would draw him in one direction and his duty in another. The law cannot safely intrust the securities which are devised for the protection of private parties to the care of those who are interested to prevent their accomplishing the purpose for which they are provided. No provision of law, it is believed, would ever be made which would allow official integrity to be subjected to the trial of such conflicts between interest and duty, as would be sure to arise if the officer were allowed to bid at a sale where his duty would be to obtain the highest practicable bid in the interest of another, while his interest would be to so manage as to obtain the lowest. For the officer voluntarily to put himself in that position is regarded as a fraud on his part upon the law; and on grounds of general public policy, the sale which he makes to himself is void.¹ On no other principle can integrity and good faith be secured in proceedings of this *ex parte* character.

In *Reeve v. Kennedy*, 43 Cal., 643, it is held that a sale cannot be attacked collaterally for fraud in obtaining it.

Holders of separate judgment liens upon the land sold, for the purpose of protecting the liens and preventing an adverse lien from attaching, may agree to jointly bid off the land. Such agreement does not necessarily prevent competition among bidders though there is none between the lien holders; but for the protection of their own interests they may control competition between themselves. "They were under no obligation to bid against each other, and their omission to do so, whether by agreement or otherwise, if not done for the purpose of preventing competition among bidders, will not impair the validity of such sale." *Morrison v. Bank of Commerce*, 81 Ind., 335.

¹ *Pierce v. Benjamin*, 14 Pick., 356; *Clute v. Barron*, 2 Mich., 192; *Payson v. Hall*, 30 Me., 819; *Taylor v. Stringer*, 1 Grat., 158; *Chandler v. Moulton*, 33 Vt., 245; *McLeod v. Burkhalter*, 57 Miss., 65. In *Fox v. Cash*, 11 Pa. St., 207, it is decided that this principle will not preclude a clerk in the treasurer's office from becoming a purchaser. To the same effect is *Wells v. Jackson Manuf. Co.*, 47 N. H., 235, and *O'Reilly v. Holt*, 4 Woods, 645. Or a deputy, if he has nothing to do with the sale. *Hare v. Carnall*, 39 Ark., 196. The officer selling cannot act as agent for others in buying; though if he does so, and the purchase is afterwards set aside on that ground, the owner must refund to the purchaser what he has paid. *Everett v. Besbe*, 37 Ia., 452. In Kansas it is held that an officer's payment under his attempted purchase does not divest the state's lien, nor operate as a payment for the

Sale in separate parcels. The sale should also be made of the parcels of land as they appear in the list. This is the general rule.¹ Exceptions are made by statutes for various reasons. Where a tract is capable of subdivision, the statute may authorize the owner of a part to relieve such part from liability by paying a proportionate part of the tax.² Under some statutes, any one who will distinctly define any portion of an unimproved tract of land may pay the tax upon that portion. So statutes permit the owner or claimant of an undivided interest to pay upon that by itself.³ In any of these cases the part of the land, or the interest in the land, upon which the tax is not paid, remains subject to sale and may be sold by itself. But in other respects the listing is to be followed in the sale.⁴ To

benefit of the lot owner; that in fact what he pays is forfeited to the state while the tax remains a charge as before. *Haxton v. Harris*, 19 Kan., 511. See *Harris v. Drought*, 24 Kan., 524. It seems that in Iowa a purchase made by the officer or his deputy is valid by statute. *Ellis v. Peck*, 45 Ia., 112. If a sale made to an officer is set aside in Arkansas, he is held entitled to be reimbursed what he paid and interest. *Cole v. Moore*, 84 Ark., 582. An officer has no right to buy for the county when not expressly authorized by law. *Wilkins v. Benning*, 51 Ga., 9.

¹ *Hayden v. Foster*, 13 Pick., 492; *Shaw v. Kirkwood*, 24 Kan., 476; *Kregelo v. Flint*, 25 Kan., 695; *State v. Sargeant*, 76 Mo., 557; *Farnham v. Jones*, 32 Minn., 7.

² See *Fellows v. Denniston*, 23 N. Y., 420.

³ Without express statutory authority, undivided interests cannot be sold separately when the tract is assessed as an entirety. *Roberts v. Chan Tin Pen*, 23 Cal., 259; *Cragin v. Henry*, 40 Ia., 158. In Vermont, it appears that a collector's deed of land sold for taxes, which describes the land simply as so many acres of a large lot, passes an undivided interest in such lot equal to the proportion which the number of acres sold bears to the whole number of acres in the lot. *Sheafe v. Wait*, 30 Vt., 735. Where a quarter section is wrongly assessed as one parcel, the owners of distinct parcels of it may pay the taxes on their parcels, leaving the remainder to be sold. *Lawrence v. Miller*, 86 Ill., 502; *Pennell v. Monroe*, 30 Ark., 661. But the officer cannot receipt as for undivided interests in such a case, where the ownerships are in severalty. *Lawrence v. Miller*, 86 Ill., 502. Where the owner of an undivided interest is permitted to pay on that interest, a sale of the remaining interest is valid. *Peirce v. Weare*, 41 Ia., 378.

⁴ *Ballance v. Forsyth*, 13 How., 18; *Walker v. Moore*, 2 Dill. C. C., 256; *Morton v. Harris*, 9 Watts, 319; *Woodburn v. Wireman*, 27 Pa. St., 18; *Hayden v. Foster*, 13 Pick., 492; *Willey v. Scoville*, 9 Ohio, 43; *Atkins v. Hinman*, 2 Gilm., 437; *Spellman v. Curtenius*, 12 Ill., 409; *Pitkin v. Yaw*, 13 Ill., 251; *Penn v. Clemans*, 19 Ia., 372; *Ware v. Thompson*, 29 Ia., 65; *Martin v. Cole*, 38 Ia., 141; *Moulton v. Blaisdell*, 24 Me., 283; *Wallingford*

group lands in the sale which are assessed as separate interests is incompetent, even though they be owned by the same person.¹ Each parcel is chargeable with its own taxes, and is to be redeemed by paying them; but such a joint sale charges it with the tax upon the other also, and is like issuing one execution upon several judgments, and selling jointly the lands which are charged with separate liens.² It may or may not be

v. Fiske, 24 Me., 386; *Andrews v. Senter*, 32 Me., 394; *State v. Richardson*, 21 Mo., 420; *Baskins v. Winston*, 24 Miss., 431. Though a sale together of several lots which really constitute one tract may be good, yet this can only be so when they were assessed together, or when they constitute a definite portion or fraction of what was assessed, so that, by mere division or subtraction, the amount of tax chargeable on the property sold can be determined from the assessment roll. *McQuesten v. Swope*, 12 Kan., 32. In Pennsylvania, the sale of seated lands with unseated is void for want of jurisdiction. *Dietrick v. Mason*, 57 Pa. St., 40. Unseated lands are sold without regard to ownership. *Reading v. Finney*, 73 Pa. St., 467. See *Cuttle v. Brockway*, 32 Pa. St., 45. In New York, it is held competent, where distinct interests are held subject to a lien for taxes, to provide by statute for a judicial sale of the whole fee, on the application of one party, after publication of notice to unknown owners. *Jackson v. Babcock*, 16 N. Y., 246.

¹ *Andrews v. Senter*, 32 Me., 394; *Woodburn v. Wireman*, 27 Pa. St., 18; *Hayden v. Foster*, 13 Pick., 492. See *Crane v. Randolph*, 30 Ark., 579; *Rankin v. Miller*, 43 Ia., 11. In Minnesota, when an assessment is of a whole block, the treasurer cannot sell in parcels. *Moulton v. Doran*, 10 Minn., 67. In Illinois it seems that if distinct tracts belonging to one person are offered separately and no bids received, then two may be offered together, even though not adjoining. *Douthett v. Kittle*, 104 Ill., 356. To sell one's "right, title and interest" in land is not equivalent to a sale of the land itself. *Clarke v. Strickland*, 2 Curt. C. C., 439. Where the sale was of an undivided interest when all was assessed together, the sale was held void. *Roberts v. Chan Tin Pen*, 23 Cal., 259. It would be otherwise if the statute provided for the sale of undivided interests after the tax on other interests had been paid. If sale of part of a tract is enjoined, the remainder, it seems, may be sold separately. *Lane v. Succession of March*, 33 Ia. An., 554.

² *Hall v. Dodge*, 18 Kan., 277; *Mathews v. Buckingham*, 22 Kan., 166. Where a sale of distinct parcels as an entirety is invalid, the question whether the land is to be regarded as one or more parcels is not always determined merely by the usual description of the land. Its use and nature control the description. And lots described as lots 2 and 3 in a town may be sold as one parcel if inclosed, built upon and occupied as one. *Weaver v. Grant*, 39 Ia., 294. See *Greer v. Wheeler*, 41 Ia., 85. If a deed shows that several parcels were sold together in bulk, and that they are separate and distinct parcels not contiguous to each other, the deed is void on its face. *Cartwright v. McFadden*, 24 Kan., 662. See *Farnham v. Jones*, 32

important to the owner that he have the opportunity of a separate redemption, but the fact that it possibly may be so is sufficient reason why the law should protect the right. But where parcels are separately sold, there is no objection to their being united in one conveyance if purchased by the same person, and their being so joined raises no presumption that they were not separately sold.¹

Surplus bond. Various methods are adopted in different states to save something to the owner, if that shall be possible, when his land is sold. One of these is, to have the land put up for sale for what it will bring, and if the bid exceed the tax, with interest and expenses, require the surplus to be deposited in the state or county treasury for the benefit of the party who shall show his right. Another is to require a bond to be given by the purchaser to account for the excess over the taxes and charges, which bond shall be a lien on the land.² Still another

Minn., 7. Where the statute requires a sale to be in parcels not larger than forty acres, it must be strictly followed. *Clarke v. Rowan*, 53 Ala., 400. But it seems that in selling for a federal tax, if the officer acts in good faith the sale is not void because of two parcels being sold jointly. *Springer v. United States*, 103 U. S., 586. See *Keely v. Saunders*, 99 U. S., 441.

¹*Towle v. Holt*, 14 Neb., 221; *Watkins v. Inge*, 24 Kan., 612. The joinder of two parcels in one conveyance does not raise a presumption that they were sold together. *Towle v. Holt*, 14 Neb., 221. And if two tracts be deeded as one parcel, the deed may be supported by evidence that they were separately sold, or that they were sold as one because occupied as one. *Greer v. Wheeler*, 41 Ia., 85.

A misdescription of one parcel of land in a deed does not affect the deed as to the remainder. *Watkins v. Inge*, 24 Kan., 612. In Arkansas it is said that if two parcels are sold separately they may be embraced in the same conveyance, but the deed ought to show the separate sales. *Pack v. Crawford*, 29 Ark., 489; *Pettus v. Wallace*, 29 Ark., 476; *Montgomery v. Birge*, 31 Ark., 491.

²*Peters v. Heasley*, 10 Watts, 208; *Loud v. Penniman*, 19 Pick., 539; *People v. Hammond*, 1 Doug. (Mich.), 276. The giving of the surplus bond is a condition precedent to the passing of the title to the purchaser at the tax sale. *Sutton v. Nelson*, 10 S. & R., 238; *McDonald v. Maus*, 8 Watts, 364; *Donnel v. Bellas*, 10 Pa. St., 341; *Cuttle v. Brockway*, 24 Pa. St., 145. As to suit upon it, see *Crawford v. Stewart*, 38 Pa. St., 34. That there is no presumption such a bond was given, where the tax purchaser does not take possession or pay taxes, see *Alexander v. Bush*, 46 Pa. St., 62. As to the land owner's right to any surplus, see *Workingmen's Bank v. Lannes*, 30 La. An., 871.

If land is sold to the United States for a federal tax and bid in for more

is to require so much of the land to be sold as may be requisite to satisfy the tax and charges, either prescribing a general rule as to where the parcel sold shall be taken off, or allowing a discretion to the officer in that regard.

Excessive sale. It has been said that in the absence of any statute limiting the officer's right to sell, to so much as would be requisite to pay the tax and charges, a restriction to this extent would be intended by the law.¹ Whether this is so or not is perhaps not very material, as it is not for a moment to be supposed that any statute would be adopted without this or some equivalent provision for the owner's benefit. And such a provision must be strictly obeyed. A sale of the whole when less would pay the tax would be such a fraud on the law as to render the sale voidable at the option of the land owner,² and the deed would be void on its face if it showed the fact of such excessive sale.³ So a sale of the remainder after the tax had been satisfied by the sale of a part would also be void, for the very plain reason that the power to sell would be exhausted the moment the tax was collected.⁴

than is due, the United States is liable to the land owner for the surplus. *United States v. Lawton*, 110 U. S., 146.

¹ *O'Brien v. Coulter*, 2 Blackf., 421; *Margraff v. Cunningham's Heirs*, 57 Md., 585; *Townsend, etc., Bank v. Todd*, 47 Conn., 190. The power to provide by law that the whole should be sold, when not necessary to pay the tax, was denied in *Martin v. Snowden*, 18 Grat., 100; *Downey v. Nutt*, 19 Grat., 59.

² *Loomis v. Pingree*, 43 Me., 299; *Lovejoy v. Lunt*, 48 Me., 377; *French v. Patterson*, 61 Me., 203, 210; *Ainsworth v. Dean*, 21 N. H., 400; *Lyford v. Dunn*, 32 N. H., 81; *Jaquith v. Putney*, 48 N. H., 138; *Avery v. Rose*, 4 Dev., 549; *Love v. Wilbourn*, 5 Ired., 344; *Baskins v. Winston*, 24 Miss., 431; *Crowell v. Goodwin*, 3 Allen, 585; *Stead's Executors v. Course*, 4 Cranch, 403; *Mason v. Fearson*, 9 How., 248; *French v. Edwards*, 13 Wall., 506; *Whitmore v. Learned*, 70 Me., 276; *Straw v. Poor*, 74 Me., 53; *Workingmen's Bank v. Lannes*, 30 La. An., 871. Where lands are to be levied upon for taxes, and an excessive levy is made with the assent of the owner, this assent precludes complaint on that ground afterwards. *Jones v. Johnson*, 60 Ga., 260.

³ *Allen v. Morse*, 72 Me., 502.

⁴ See *Washington v. Pratt*, 8 Wheat., 681; *Mason v. Fearson*, 9 How., 248. When the land as assessed consists of several distinct parcels constituting one tract, if the several parcels are offered separately and no bids obtained, the whole may then be offered together. *Slater v. Maxwell*, 6 Wall., 268. Where a quarter section contained several village lots, it was held incom-

It has been shown in a preceding chapter that an excessive levy is void, whether it is made excessive by including with lawful taxes those which are unlawful, or in any other manner. If the levy would be void, there would of course be nothing to uphold a sale.¹ And if a valid levy were to be increased afterwards by unlawful additions, the sale would be equally bad. The statutory power is a power to sell for lawful taxes and lawful expenses, and if it is exceeded by including unlawful items of either class, the power is exceeded and its exercise is invalid *in toto* from the manifest impossibility of saving the sale in part when the invalidity extends to the whole.² It is to be presumed, when the sale has been made for a sum in part illegal, that some undefined and undefinable portion of the land has gone to satisfy an illegal demand, and that such part would not have been sold at all if only what was lawful had been called for.³

tent to sell off an acre from one side for the tax on the whole. *Ballance v. Forsyth*, 13 How., 18. Under the Massachusetts statute providing that if an estate is capable of division the collector may sell so much thereof as would be sufficient to discharge the taxes and intervening charges, it must appear by the collector's deed, or otherwise, that the land was so divided that no greater portion was sold than was necessary to satisfy the tax and charges, or that it could not be conveniently divided to that extent. *Crowell v. Goodwin*, 3 Allen, 535. Undivided interests are not to be sold under this statute. *Wall v. Wall*, 124 Mass., 65; *Sanford v. Sanford*, 135 Mass., 314.

¹ See *ante*, pp. 429-431.

² *McQuilkin v. Doe*, 8 Blackf., 581; *Hutchens v. Doe*, 3 Ind., 528; *Hardenburgh v. Kidd*, 10 Cal., 402; *Harper v. Rowe*, 53 Cal., 233; *Stockle v. Silsbee*, 44 Mich., 561; *Dogan v. Griffin*, 51 Miss., 782; *Beard v. Green*, 51 Miss., 856; *Shattuck v. Daniel*, 52 Miss., 834; *McCann v. Merriam*, 11 Neb., 241; *Covell v. Young*, 11 Neb., 510; *Pack v. Crawford*, 29 Ark., 489; *Young v. Joslin*, 13 R. I., 675; *Buttrick v. Nashua I. & S. Co.*, 59 N. H., 392; *Treadwell v. Patterson*, 51 Cal., 637. See *Cuming v. Grand Rapids*, 46 Mich., 150; *McQuesten v. Swope*, 12 Kan., 82. Sale void where an illegal percentage is added. *Bucknall v. Story*, 36 Cal., 67. Or illegal printing or other charges. *Genthner v. Lewis*, 24 Kan., 309. The rule applies where the tax is made excessive by the levy of an unauthorized percentage on the valuation. *Wattles v. Lapeer*, 40 Mich., 324; *Silsbee v. Stockle*, 41 Mich., 615. The sale being void, the purchaser has no lien for the sum paid. *Naltner v. Blake*, 56 Ind., 127.

³ *Silsbee v. Stockle*, 44 Mich., 501. In Iowa, by statute, a sale made for taxes, any one of which is valid, is to be sustained. See *Corning Town Co. v. Davis*, 44 Ia., 622. There is a similar statute in Michigan. See *Upton v. Kennedy*, 86 Mich., 215. If suit is brought to recover taxes, part of which are illegal, recovery may be had to the extent that they are legal. De

Sale to highest bidder and for cash. When the law requires the sale to be made to the highest bidder that method must be adopted, and the officer has no discretion to substitute any other.¹ And as the conveyance must be in execution of a sale actually made, if the sale is made to one man, and by arrangement the deed is made to another, such deed can convey no legal title, though it might, perhaps, be a basis for relief in equity.² The sale must be for *cash*. The officer can give no credit where the statute provides for none.³ The officer must not demand more than is due and make sale accordingly, for if he shall do so, the sale will be voidable, as already shown.⁴ If the statute requires the land to be sold to the person who will pay taxes, interest and charges for the smallest portion of the land, the officer must sell accordingly and cannot substitute a different sale.⁵ But, observing the statutory directions and precautions, and the principles of the common law and of public

Fremery v. Austin, 53 Cal., 380. The sale should be for all the taxes for which a sale is ordered, or it will be bad. *Tillotson v. Small*, 13 Neb., 202; *O'Donohue v. Hendricks*, 18 Neb., 257; *McGavock v. Pollock*, 13 Neb., 536. See *Worthen v. Badgett*, 32 Ark., 496. As to what are legal costs in a sale, see *Harper v. Rowe*, 53 Cal., 233. The tax will be presumed legal if it may be so under the statute. *Crooks v. Whitford*, 47 Mich., 283.

¹ See *Cardigan v. Page*, 6 N. H., 182; *Bean v. Thompson*, 19 N. H., 290.

² *Keene v. Houghton*, 19 Me., 368. But the sale is not avoided by the delay of the officer in executing papers if in fact no credit was given. *Maina v. Elliott*, 51 Cal., 8.

³ *Cushing v. Longfellow*, 26 Me., 306. In *Longfellow v. Quimby*, 29 Me., 196, it was decided that, where the sale was for cash, the giving of credit to the purchaser afterwards would not defeat it. In *Donnel v. Bellas*, 34 Pa. St., 157, the treasurer took a note from the purchaser instead of cash. The sale was held void, and incapable of being affirmed by the treasurer by receiving payment after leaving office. See the same case, 10 Pa. St., 341; 11 Pa. St., 341.

⁴ *Peters v. Heasely*, 10 Watts, 208; *Loud v. Penniman*, 19 Pick., 539. A sale for the taxes of several years, one of which has been paid, is void. *Kinsworthy v. Mitchell*, 21 Ark., 145. And see *Douglass v. Short*, 3 Dev., 432. Sale of lands for the tax of the wrong party is void. *Gardner v. Brown*, Meigs, 354. Sale for two taxes, one of which is illegal, also void. *Elwell v. Shaw*, 1 Greenl., 339; *Hardenburgh v. Kidd*, 10 Cal., 402. A slight apparent excess will be presumed legal if it may be under the law. *Drennan v. Beierlein*, 49 Mich., 272.

⁵ *Hewell v. Lane*, 53 Cal., 213; *Mora v. Nunez*, 7 Sawy., 455; *Carpenter v. Gann*, 51 Cal., 193. In Louisiana a sale is bad if made for less than is due. *Renshaw v. Imboden*, 31 La. An., 661. If the whole land is sold, the deed should show that this became necessary. *Brookings v. Woodin*, 74 Me., 222.

policy, to which reference has been made, the officer may transfer to the purchaser the full interest in the land which has been assessed, and may convey a complete and perfect title, if such is the provision of the law on the subject, as in many states is the case.¹ Inadequacy of price does not defeat such a sale; if

¹*Osterberg v. Union Trust Co.*, 98 U. S., 424; *Jones v. Randle*, 68 Ala., 258; *Sinclair v. Learned*, 51 Mich., 385; *Eaton v. North*, 29 Wis., 75; *Eastman v. Thayer*, 60 N. H., 408; *Langley v. Chapin*, 134 Mass., 82.

Where the whole title is sold, it cuts off back taxes, unless other provision is made. *Trego v. Huzzard*, 19 Pa. St., 441; *Irwin v. Trego*, 22 Pa. St., 368; *Same v. Same*, 35 Pa. St., 9. In Indiana a tax sale does not cut off any existing right or claim in the state. *Reid v. State*, 74 Ind., 252; *State v. Jones*, 95 Ind., 175. In some states the sale is only of the title which the person taxed had at the time. *Gates v. Lawson*, 32 Gratt., 12; *Morrow v. Dows*, 28 N. J. Eq., 459; *Blackwell v. Pidcock*, 43 N. J., 165. In Tennessee the sale is only of the title of the owner in whose name it was or should have been assessed, subject to existing liens for taxes. *Nashville v. Cowan*, 10 Lea, 209. Under a statute in Pennsylvania a first mortgage is unaffected by any tax on the land which was not a lien when the mortgage was recorded. *Rhein Building Ass'n v. Lea*, 100 Pa. St., 210. In Kansas, if there are successive tax deeds to different persons, each of them may be good as against the original land owner. *Douglass v. Nuzum*, 16 Kan., 515. In Georgia the tax lien is paramount to all other claims, but the officer in selling may sell a part or all of the land, or may sell subject to other liens. *Verdery v. Dotterer*, 69 Ga., 194. See, as to preserving the statutory precedence, *Murray v. Bridges*, 69 Ga., 644.

Statutes sometimes provide for selling a leasehold interest in lands; the person taking them who will pay taxes and charges for the shortest term of years. See *Murphy v. Campan*, 33 Mich., 71. So land mortgaged to the state may, under a proper statute, be sold for taxes subject to the lien, but cutting off the mortgagor's title. *Harrison v. Williams*, 39 Ark., 315. See *Stockwell v. State*, 101 Ind., 1.

It has already been stated that the separate interests of different owners are, under some laws, assessed separately. In such a case, a sale of the land for a tax assessed against one does not cut off the interests of others. *Irwin v. Bank of United States*, 1 Pa. St., 349. See *Macay, Ex parte*, 84 N. C., 63. Where the sale is to be of the smallest quantity of land, the officer must still sell an undivided interest, where such was the interest assessed. *Harper v. Rowe*, 55 Cal., 132.

A trustee, where the trust estate has been sold for taxes, has no superior rights to those of others, to be relieved against the sale. *Dewey v. Donovan*, 126 Mass., 335. See *Greenwalt v. Tucker*, 8 Fed. Rep., 792. An infant's land is subject to tax sale. *Douglass v. Dickson*, 31 Kan., 310.

Where the land is to be struck off to the bidder of smallest quantity, the law commonly designates where the quantity bid shall be set off. But in Iowa, by thus bidding, the purchaser takes an undivided portion. *Brundige v. Maloney*, 52 Ia., 218.

As to an occupant of land relying upon outstanding tax titles with

it did, the power to collect revenue by this method would be futile.¹

Who may acquire tax titles. Some persons, from their relation to the land or to the tax, are precluded from becoming purchasers on grounds which are apparent when their relation to the tax and to the property is shown. The title to be given on a tax sale is a title based on the default of the person who owes to the public the duty to pay the tax, and the sale is made by way of enforcing that duty.² But one person may owe the duty to the public, and another may owe it to the owner of the land by reason of contract or other relations. Such a case may exist where the land is occupied by a tenant, who, by his lease, has obligated himself to pay taxes. Where this is the relation of the parties to the land, it would cause a shock to the moral sense if the law were to permit this tenant to neglect his duty and then take advantage thereof to cut off his lessor's title by buying in the land at a tax sale.³ So the mortgagor, remaining in possession of the land, owes to the mortgagee a duty to keep down the taxes; and the law would justly be chargeable with

which he is not connected, as a defense in suits brought against him, see *Jeffery v. Hursh*, 45 Mich., 60; *Hess v. Griggs*, 43 Mich., 397.

¹ See *Slater v. Maxwell*, 6 Wall., 268; *Shackleford v. Hooper*, 65 Ga., 366.

² That the person taxed cannot acquire a tax title based on his default in paying, see *Garwood v. Hastings*, 38 Cal., 216; *McMinn v. Wheelan*, 27 Cal., 300. Whether this is a universal rule will be considered further on. One who is not in possession, and whose only claim is under a void tax deed, is not precluded from buying. *Neal v. Frazier*, 63 Ia., 451.

³ *Busch v. Huston*, 75 Ill., 343; *Bertram v. Cook*, 33 Mich., 518. The circumstances will sometimes impose this duty without any actual contract. *Williamson v. Russell*, 18 W. Va., 618. In Kansas it seems a tenant not bound to pay the taxes may acquire the title by purchase. *Weichselbaum v. Curlett*, 20 Kan., 709. Compare *Keith v. Keith*, 26 Kan., 26, and *Duffit v. Tuhau*, 28 Kan., 292, which, under peculiar facts, hold the tenant not entitled to acquire a tax title. In Florida he is held not entitled generally. *Petty v. Mays*, 19 Fla., 652.

Where a receiver gives leases, the tenants cannot make use of their possession to redeem from a tax sale, and thus acquire rights in themselves as actual settlers. Buying from the state under such circumstances, they are to be deemed trustees for the benefit of the owners of the property in the hands of the court, and should be allowed the amount paid. *Waggener v. McLaughlin*, 33 Ark., 195.

A purchase at tax sale by a railroad company is not necessarily void on the doctrine of *ultra vires*. *School Dist. v. Allen Co. Com'rs*, 22 Kan., 568; *Dickinson Co. Com'rs v. Land Co.*, 23 Kan., 196.

connivance at fraud and dishonesty, if a mortgagor might be suffered to permit the taxes to become delinquent, and then discharge them by a purchase which would at the same time extinguish his mortgage. There is a general principle applicable to such cases which may be stated thus: That a purchase made by one whose duty it was to pay the taxes shall operate as payment only; he shall acquire no rights as against a third party, by a neglect of the duty which he owed to such party. This principle is universal, and is so entirely reasonable and just as scarcely to need the support of authority. Show the existence of the duty, and the disqualification is made out in every instance.¹

The cases to which attention is called in the margin, and many others to which they refer, will show the application of

¹ *Varney v. Stevens*, 22 Me., 331; *Gardiner v. Gerrish*, 23 Me., 46; *Fuller v. Hodgdon*, 25 Me., 243; *Mathews v. Light*, 32 Me., 305; *Coombs v. Warren*, 34 Me., 89; *Williams v. Hilton*, 35 Me., 547; *Haskell v. Putnam*, 42 Me., 244; *Magner v. Ins. Co.*, 30 La. An., 1357; *Kezer v. Clifford*, 59 N. H., 208; *Cooper v. Jackson*, 99 Ind., 566; *Coxe v. Wolcott*, 27 Pa. St., 154; *Coxe v. Gibson*, 27 Pa. St., 160; *Oldhams v. Jones*, 5 B. Monr., 458, 467; *Blake v. Howe*, 1 Aikens, 306; *Willard v. Strong*, 14 Vt., 532; *Lacey v. Davis*, 4 Mich., 140; *Taylor v. Snyder*, Wal. Ch., 492; *Frye v. Bank of Illinois*, 11 Ill., 367; *Prettyman v. Walston*, 34 Ill., 175; *Higgins v. Crosby*, 40 Ill., 260; *Smith v. Lewis*, 20 Wis., 350; *Avery v. Judd*, 21 Wis., 262; *Bassett v. Welch*, 22 Wis., 175; *Phelan v. Boylan*, 25 Wis., 679; *Edgarton v. Schneider*, 26 Wis., 385; *Brown v. Simons*, 44 N. H., 475; *McLaughlin v. Green*, 48 Miss., 175, 207; *Carithers v. Weaver*, 7 Kan., 110; *Krutz v. Fisher*, 8 Kan., 90; *Leppo v. Gilbert*, 26 Kan., 138; *Annely v. De Saussure*, 12 S. C., 488; *Allison v. Armstrong*, 28 Minn., 276; *Kelsey v. Abbott*, 13 Cal., 609; *Barrett v. Amerein*, 36 Cal., 322; *McMinn v. Whelan*, 27 Cal., 300; *Coffinger v. Rice*, 33 Cal., 408; *Garwood v. Hastings*, 38 Cal., 216; *Savings and Loan Society v. Ordway*, 38 Cal., 679; *Lamborn v. County Courts*, 97 U. S., 181; *Leroy v. Reeves*, 5 Sawy., 102; *Williamson v. Russell*, 18 W. Va., 613; *Foley v. Kirk*, 33 N. J. Eq., 170; *Dayton v. Rice*, 47 Ia., 429; *Stears v. Hollenback*, 38 Ia., 550. The purchaser of the equity of redemption is under the same disability. *Trav. Ins. Co. v. Patten*, 98 Ind., 209.

One who takes title to land subject to the incumbrance of a tax, and subsequently buys the tax title, acquires thus no additional title. *Jacks v. Dyer*, 81 Ark., 334. If a mortgagor has covenanted to pay the taxes, his tenant cannot set up a tax title as against the mortgagee, derived from the mortgagor's failure to pay. *Dunn v. Snell*, 74 Me., 22. One who has acquired an undivided interest under a quitclaim deed purporting to convey the whole is not precluded from buying a tax title originating in his grantor's default, and which when he took possession was held adversely to the whole original title. *Sands v. Davis*, 40 Mich., 14.

the rule under a great variety of circumstances. It has been applied to cases where the default was only in part that of the purchaser; as where he was tenant in common with others,¹ or where his own land was taxed as one parcel with that of another, and the whole was sold together;² to the owner of a life estate in the land, who should have paid the tax for the protection of the inheritance;³ to one in possession under a contract whereby he has undertaken to pay the taxes;⁴ to an agent employed to pay taxes, who made a purchase of his principal's lands, assuming to justify himself on the ground that his principal had neglected to supply him with the means of making payment.⁵ In all such cases, and all to which the like reasons

¹ *Lloyd v. Lynch*, 28 Pa. St., 419; *Maul v. Rider*, 51 Pa. St., 877; *Piatt v. St. Clair's Heirs*, 6 Ohio, 227; *Page v. Webster*, 8 Mich., 263; *Butler v. Porter*, 13 Mich., 262; *Dubois v. Campau*, 24 Mich., 360; *Choteau v. Jones*, 11 Ill., 300, 322; *Brown v. Hogle*, 80 Ill., 119; *Chickering v. Faile*, 38 Ill., 342; *State v. Williston*, 20 Wis., 240; *Phelan v. Boylan*, 25 Wis., 679; *Baker v. Whiting*, 8 Sumn., 475; *Downer's Adm'r v. Smith*, 38 Vt., 464; *Davis v. King*, 87 Pa. St., 261; *Harrison v. Harrison*, 56 Miss., 174; *Fallon v. Chidester*, 46 Ia., 588; *Shell v. Walker*, 54 Ia., 386; *Bracken v. Cooper*, 80 Ill., 221; *Conn v. Conn*, 58 Ia., 747; *Weare v. Van Meter*, 42 Ia., 128. That payment by one tenant in common inures to the benefit of all, see *Chickering v. Faile*, 38 Ill., 342; *McConnell v. Konepel*, 46 Ill., 519; *Oliver v. Montgomery*, 42 Ia., 36; *Winter v. Atkinson*, 28 La. An., 650. He will simply hold for reimbursement. *Allen v. Poole*, 54 Miss., 324. As to what right one might have to buy the interest of his co-tenant after paying his own tax, there is some discussion in *Butler v. Porter*, 13 Mich., 262. As to the right of one tenant in common to buy in a matured tax title, see *Kirkpatrick v. Mathiot*, 4 W. & S., 251; *Reinboth v. Zerbe Run Co.*, 29 Pa. St., 139; *Frentz v. Klotsch*, 28 Wis., 312. The rule that a co-tenant cannot take a deed which will cut off his co-tenant's title applied to a case where the purchase was made before the co-tenancy began. *Tice v. Derby*, 59 Ia., 312.

See *Flinn v. McKinley*, 44 Ia., 68. The husband of a tenant in common is precluded from buying when his wife is. *Burns v. Byrne*, 45 Ia., 285. The tenure in common being dissolved by a third person obtaining paramount title, each co-tenant may buy of him unless by reason of being in possession when the paramount title was obtained he is precluded. *Alexander v. Sully*, 50 Ia., 192.

² *Cooley v. Waterman*, 16 Mich., 366; *Lewis v. Ward*, 99 Ill., 525.

³ *Olleman v. Kelgore*, 52 Ia., 38.

⁴ *Stinson v. Richardson*, 48 Ia., 541; *Fitzgerald v. Spain*, 30 Ark., 95; *Harkreader v. Clayton*, 56 Miss., 383.

⁵ *McMahon v. McGraw*, 26 Wis., 614. As to the disqualification of the agent to purchase his principal's land at tax sale, see, further, *Oldhams v. Jones*, 5 B. Monr., 458; *Bartholomew v. Leach*, 7 Watts, 472; *Matthews v.*

apply, the purchase, as between the parties, is in law a payment only; or if made at second hand from another who was purchaser at the public sale, it is allowed to operate, for the purposes of justice, only as a redemption,¹ and the party making it may have a remedy over for the money paid, or for any portion thereof, if in equity any other person who is benefited by the purchase ought to have paid it; otherwise not.²

Some other cases are not so plain, because the duty as between the parties is not so definitely determined by their contract or by their legal relation. While a mortgagor in general cannot be allowed to cut off his mortgage, by buying in the land at tax sale, yet if the mortgagee were in possession, receiving the issues and profits, and bound to pay the taxes himself, it might not be so clear that the mortgagor should be precluded from taking advantage of the mortgagee's neglect. If it were to be so held, there would seem to be reason for holding that the mortgagee also, by reason of his relation to the title, was precluded from becoming purchaser of the mortgagor's interest at a tax sale, and that his remedy would be confined to a payment for the protection of his lien, with a remedy over for the amount paid. It cannot be said in such a case that

Light, 32 Me., 305; *Lindsley v. Sinclair*, 24 Mich., 380; *Krutz v. Fisher*, 8 Kan., 90; *Schedda v. Sawyer*, 4 McLean, 181; *Kelsey v. Abbott*, 13 Cal., 609; *Bernal v. Lynch*, 36 Cal., 135, 146; *Barton v. Moss*, 32 Ill., 50; *Shay v. MacNamara*, 54 Cal., 169; *Tapp v. Bonds*, 57 Miss., 281; *Bowman v. Officer*, 53 Ia., 640; *Eckrote v. Myers*, 41 Ia., 324. One who has bargained for the land, and is in possession under an agreement to purchase, occupies a similar position. *Haskell v. Putnam*, 42 Me., 244; *Voris v. Thomas*, 12 Ill., 442; *Oliver v. Crowell*, 42 Ill., 41. See *Coxe v. Wolcott*, 27 Pa. St., 154; *Quin v. Quin*, 27 Wis., 168. The mere fact that one had been an attorney for the owner would not preclude his buying. *Pack v. Crawford*, 29 Ark., 489. It is otherwise if he is counsel in a matter relating to the title. *Wright v. Walker*, 30 Ark., 44. See *Eckrote v. Myers*, 41 Ia., 324; *Conn. Mut. L. Ins. Co. v. Bulte*, 45 Mich., 113. The purchase by an agent, however, is only voidable at the option of the principal, who, if he avoids it, must refund what was paid. *Ellsworth v. Cordrey*, 63 Ia., 675; *Conn. Mut. L. Ins. Co. v. Bulte*, 45 Mich., 113.

¹See *Shepardson v. Elmore*, 19 Wis., 424; *Coxe v. Wolcott*, 27 Pa. St., 154; *Carithers v. Weaver*, 7 Kan., 110; *Bernal v. Lynch*, 36 Cal., 135, 146. One in possession under a contract of purchase, though not bound to pay taxes, will only, by a purchase, acquire a right to be reimbursed by the vendor. *Johnston v. Smith's Adm'r*, 70 Ala., 108. See *Harkreader v. Clayton*, 56 Miss., 883.

²See *Conn. Mut. L. Ins. Co. v. Bulte*, 45 Mich., 113.

either mortgagor or mortgagee is under no obligation to the government to pay the tax. On the contrary, the tax being one that purposely is made to override the lien of the one as well as the title of the other, it might well, as it seems to us, be held that neither mortgagor nor mortgagee was at liberty to neglect the payment, as one step in bettering his condition at the expense of the other, but that the presumption of law should be that the party purchasing did so for the protection of his own interest merely. And so, in general, are the authorities.¹ The sale in such a case, however, would not be absolutely void, but only voidable at the option of the party who would be injured by it, and only to the extent necessary for his protection.²

¹ See *Fiske v. Brunette*, 30 Wis., 102; *Chickering v. Failes*, 26 Ill., 507; *Moore v. Titman*, 44 Ill., 367; *Brown v. Simons*, 44 N. H., 475; *Schenck v. Kelley*, 88 Ind., 444. Compare *Williams v. Townsend*, 81 N. Y., 411; *Sturdevant v. Mather*, 20 Wis., 576; *Walthall v. Rives*, 34 Ala., 91; *Harrison v. Roberts*, 6 Fla., 711; *Chapman v. Mull*, 7 Ired. Eq., 292.

A mortgagee who buys at a tax sale may add the amount with interest to his mortgage on foreclosure. *Baker v. Clark*, 52 Mich., 22; *Young v. Brand*, 15 Neb., 601. But if he forecloses first and then buys, he takes the risks of a purchase, and cannot afterwards foreclose again in respect of his tax purchase. *Walton v. Hollywood*, 47 Mich., 385. A mortgagee who has become absolute owner by foreclosure, and then buys at a tax sale, only in legal effect pays the tax, and has no remedy if the tax is bad. *Home Sav. Bank v. Boston*, 131 Mass., 277. Where a city buys at tax sale and puts the mortgagor in possession as tenant at will, the mortgagee cannot enter for breach of condition, since if the mortgagor were ousted the city would be entitled to possession. *Coughlin v. Gray*, 131 Mass., 56.

² That the municipality cannot question the tax title in such case, see *Home Sav. Bank v. Boston*, 131 Mass., 277. In South Carolina it has been decided if a mortgagee of land, which is subject to a mechanic's lien junior to the mortgage, buys at a tax sale, his mortgage will be merged in the fee, the mortgage debt extinguished, and the tax title subject to the mechanic's lien. *Devereux v. Taft*, 20 S. C., 555. But in *Conn. Mut. Life Ins. Co. v. Bulte*, 45 Mich., 118, it was decided that a first mortgagee owed no duty to other lienholders, and may cut off a second mortgagee by a tax purchase. But the utmost that the second mortgagee could claim, if the first mortgagee did not hold the title, would be that the purchase inured as a payment of the tax; and if he redeemed from the first mortgage, he must pay this as a part of the first mortgagee's lien. See, also, *Maxfield v. Willey*, 46 Mich., 252; *Newton v. Marshall*, 62 Wis., 8. In *Hawes v. Howland*, 136 Mass., 267, it was decided that one who buys at a tax sale while a suit is pending to restore the lien of a mortgage will take his title subject to the result of the suit, whether he knew of its pendency or not. In *Maxfield v. Willey*, 46 Mich., 252, it was held that neither party to a mortgage can be suffered

It has been very properly held that one who has conveyed lands with warranty cannot, as against his grantee, acquire a tax title for taxes, any part of which were on the land when his conveyance was given.¹ So he who, pending an injunction sued out by himself to restrain the enforcement of a mechanic's lien, obtains a tax title, will not be allowed to make use of it to defeat the lien.² So a beneficiary under a trust deed can-

against the will of the other to buy at a tax sale, and thereby cut off the other. But either may bid as a stranger to the title if the other does not object. One who has given bond to indemnify the mortgagee against a tax title cannot buy it in and set it up against the rights of the mortgagee acquired by foreclosure. *Wyman v. Baer*, 46 Mich., 418. Where a mortgagee forecloses on land upon which there are taxes due, but against which there are no tax deeds as yet, he may pay the taxes and have the amount included in his judgment, or after confirmation of sale have the sheriff directed to satisfy all tax liens from the proceeds of the sale; but if he delays confirming sale till after deeds have issued for the taxes, he cannot contest them on the ground that when the deeds issued the land did not belong to the mortgagor, and could not be sold as his. *Galbreath v. Drought*, 29 Kan., 711. A mortgagee is not precluded from cutting off one tax title by buying at a second sale. *Spratt v. Price*, 18 Fla., 289. Nor from acting as agent of another in a tax purchase. *Jury v. Day*, 54 Ia., 573. It is held that a junior mortgagee cannot cut off the first mortgage by buying at a tax sale, nor exact penalties if the first mortgagee offers to reimburse him for his payment. *Garrettson v. Scofield*, 44 Ia., 85. See *Strong v. Burdick*, 52 Ia., 630. The above rule held applicable to the case of a judgment lien which was subject to a mortgage. *Fair v. Brown*, 40 Ia., 209. A mortgagee held entitled to acquire a tax title. *Waterson v. Devoe*, 18 Kan., 223. Junior mortgages held not entitled to cut off prior mortgagee by buying a tax title. *Woodbury v. Swan*, 59 N. H., 22. In Connecticut the general rule is laid down that one who has a right to redeem from a mortgage, and on redeeming would be required to refund to the mortgagee any taxes paid by him, cannot be a purchaser of the property if sold for taxes. This rule applied to one who had acquired one-eighth of the equity of redemption (*Middle-town Bank v. Bacharach*, 46 Conn., 513); and to a second mortgagee in possession. *Goodrich v. Kimberly*, 48 Conn., 395. A mortgagee subject to a rent charge cannot cut off the rent charge by procuring a tax title of the land. *Homer v. Dellinger*, 18 Fed. Rep., 495. Where the statute provides that if a mortgagee pays taxes the amount shall become part of the amount due on the mortgage, the mortgagee cannot, by acquiring a tax title, cut off a right of dower. *Walsh v. Wilson*, 130 Mass., 124.

¹*Hannah v. Collins*, 94 Ind., 201. In *Rapp v. Lowry*, 80 Ia. An., 1272, the same ruling was had where the conveyance was without warranty. A creditor in possession cannot buy to the debtor's prejudice. *Miller v. Ziegler*, 81 Kan., 417.

²*McLaughlin v. Green*, 48 Miss., 175.

not acquire a tax title adverse to the trust.¹ And any purchase by one who, by contract or otherwise, was under obligation to pay the taxes, will be deemed a payment only.² But one who has been in possession under a contract of purchase which he has surrendered is not precluded from buying.³

Whether one should be precluded by the naked fact that he claims title to the land, or that he has possession of it, from making a purchase in extinguishment of the right of another with whom he stands in no contract or fiduciary relations, is a question often touched by the discussions of courts without having as yet been very fully or comprehensively examined. So far as the cases hold that one who ought, as between himself and some third person, to pay the taxes, shall not build up a title on his own default, the principle is clear and well founded in equity. But when one owes no duty to any other in respect to the land, it is not so clear upon what principle of equity or of estoppel such other is to set up, as against him, his neglect to perform in due season his duty to the state.

There are some cases in which it has been distinctly held that possession, when the tax was assessed, fixed upon the possessor the duty to pay, and precluded his becoming a purchaser at a sale for the taxes when they became delinquent. In the leading case the occupant had gone into possession under an invalid tax title, and by the decision he was precluded from

¹ *Frierson v. Branch*, 30 Ark., 453. The wife of the grantor in a trust deed is not precluded from buying, and she may hold the tax title against a creditor who has foreclosed. *Carter v. Bustamente*, 59 Miss., 559.

² *Martin v. Swofford*, 59 Miss., 329; *Hunt v. Gaines*, 33 Ark., 267. The facts in these two cases were such that the party paying was entitled to reimbursement. See *Langley v. Chapin*, 134 Mass., 82. A vendee in possession under a contract for cutting timber, the title to which was to be in the vendor until paid for, cannot avoid payment by buying the land at tax sale. *Lacy v. Johnson*, 58 Wis., 414, citing *Taft v. Kessel*, 16 Wis., 273; *Horton v. Arnold*, 18 Wis., 212; *Ludlow v. Gilman*, 18 Wis., 552; *Mecklem v. Blake*, 22 Wis., 588; *McIndoe v. Moorman*, 26 Wis., 588; *Eaton v. Lyman*, 30 Wis., 41; *Oates v. Buckley*, 49 Wis., 592.

³ *Shoup v. Central, etc., R. Co.*, 24 Kan., 547. The holders of judgment liens have been held entitled to buy and hold the title as well against the debtor as against other creditors. *Morrison v. Bank of Commerce*, 81 Ind., 335.

If a tenant becomes a disseizor, and the holder of a tax title brings ejectment against him, a formal waiver by the landlord of his right to object to the tax title will not affect the tenant. *Reid v. Crapo*, 133 Mass., 251.

relying upon a second title which accrued while he was in the occupancy of the land.¹ The subject is dismissed with very brief mention, the court appearing to regard the claim as inequitable and unjust, but for what reason is not very clearly explained. Other cases treat the point as equally plain.² But it seems to be very well deserving of more consideration whether, where parties stand to each other in the position of adverse claimants to land, either of them can insist that the other shall discharge for his protection a duty owing to the public. There being nothing in the relation of the parties to each other upon which an estoppel can be raised, it is necessary to look elsewhere for the disqualification insisted upon; and this can only be found in some general rule of public policy. It is certainly an imperative requirement of public policy that the revenues of the state shall be collected, and that no one shall be allowed to defraud the treasury of his due proportion; but in the case where a tax sale has been made there is no fraud,

¹ *Douglas v. Dangerfield*, 10 Ohio, 152.

² *Choteau v. Jones*, 11 Ill., 300, 322; *Lacey v. Davis*, 4 Mich., 140, 152

The doctrine of *Choteau v. Jones*, *supra*, was affirmed in *Voris v. Thomas*, 12 Ill., 442, and the same general doctrine is asserted in *Smith v. Lewis*, 20 Wis., 350, 354, though there the case was between mortgagee and the assignee of the mortgage, and the relation of the parties precluded a purchase. The same remark may be made of *Dubois v. Campau*, 24 Mich., 360. *Bassett v. Welch*, 22 Wis., 175, goes the full length of deciding that the mere fact of possession when the taxes are assessed is a disqualification to buy. *Jones v. Davis*, 24 Wis., 229, was a case where one in possession of land had endeavored to cut off a judgment lien by a purchase at tax sale, corresponding to the case of purchase by a mortgagor. *Whitney v. Gunderson*, 31 Wis., 359, 379, asserts the broad doctrine that if one was in possession when the tax was assessed, "it then became his duty to pay the taxes, and he could not permit the lands to be sold for such taxes, and obtain a tax deed for the purpose of destroying an outstanding title." And see *McMinn v. Whelan*, 27 Cal., 300; *Barrett v. Amerein*, 36 Cal., 322; *Christy v. Fisher*, 58 Cal., 256; *Guyun v. McCauley*, 32 Ark., 97; *Blakely v. Bestor*, 13 Ill., 708; *Keith v. Keith*, 26 Kan., 26. In *Swift v. Agnes*, 33 Wis., 228, it is decided that where one owning land, and bound to pay taxes thereon, permits them to be sold and deeded for such taxes, and then purchases the tax title, and causes it to be conveyed to a third person for his benefit, he cannot set up such title as a defense in ejectment against one who has purchased at a sale on execution against him since the execution of the tax deed. There is nothing in the fact that the owner of the land has become the purchaser at tax sale which can estop him from claiming the surplus moneys. *Russel v. Reed*, 27 Pa. St., 166.

and the revenue chargeable upon the land has been received. No wrong has consequently been done to the state. There has been delay in payment, but it is one for which the state makes ample provision, and for which it charges and collects all costs, as well as a further sum under the name of interest or penalty sufficient fully to compensate for any public inconvenience. It is not perceived that the state can then have any complaint to make, as the duty owing to it, though performed tardily, has been performed at last, and the incidental inconvenience paid for. The state, then, not being wronged in the purchase, it would seem that if any individual objects to it he ought to be able to point out how and in what particular it wrongs him.

It is difficult to dispute the truth of what is said by the supreme court of Pennsylvania, that "there is nothing in reason or law to prevent a man who holds a defective title from purchasing a better at a treasurer's sale for taxes."¹ As between himself and any adverse claimant, the state is not concerned to inquire whether the one or the other was in possession. If the state, in taxing land, takes any notice of ownership, it is either for the convenience of the officers in making collections or for information to parties concerned. The tax is upon every possible interest in the land; and all parties having interests are equally under obligation to the state to make payment. The penalty for failure is a forfeiture or sale which will cut them all off; and while, without doubt, any one may defeat such a sale who can give satisfactory reasons for an assertion that it would be unjust to him for the purchaser to be allowed to rely upon it, it is not perceived that any other person can, upon plausible

¹ *Woodward, J.*, in *Coxe v. Gibson*, 27 Pa. St., 160, 165. And see *Blackwood v. Van Vleet*, 30 Mich., 118; *Lybrand v. Haney*, 31 Wis., 230. In *Tweed v. Metcalf*, 4 Mich., 579, it was decided that one who had bought at a tax sale might buy the same land at a subsequent sale made at any time before redemption from the first had expired. In *Eaton v. North*, 29 Wis., 75, it was held that one having a tax title, but not in possession, might buy at a subsequent sale. In *Stubblefield v. Borders*, 92 Ill., 279, it is said that, where no duty appears to rest on one who claims title to land to pay old taxes assessed upon it, his purchase of an outstanding title for such taxes will not be held a payment, but a purchase. In *Paul v. Fries*, 18 Fla., 573, it is held that, if one who has an apparently valid tax title buys again, his purchase is only payment.

grounds of equity, insist upon the privilege to do so.¹ There are decisions that the possession of a mere intruder or trespasser will not preclude his becoming purchaser:² if this is true, mere possession ought not to be an impediment in any case; for the element of wrong involved in the possession of a trespasser cannot, on any grounds of equity or justice, be taken notice of as giving him a privilege denied to one whose possession is rightful.³

In what is said above it must not be understood that when it is said one may rely upon a tax title, this means that the title is to be held valid in his favor. In general, if there are fatal irregularities or defects in a tax title, any one may rely upon them when the tax title is made use of against him; as they go, or may go, to the power of the officer to sell at all.

Bids by the state or county. It is not an uncommon provision that, if no bidders offer to take the land and pay the tax, it shall be bid in for the state or for the county.⁴ A purchase

¹ It is held in California that one in possession of lands, if under no legal or moral obligation to pay the tax, may buy in the lands at tax sale. *Moss v. Shear*, 25 Cal., 33. The same ruling is made in Kansas. *Bowman v. Cockrill*, 6 Kan., 311, 332. In *Blackwood v. Van Vleet*, 30 Mich., 118, it is said that, "to preclude any person from making and relying upon a purchase of lands at tax sale, there must be something in the circumstances of the case which imposes upon him a duty to the state to pay the tax, or something which renders it inequitable, as between himself and the holder of the existing title, that he should make the purchase." And it is denied that the mere fact that one is in possession of the land when the tax is levied should preclude his becoming purchaser when the land is not assessed to him, and he is bound by no contract relations to pay the tax.

² *Buckley v. Taggart*, 62 Ind., 236; *Link v. Doerfer*, 42 Wis., 391. In this last case it is said, if no title appears, the party presumptively is a mere intruder. See *Read v. Crapo*, 133 Mass., 201.

³ In *Curtis v. Smith*, 42 Ia., 665, it is held that, if possession is held neither as tenant, nor trustee, nor agent, of the owner, it is no impediment to getting a tax title. Hence one in possession who claims adverse to the owner under a void quitclaim deed may buy. And in *Seaver v. Cobb*, 98 Ill., 200, it is decided that one may buy up a tax title, held by a third party, which accrued while he occupied the land claiming that it belonged to the United States, and may use such title against an adverse claimant.

⁴ In the absence of express statutory authority a city or other municipality cannot buy land at a tax sale. *Logansport v. Humphrey*, 84 Ind., 467; *Champaign v. Harmon*, 98 Ill., 491. The state has no priority over county or city when the sale does not produce enough to pay all. *Nashville v. Lee*, 12 Lea, 452.

on such a bid would give the state or county the usual rights of a purchaser, and no more.¹ Whether a deed would be requisite to carry into effect such a purchase must depend upon the statute.² If by statute land is to be struck off to a county without its bidding in case there are no bidders, a deed to the county which shows a bid for it, and does not show there were no other bidders, is void on its face.³ In general, it may be said that, when land is struck off to the state or any of its municipalities in pursuance of law, no better title passes than would pass on a purchase by an individual; and the title, when brought in contest, must be proved in the usual way unless the statute has made some special rule on the subject.⁴

¹ See *Gendrey v. Broussard*, 32 La. An., 924.

² Commissioners authorized to bid the amount of the tax on behalf of the county, if they bid more, may have the land left on their hands unless the county see fit to take it. The bid cuts off the prior title. *Russell v. Reed*, 27 Pa. St., 166. And see *Cuttle v. Brockway*, 32 Pa. St., 45. Commissioners authorized to bid off land for the United States, unless some person will bid two-thirds the appraised value, are not compelled to do so, and a sale to another bidder for less is not invalid. *Turner v. Smith*, 14 Wall., 553, 562. Where lands are bid in by a county at a tax sale, and the law provides for their being subsequently sold after a specified notice, a private sale without the notice is void. The provision for such a sale is to be regarded as a proceeding to collect taxes, and must be followed. *Jenks v. Wright*, 61 Pa. St., 410.

In Kansas the county treasurer holds a certificate of sale to the county until it can be sold to an individual, and then assigns the certificate. The county commissioners cannot control his action in this regard. *State v. Magill*, 4 Kan., 415. In Nebraska counties may purchase at a tax sale when there are no private bidders, and may assign the certificate. *Shelley v. Towle*, 16 Neb., 194; *Otoe Co. v. Brown*, 16 Neb., 394.

³ *Norton v. Friend*, 13 Kan., 532; *Magill v. Martin*, 14 Kan., 67; *Babbitt v. Johnson*, 15 Kan., 252; *Larkin v. Wilson*, 28 Kan., 513. Though it is provided by statute that lands struck off to a county shall not be resold while the county holds the title, yet if its purchase was void the statute will be held not applicable, and the county may acquire a subsequent title while still holding the first deed. *Morrill v. Douglass*, 17 Kan., 291. A county in Kansas which takes a tax title cannot sell for less than the statutory cost of redemption. *Noble v. Cain*, 22 Kan., 493. See a special case as to a sale by a county of its tax certificates in a lump. *Morrill v. Douglass*, 14 Kan., 293. If a county is authorized by law to bring suit for taxes, it has authority to buy lands on the judgment. *Douthett v. Kettle*, 104 Ill., 356.

⁴ As to proving the title of the state in Mississippi, see *Clymer v. Cameron*, 55 Miss., 593; *Vaughan v. Swayzie*, 56 Miss., 704; *Weathersby v. Thoma*, 57 Miss., 296; *French v. Ladd*, 57 Miss., 678; *Mayson v. Banks*, 59 Miss., 447.

Different sales at the same time. Where the taxes of several years are delinquent at the same time, sales are sometimes permitted to be made separately for each year's tax. Such sales might raise serious questions as between purchasers, if two or more should severally buy the land at sales bearing the same date, and subject to the same redemption. In Iowa it seems that such separate sales are unauthorized.¹ Such questions might and should be settled by statute.

Certificate of sale. The sale is usually accompanied or followed by the issue to the purchaser of a certificate, which recites the fact of sale, and states the time when the purchaser will become entitled to a conveyance.² The rights of the purchaser under such a certificate are not uniform in the different states. In some he would perhaps be recognized as owner of an estate subject to be defeated on the statutory redemption being made; in others as owner of an inchoate title which would become complete if the time for redemption expired without its being made.³ In some states the purchase

And a purchase from the state: *Allen v. Poole*, 54 Miss., 323. In North Carolina it is said a tax title acquired by a city is a nullity unless the statute is shown to have been strictly complied with. *Busbee v. Lewis*, 85 N. C., 332.

¹*Preston v. Van Gorder*, 31 Ia., 250; *Shoemaker v. Lacey*, 38 Ia., 277. In Iowa, where the treasurer on the same day made different sales of the same land for the taxes of different years, and the owner, being aware of but one sale, had redeemed therefrom in good faith, he was held entitled to redeem from the other after the statutory time, by paying the amount for which the land was sold, with legal interest and penalty. *Shoemaker v. Lacey*, 38 Ia., 277, citing *Noble v. Bullis*, 23 Ia., 559. In California it is held that a sale for a city tax of one year will not cut off the tax for the preceding year. *Cowell v. Washburn*, 22 Cal., 519. But if sales are made for the taxes of two years the title for the last year prevails over the other. *Chandler v. Dunn*, 60 Cal., 15.

Where by mistake a sale was made for one tax when it should have included several, and the owner of the record title bought up the tax title, *held*, this operated as a redemption merely. *Bowman v. Eckstien*, 46 Ia., 533, distinguishing earlier cases. But in general in Iowa a sale for taxes cuts off all prior taxes. See *Hough v. Easley*, 47 Ia., 330.

²The certificate is evidence of the sale, but it is said the record of sale is better evidence. *McCready v. Sexton*, 29 Ia., 336; *Henderson v. Oliver*, 32 Ia., 512; *Clark v. Thompson*, 37 Ia., 536. In Louisiana it seems the registry laws apply to tax certificates. *Meyer v. Fountain*, 34 La. An., 987.

³In Kansas it seems to be held that title passes at the sale, subject to be defeated by redemption. *Stebbins v. Guthrie*, 4 Kan., 353. In Alabama

gives a lien merely,¹ and provision has been made in some cases for a suit to foreclose this lien, in which suit all questions affecting the validity of the sale might be passed upon.² Pending the right to redeem, the purchaser would doubtless have the same rights to protect his interests which would exist in analogous cases of purchases at judicial sales.³

In general, a right to assign his certificate will be found given by statute, and when exercised, the assignee becomes entitled to all the rights acquired by the purchase; to the redemption money if redemption is made, and to a deed if it is not.⁴ But he will acquire no rights superior to those of his assignor.⁵

the purchaser has no title until he gets his deed. *Johnson v. Smith's Adm'r*, 70 Ala., 108. See to the same effect, *Tilson v. Thompson*, 10 Pick., 359; *Hightower v. Freedle*, 5 Sneed, 312; *Alexander v. Bush*, 46 Pa. St., 62; *Stephens v. Holmes*, 26 Ark., 48.

A statute making a tax certificate of sale under a judgment *prima facie* evidence that all the requirements of the law in respect to the sale have been complied with, does not make it evidence of the judgment. *Sanborn v. Cooper*, 31 Minn., 307. In Nebraska the certificate is presumptive evidence of the regularity of all the prior proceedings (*Bryant v. Estabrook*, 16 Neb., 217), and it is not invalid because of being made out several months after the sale. *Otoe Co. v. Brown*, 16 Neb., 394.

¹ See *Phillips v. Myers*, 55 Ia., 265; *Spratt v. Price*, 18 Fla., 289.

² See *Manseau v. Edwards*, 53 Wis., 457. The statutory suit may be resorted to even though a deed has been given, if the deed proves to be void. *Potts v. Cooley*, 56 Wis., 45.

³ See *Ferguson v. Miles*, 3 Gilm., 358; *Stout v. Keyes*, 2 Doug. (Mich.), 184. Under the Missouri statute it has been held that the tax deed does not relate back to the sale, where redemption was allowed afterwards. *Donohoe v. Veal*, 19 Mo., 331. See *Hemingway v. Drew*, 47 Mich., 554. A statute giving a tax purchaser an action for waste committed between the time of the sale and the giving of the deed will not entitle him to the timber cut in that period, but only to damages. *Lacy v. Johnson*, 58 Wis., 414, citing *Northrup v. Trask*, 39 Wis., 515.

The tax deed when given relates back to the time of sale for all purposes of substantial justice, but the fiction of relation will not be suffered to work a wrong. *Conn. Mut. L. Ins. Co. v. Bulte*, 45 Mich., 113.

⁴ See *McCauslin v. McGuire*, 14 Kan., 234; *Smith v. Stephenson*, 45 Ia., 645. Where a tax certificate has been assigned, a second assignment by the purchaser is void, and a deed based thereon is void, even as against the original owner. *Smith v. Todd*, 55 Wis., 459, citing *State v. Winn*, 19 Wis., 301; *Horn v. Garry*, 49 Wis., 464.

⁵ He cannot bring ejectment before obtaining his deed. *Hibbard v. Brown*, 51 Ala., 469; *Costley v. Allen*, 56 Ala., 198. Unless the statute expressly authorizes it. See *Billings v. McDermott*, 15 Fla., 60. He takes the certificate subject to all infirmities. *Light v. West*, 42 Ia., 138; *Resore v. Doak*,

Report of sale. A report of the sale by the officer who has made it is commonly provided for, sometimes for the purposes of a record exclusively, and sometimes, also, because some other officer than the one who made the sale is to execute the deed. The making of this report is important to the land owner if his right to redeem is to depend upon or to be ascertained by it, and then the failure to make it would be fatal.¹ If made, it should be filed in proper time, and conform in its recitals to the statutory requirements,² and the deed, if one is subsequently given, must follow the report.³ But where the case is such that a report is of no importance to the land owner, he would probably not be heard to complain of a failure to make return, or of errors or imperfections in it.

The deed. The deed is the last act in the execution of the statutory power, and all conditions precedent must be complied with before it can lawfully be given. One of the most important of those sometimes provided for is, that notice be served upon the owner of the record title; and in respect to such a requirement observance of the statute must be strict and particular.⁴ The deed when given must be officially exe-

43 Ia., 211. It is not good unless officially signed. *Billings v. Stark*, 15 Fla., 296. If the tax purchaser was incompetent to buy and hold a tax title, he cannot make a valid assignment. *Jackson v. Jacksonport*, 56 Wis., 310. After assignment the purchaser cannot be reinvested in his ownership by procuring the certificate to be redelivered to him and erasing the assignment. *Bird v. Jones*, 37 Ark., 195. But this would probably not be held in all the states. A tax deed issued to one as assignee when he is not is void. *Smith v. Todd*, 55 Wis., 459; *Dreutzer v. Smith*, 56 Wis., 292. But defects in the assignment cannot be alleged after the statutory period of limitation has run. *Haseltine v. Simpson*, 58 Wis., 579. In Kansas a tax deed to one as assignee proves the assignment, and the land owner cannot disprove it. *Gardenhire v. Mitchell*, 21 Kan., 83.

¹*De Quasie v. Harris*, 16 W. Va., 345; *Jones v. Dills*, 18 W. Va., 759; *Barton v. Gilchrist*, 19 W. Va., 223; *Orr v. Wiley*, 19 W. Va., 150. See *Burlew v. Quarrier*, 16 W. Va., 108.

²*Barton v. Gilchrist*, 19 W. Va., 223; *De Quasie v. Harris*, 16 W. Va., 345.

³*Burlew v. Quarrier*, 16 W. Va., 109.

⁴See *Denike v. Rourke*, 3 Biss., 39; *Potts v. Cooley*, 51 Wis., 353; *Wilson v. Crafts*, 56 Ia., 450; *Reed v. Thompson*, 56 Ia., 457; *Le Blanc v. Blodgett*, 34 Ia. An., 107. Service upon an occupant of the land is not sufficient when personal notice is required. *Gage v. Schmidt*, 104 Ill., 106. See *Heaton v. Knight*, 63 Ia., 686; *Blackstone v. Sherwood*, 31 Kan., 35. If the

cuted;¹ and a deed made after the officer's term has expired is void unless expressly authorized by law.²

The tax deed should conform to the statute in the formalities of execution, such as signing, witnessing and acknowledgment,³ and it is generally held that, if it is defective or erroneous in these or any other particulars, a bill will not lie in equity to reform it.⁴ What recitals the deed shall contain may or may

statute requires affidavit of the fact of notice to be made before the deed issues, the affidavit must show the manner of giving notice. *Price v. England*, 109 Ill., 394.

If a tax deed shows on its face that it is prematurely executed it is void. *Neal v. Spooner*, 20 Fla., 88. If the statute provides that the deed shall be given on production of the certificate, this production is a condition precedent. *Thompson v. Merriam*, 15 Neb., 498.

¹ In Nebraska the deed must be under seal: *Reed v. Merriam*, 15 Neb., 323; and this means a real seal. *Hendrix v. Boggs*, 15 Neb., 469. The mistake in the date of acknowledgment of a deed will neither invalidate it nor preclude its being recorded. *Yorty v. Paine*, 62 Wis., 154.

² The statute in force when a deed is given will determine its formal sufficiency. *McCann v. Merriam*, 11 Neb., 241; *Covell v. Young*, 11 Neb., 510; *Baldwin v. Merriam*, 16 Neb., 199. It will be void if it fails to show where the sale was made, and the officer cannot issue a second deed on the canceled certificate. *Baldwin v. Merriam*, 16 Neb., 199. See *Shelley v. Towle*, 16 Neb., 194.

³ *Hoffman v. Bell*, 61 Pa. St., 444. It is no objection that it was executed after the tax payer's death. *Currie v. Fowler*, 3 A. K. Marsh., 504. For some peculiar questions arising under what was called the Kansas compromise act of 1879, see *Ide v. Finneran*, 29 Kan., 569. In general the statute will provide in what name as grantor the deed shall be made. When it does not, a deed on a sale for a city tax should be in the name of the city. *Sams v. King*, 18 Fla., 557.

⁴ *Tilson v. Thompson*, 10 Pick., 359; *Stierlin v. Daley*, 37 Mo., 483; *Dalton v. Fenn*, 40 Mo., 109; *Gabe v. Root*, 93 Ind., 256; *Dunlap v. Henry*, 76 Mo., 106. See *Little v. Herndon*, 10 Wall., 26; *Sibley v. Smith*, 2 Mich., 486; *Elston v. Kennicott*, 46 Ill., 187; *Wetherbee v. Dunn*, 32 Cal., 106; *Large v. Fisher*, 49 Mo., 307. In *McMichael v. Carlyle*, 53 Wis., 504, a tax deed was held not void for want of a date. See *Phelps v. Meade*, 41 Ia., 470. It is void without the county seal when the statute requires it. *Sutton v. Stone*, 4 Neb., 319. A deed covering two sales may be good if either sale was good. *Hunt v. Chapin*, 42 Mich., 24. Where by the statute the land was to be conveyed, a deed of the right, title and interest of the state was held infellectual. *Hodgdon v. Burleigh*, 4 Fed. Rep., 111.

⁵ *Keepfer v. Force*, 86 Ind., 81; *Bowers v. Anderson*, 52 Miss., 596.

Contra, *Hickman v. Kempner*, 35 Ark., 505. The tax deed is void if it gives no name of purchaser. *Knowlton v. Moore*, 136 Mass., 32; *Eaton v. Lyman*, 33 Wis., 34. But a deed to a partnership is not void for that reason. *Sherry v. Gilmore*, 58 Wis., 324.

not be determined by the statutes of the state. If a form is given by statute and is followed, it must be held sufficient;¹ but if none is given enough should appear to show that the

¹*Bell v. Gordon*, 55 Miss., 45; *Bowers v. Chambers*, 53 Miss., 259. Slight departures from the statutory form will be overlooked. *Bowman v. Cockrill*, 6 Kan., 811; *Haynes v. Heller*, 12 Kan., 881; *Geekie v. Kirby, etc., Co.*, 106 U. S., 379. See *Hardie v. Chrisman*, 60 Miss., 671; *Brigins v. Chandler*, 60 Miss., 862. But the deed is void if recitals required by statute are omitted. *Haller v. Blaco*, 10 Neb., 36.

If the form as given by the statute contains recitals which would make the sale invalid, they should be omitted. *Magill v. Martin*, 14 Kan., 67; *McCauslin v. McGuire*, 14 Kan., 284; *Morrill v. Douglass*, 14 Kan., 294. A deed in the statutory form, but containing recitals not required by the statute, is no evidence of the truth of such recitals. *Millikan v. Patterson*, 91 Ind., 515. A deed of resident lands in the form required for non-resident lands held void. *Jacks v. Dyer*, 81 Ark., 894.

It has been held in California that, if the recitals in a deed show the proceedings in any part defective, the deed cannot be helped by showing that, in fact, they were good. *Grimm v. O'Connell*, 54 Cal., 522; *Hubbell v. Campbell*, 56 Cal., 527. But see *Caruthers v. McLaren*, 56 Miss., 371. Recitals in a deed not required by statute to appear may be treated as surplusage. *Flannagan v. Grimmer*, 10 Grat., 421; *Hobbs v. Shumates*, 11 Grat., 516; *Harper v. Rowe*, 55 Cal., 182. Where the statute requires the date of execution or of the order of the county court authorizing a sale for taxes to be recited in the deed, this must appear, or the deed will be void. *Williams v. McLanahan*, 67 Mo., 499. See *Sabattie v. Baggs*, 55 Ga., 572; and, as to statutory form and compliance therewith, *Adams v. Mills*, 126 Mass., 278.

Omission of recitals required by statute held to avoid the deed. *Haller v. Blaco*, 10 Neb., 36; *Lunenberg v. Walter, etc., Co.*, 118 Mass., 540; *Reed v. Crapo*, 127 Mass., 39; *Thompson v. Merriam*, 15 Neb., 498.

One who claims under a tax deed is concluded by its recitals as to the person to whom the land was assessed. *Brady v. Dowden*, 59 Cal., 51; *Grimm v. O'Connell*, 54 Cal., 522. Compare *Hickman v. Kempner*, 35 Ark., 505. In Arkansas erroneous recitals in a tax deed may be corrected in equity. *Ibid.* But the recitals are presumptively true. *Thweatt v. Black*, 30 Ark., 732. And so they are in Kansas. *Hobson v. Dutton*, 9 Kan., 477.

It seems to be settled in Pennsylvania that a deed of county commissioners given on a sale for taxes, reciting the facts which would make out a good sale, is *prima facie* evidence of those facts. *Lee v. Jeddo Coal Co.*, 84 Pa. St., 74, reviewing prior cases. See, as to New York, *Rathbone v. Hooney*, 58 N. Y., 463. In Maine recitals are not evidence of the facts recited when not made so by statute. *Nason v. Ricker*, 63 Me., 381. Where a deed is made evidence only of its own recitals, important facts not recited must be proved. *Lawrence v. Zimpleman*, 37 Ark., 643. If the deed recites that the land sold was offered separately, this in Iowa is conclusive. *Chandler v. Keiler*, 44 Ia., 371.

deed is made in execution of the statutory power.¹ Here again description becomes important; the description should, in substance at least, follow that in the assessment when the whole parcel assessed was sold, and if less than the whole, then the connection between what was assessed and what was sold should appear.² In either case the description should be one that with reasonable certainty identifies the land.³ If the deed is to one as assignee of the purchaser, there must be evidence, by recital therein or otherwise, of the fact of the assignment.⁴

The form of the deed may be changed by legislation after the purchase is made, and the purchaser cannot object when it does not injure him.⁵

¹ In Rhode Island it seems that the facts going to show a regular sale may be proved by parol if the return of sale which the statute provides for is not made. *Thurston v. Miller*, 10 R. I., 358. If the recitals in the deed do not conform to the facts a second and correct deed may be given. *Douglas v. Nuzum*, 16 Kan., 515; *Gould v. Thompson*, 45 Ia., 450. But when the first deed was right, a second cannot be given to avoid the bar of the statute of limitations. *Corbin v. Bronson*, 28 Kan., 532.

² See *Quivey v. Lawrence*, 1 Idaho, 313; *Blair Town, etc., Co. v. Scott*, 44 Ia., 143. In West Virginia it was held, if the whole tract is reported sold, a deed of a part only is invalid. *Williamson v. Russell*, 18 W. Va., 612. As to setting off the land in that state when only a part is sold, see *Delany v. Goddin*, 12 Grat., 266; *Nowlin v. Burwell*, 28 Grat., 883.

³ For illustrations see *Wendell v. Whitaker*, 28 Kan., 690; *Martz v. Newton*, 20 Kan., 331; *Jacks v. Chaffin*, 34 Ark., 534; *Judd v. Anderson*, 51 Ia., 345. Latent defects in description may be explained by parol evidence. *Brown v. Walker*, 11 Mo. App., 226; *Nelson v. Brodhack*, 44 Mo., 596; *Judd v. Andersen*, 51 Ia., 345. A tax deed of one hundred acres of a tract of six hundred is void, and does not entitle the grantee to have a hundred acres surveyed out as the land granted. *Humphries v. Huffman*, 33 Ohio St., 395.

⁴ *Florida Sav. Bank v. Brittain*, 20 Fla., 507.

⁵ *Gardenhire v. Mitchell*, 21 Kan., 83. In Kansas the purchaser is entitled to his deed when the regular time for redemption has expired, even though there may be a contingent right to redeem by minors, but he will take subject to such contingent right. *Ibid.*

The fact that both parties in ejectment claim under the state through successive tax titles cannot preclude either from denying the validity of the other's deed. *Wadleigh v. Marathon Co. Bank*, 58 Wis., 546.

For cases passing upon particular defects as defeating or not defeating a tax deed, see *Wing v. Hall*, 47 Vt., 182, 215; *Renshaw v. Imboden*, 31 La. An., 661; *Madland v. Benland*, 24 Minn., 372; *Coxe v. Deringer*, 82 Pa. St., 236; *Austin v. Holt*, 32 Wis., 478; *Lybrand v. Haney*, 31 Wis., 230; *Cutler v. Hurlbut*, 29 Wis., 152; *Marshall v. Benson*, 48 Wis., 558; *Jenkins v. McGreece*, 22 Fed. Rep., 148; *Woodward v. Sloan*, 27 Ohio St., 592; *Coleman v. Shattuck*, 62 N. Y., 348; *Earle v. Simons*, 94 Ind., 573.

The tax deed as evidence. It has been shown that, according to the principles of the common law, the purchaser at a tax sale, when he attempts to enforce rights under his purchase, is under the necessity of taking upon himself the burden of showing that the purchase was made pursuant to law. To do this he must show the substantial regularity of all the proceedings. The deed of conveyance would not stand for this evidence. It would prove its own execution; nothing more. The power to execute it must be shown before the deed itself could have any force; for no officer can make out his own jurisdiction to act by the mere fact of acting. In all administrative proceedings the facts upon which jurisdiction depends must always be shown by him who claims anything under its exercise. This principle is undisputed. It leads us inevitably to this conclusion: that whoever claims lands under a sale for delinquent taxes must take upon himself the burden of proving that taxes were duly assessed, which were a charge upon the land, and that the successive steps were taken which led to a lawful sale therefor, at which he or some one under whom he claims became the purchaser.¹ And this common law rule of evidence must be applied

¹*Stead's Lessee v. Course*, 4 Cranch, 403; *Williams v. Peyton*, 4 Wheat., 77; *McClung v. Ross*, 5 Wheat., 116; *Thatcher v. Powell*, 6 Wheat., 119; *Ronkendorff v. Taylor*, 4 Pet., 849; *Clarke v. Strickland*, 2 Curt. C. C., 439; *Minor v. McLean*, 4 McLean, 138; *Moore v. Brown*, 4 McLean, 211; *Same Case in error*, 11 How., 414; *Mahew v. Davis*, 4 McLean, 213; *Parker v. Overman*, 18 How., 137; *Brown v. Veazie*, 25 Me., 359; *Payson v. Hall*, 30 Me., 319; *Loomis v. Pingree*, 43 Me., 299; *Lovejoy v. Lunt*, 48 Me., 377; *Williamsburgh v. Lord*, 51 Me., 599; *French v. Patterson*, 61 Me., 203; *Doe v. Roe*, 2 Hawks, 17; *Avery v. Rose*, 4 Dev., 549; *Love v. Gates*, 4 Dev. & Bat., 353; *Garrett v. White*, 3 Ired. Eq., 181; *Jordan v. Rouse*, 1 Jones, L., 119; *Yancey v. Hopkins*, 1 Munf., 419; *Christy v. Minor*, 4 Munf., 431; *Nalle v. Fenwick*, 4 Rand., 535; *Allen v. Smith*, 1 Leigh, 231; *Chapman v. Doe*, 2 Leigh, 329; *Polk v. Rose*, 25 Md., 153; *Beatty v. Mason*, 30 Md., 409; *Dyer v. Boswell*, 39 Md., 465; *Doe v. Insurance Co.*, 8 S. & M., 197; *Natchez v. Minor*, 10 S. & M., 246; *Rule v. Parker*, Cooke, 278; *Hamilton v. Burum*, 3 Yerg., 355; *Pope v. Headen*, 5 Ala., 493; *Lyons v. Hunt*, 11 Ala., 295; *Blake-ney v. Ferguson*, 8 Ark., 272; *Shearer v. Woodburn*, 10 Pa. St., 511; *McReynolds v. Longenberger*, 57 Pa. St., 13; *Bucknall v. Story*, 36 Cal., 67; *Richardson v. Dorr*, 5 Vt., 9; *Fitch v. Casey*, 2 Greene (Iowa), 300; *Kellog v. McLaughlin*, 8 Ohio, 114; *McMillan v. Robbins*, 5 Ohio, 31; *Williams v. State*, 6 Blackf., 36; *Doe v. Flagler*, 1 Ind., 542; *Doe v. Sweetzer*, 2 Ind., 649; *Barnes v. Doe*, 4 Ind., 132; *Kyle v. Malin*, 8 Ind., 34; *Atkins v. Kinman*, 20 Wend., 241; *Doughty v. Hope*, 3 Denio, 595; *Waldron v. McComb*, 1 Hill, 107; *Sharp v. Spier*, 4 Hill, 76; *Tallman v. White*, 2 N. Y., 66; *Bennett v.*

to tax conveyances of all descriptions, where the statute has failed to prescribe any other.¹

The difficulty of making the complete showing in these cases has been thought to be so great as to render some modification of the rule reasonable, and statutes have from time to time been made in that direction. The early statutes were probably not as comprehensive in their terms as their authors intended; at least, as construed by the courts, they did not change to any considerable extent the former rule. Thus, a statute which declared that the deed should be evidence of the regularity of the sale, was held to prove *only* the regularity of the proceedings at the sale, leaving the purchaser still under the necessity of showing the regularity of the prior proceedings.² The decisions made the statutes of little or no moment, as whether the proceedings at the sale were regular or not was commonly proved

Buffalo, 17 N. Y., 383; *Cruger v. Dougherty*, 43 N. Y., 107; *Chicago v. Wright*, 32 Ill., 192; *Scammon v. Chicago*, 40 Ill., 146; *Harkness v. Board of Public Works*, 1 MacAr., 121; *Minthorn v. Smith*, 3 Sawy., 142; *Boykin v. Smith*, 65 Ala., 294; *Cahoon v. Coe*, 57 N. H., 556.

A statute which makes the deed evidence of a title in fee-simple in the owner is held to make it evidence only of such a title after the right to give the deed has been shown by the proof of anterior proceedings that support it. This is recognized in many of the cases above cited. See, also, *Merrick v. Hutt*, 15 Ark., 331. A declaration in a tax law that the tax deed should be "good and effectual both at law and in equity" gives no special sanction to the conveyance beyond that derived from the general principles of law. The purchaser must show that all prerequisites were complied with. *Hadley v. Tankersley*, 8 Tex., 12.

¹Or, it may be added, prescribed it imperfectly. *Upton v. Kennedy*, 36 Mich., 215. In Minnesota it seems a tax deed is only *prima facie* evidence after it has been shown that the officer had authority to make it. *Shearer v. Corbin*, 3 Fed. Rep., 705. A provision of law that the purchaser in a municipal tax lease "shall hold the land against the owner and all persons claiming it" does not make the lease *prima facie* evidence of the regularity of the proceedings. *Hilton v. Bender*, 69 N. Y., 75. Where a tax deed is not *prima facie* evidence of title, the destruction of the tax records will not raise a presumption that will support it. *Rhodes v. Gunn*, 35 Ohio St., 387. Neither will lapse of time raise such a presumption. *Hilton v. Bender*, 69 N. Y., 75.

²*Tallman v. White*, 2 N. Y., 66; *Striker v. Kelly*, 2 Denio, 323; *Doughty v. Hope*, 3 Denio, 594; *Beekman v. Bigham*, 5 N. Y., 366; *Westbrook v. Willey*, 47 N. Y., 457; *Rowland v. Doty*, Har. Ch., 3; *Scott v. Young Men's Society*, 1 Doug. (Mich.), 119; *Latimer v. Lovett*, 2 Doug. (Mich.), 204; *Ives v. Kimball*, 1 Mich., 308; *Yenda v. Wheeler*, 9 Tex., 408; *Wilson v. Lemon*, 23 Ind., 433.

with little difficulty.¹ Later statutes have gone further; some of them making the tax deed *prima facie* evidence of the facts recited in it; others making it *prima facie* evidence of the regularity of all the proceedings to and including the sale, and of title in the purchaser, and still others undertaking to make it conclusive evidence of some or perhaps of all the proceedings.

Where the deed is evidence only of the facts recited, if essential facts are omitted they must be proved before the deed will become evidence of title in the grantee.²

If the tax deed is made *prima facie* evidence of the regularity of all the proceedings, and of title in the purchaser, this effects an entire change in the burden of proof, relieving the purchaser thereof and casting it upon the party who would contest the sale. The purchaser is no longer under the necessity to show the correctness of the proceedings, but the contestant must point out in what particular he claims them to be incorrect. The power to enact such laws has been denied in

¹See *Robson v. Osborn*, 13 Tex., 298.

²In Indiana, if the deed does not show that before sale of the land there was unsuccessful search for personalty, that fact must be proved *aliunde*. *Ward v. Montgomery*, 57 Ind., 276; *Swift v. Kyler*, 74 Ind., 575; *Reid v. State*, 74 Ind., 252; *Woolen v. Rockafeller*, 81 Ind., 208. In Maine, if the deed does not show on its face that the tax had remained unpaid for the statutory time before notice of sale; that the notices were legally posted and personal notice given; or if it does show that sale was made *en masse* and no offer made to sell a fractional part, it is void. *Wiggin v. Temple*, 73 Me., 380. Where a statute precludes any one from contesting a tax title unless he has title derived from the state or the general government, it is not necessary for the contestant to go farther back in tracing title than to make out such *prima facie* right in himself as will raise a presumption of a grant from the sovereign authority. *Gamble v. Horr*, 40 Mich., 561. Where by statute a deed is only to be given if there has been no redemption, the fact of redemption, it is held, must be affirmatively shown. *Greve v. Coffin*, 14 Minn., 345. A tax deed in Louisiana is *prima facie* evidence of a valid sale, but in the absence of recitals in the deed and of proof *aliunde* of the appointment of a curator, and the service of notice on him, the sale of the land of a non-resident owner is void. *Rapp v. Lowry*, 30 La. An., 1272.

It seems that in Louisiana a tax deed cannot be collaterally attacked. See *Lannes v. Workingmen's Bank*, 29 La. An., 112; *Jurey v. Allison*, 30 La. An., 1234. In Iowa a purchaser who for eleven years fails to take out a deed will be presumed to have abandoned his purchase, and he cannot then dispute the title of grantees of the record owner. *Ockendon v. Barnes*, 43 Ia., 615.

argument, but the decisions fully sustain them.¹ These decisions are that the statutes take away no substantial rights; they only regulate the order of proceeding in the legal tribunals, in exhibiting the evidence of substantial rights; and they rest on the solid foundation of the supreme authority of the legislature over the whole subject of evidence; an authority which is only exceeded when the legislature, going beyond all bounds, undertakes, under the pretense of prescribing rules of evidence, to take away rights without opportunity for a hearing.²

¹ *Pillow v. Roberts*, 13 How., 472; *Williams v. Kirtland*, 13 Wall., 306, 310; *Kelly v. Sanders*, 99 U. S. 441; *Sperry v. McKinley*, 99 U. S., 496; *De Treville v. Smalls*, 98 U. S., 517; *Freeman v. Thayer*, 83 Me., 76; *Orono v. Veazie*, 57 Me., 517; *Hand v. Ballou*, 12 N. Y., 541; *Forbes v. Halsey*, 26 N. Y., 53; *Johnson v. Elwood*, 53 N. Y., 435; *Steedman v. Planters' Bank*, 7 Ark., 424; *Briscoe v. Coulter*, 18 Ark., 423; *Butts v. Francis*, 4 Conn., 424; *Ray v. Murdock*, 36 Miss., 692; *Belcher v. Mhoon*, 47 Miss., 618; *Abbott v. Lindenbower*, 42 Mo., 162; *S. C.*, 46 Mo., 291; *Cook v. Hackleman*, 45 Mo., 317; *Hoffman v. Bell*, 61 Pa. St., 444; *Delaplaine v. Cook*, 7 Wis., 44; *Stewart v. McSweeney*, 14 Wis., 468; *Whitney v. Marshall*, 17 Wis., 174; *Smith v. Cleveland*, 17 Wis., 556; *Lumsden v. Cross*, 10 Wis., 282; *Allen v. Armstrong*, 16 Ia., 508; *Adams v. Beale*, 19 Ia., 61; *Eldridge v. Kurhl*, 27 Ia., 160; *Clark v. Connor*, 28 Ia., 311, 315; *Hurley v. Woodruff*, 30 Ia., 260; *Genther v. Fuller*, 36 Ia., 604; *Sprague v. Pitt, McCahon*, 212; *Sibley v. Smith*, 2 Mich., 486; *Lacey v. Davis*, 4 Mich., 140; *Amberg v. Rogers*, 9 Mich., 332; *Wright v. Dunham*, 13 Mich., 414; *Groesbeck v. Seeley*, 13 Mich., 329; *Stanbery v. Sillon*, 13 Ohio St., 571; *Turney v. Yeoman*, 14 Ohio, 207; *Smith v. Chapman*, 10 Grat., 445; *Sams v. King*, 18 Fla., 557; *Paul v. Fries*, 18 Fla., 573; *Virden v. Bowers*, 55 Miss., 1.

As to the evidence necessary to overcome the presumption of regularity which the deed affords, and the presumptions which will be made in its support, see *Colman v. Shattuck*, 62 N. Y., 348; *State Auditor v. Jackson Co.*, 65 Ala., 142; *Fuller v. Armstrong*, 53 Ia., 683; *Woodbridge v. State*, 43 N. J., 362; *Shackelford v. Hooper*, 65 Ga., 366. As to the effect as evidence of a deed given on a sale for federal taxes, see *Brown v. Goodwin*, 75 N. Y., 409, citing *Marsh v. Brooklyn*, 59 N. Y., 280.

It is competent to make certificate of city engineer *prima facie* evidence of the validity of a charge against owners of property for special assessment. *St. Louis v. Coons*, 37 Mo., 44; *St. Louis v. Armstrong*, 38 Mo., 29. Where the tax deed is evidence of regularity the counter-evidence should be such as to exclude any reasonable presumption of regularity. *Sams v. King*, 18 Fla., 557. Compare *Bidleman v. Brooks*, 28 Cal., 72; *Rayburn v. Kuhl*, 10 Ia., 92; *Lacey v. Davis*, 4 Mich., 140; *Wright v. Dunham*, 13 Mich., 414; *Case v. Dean*, 16 Mich., 12; *Hall v. Kellogg*, 16 Mich., 139; *Ewart v. Davis*, 76 Mo., 129; *Wood v. Meyer*, 36 Wis., 308.

² In Alabama a tax deed is *prima facie* evidence that the land was subject to taxation, that the taxes were not paid before sale, and that the land had not been redeemed. Save as to these things the recitals in the deed are not

That a tax deed can be made conclusive evidence of title in the grantee we think is more than doubtful; the attempt is a plain violation of the great principle of Magna Charta which has been incorporated in our bills of rights, and if successful would in many cases deprive the citizen of his property by proceedings absolutely without warrant of law or of justice; it is not in the power of any American legislature to deprive one of his property by making his adversary's claim to it, whatever that claim may be, conclusive of its own validity. It cannot, therefore, make the tax deed conclusive evidence of the holder's title to the land, or of the jurisdictional facts which would make out title.¹ But the legislature might doubt-

evidence, and the *onus* is on the purchaser to prove their truth. *Stoudenmire v. Brown*, 57 Ala., 481. A provision making the deed conclusive evidence of the facts recited is void. *Davis v. Minge*, 56 Ala., 121; *Oliver v. Robinson*, 58 Ala., 48. Where the deed is made *prima facie* evidence of the regularity of all proceedings, it is not defeated by showing facts which merely raise doubts, but which are reconcilable with regular proceedings. See *Silsbee v. Stockle*, 44 Mich., 561.

Where the statute provided that the tax deed should be conclusive evidence of the truth of all the facts recited therein, and vest in the grantee an absolute title in fee-simple, held, that it vested such an estate only in case the statute had been substantially complied with in the tax proceedings, and that every fact not recited in the deed, necessary to make out a valid sale, must be proved by one claiming under it. *Steeple v. Downing*, 60 Ind., 478; *Langohr v. Smith*, 81 Ind., 495; *Farrar v. Clark*, 85 Ind., 449; *Keeper v. Force*, 86 Ind., 81. A tax deed, even when founded on a judgment sale, cannot be conclusive against one not a party to the judgment and who had actually paid the tax. *Mayo v. Haynie*, 50 Cal., 70. A tax deed, though made conclusive evidence of the regularity of the sale, is not conclusive as to the publication of the statutory notice required to cut off the right of redemption. *Westbrook v. Willey*, 47 N. Y., 457. As to attacking a deed *prima facie* valid in Louisiana, see *Hickman v. Dawson*, 83 La. An., 438; *Telle v. Fish*, 34 La. An., 1243; *Delaroderie v. Hillen*, 28 La. An., 537. A sale is defeated in Louisiana by showing that the land stood of record in the name of the owner and was assessed to another. *Lague v. Boagni*, 32 La. An., 912; *Guidry v. Broussard*, 32 La. An., 924. A tax deed held not *prima facie* evidence of title where it failed to show the sale was made for taxes due, delinquent and unpaid. *Sheehy v. Hinds*, 27 Minn., 259. A tax deed *prima facie* valid is not shown to be invalid without a showing of facts which are necessarily inconsistent with legality. *Wood v. Meyer*, 36 Wis., 308; *Upton v. Kennedy*, 36 Mich., 215. A necessary certificate not found in the proper office will still, in Michigan, be presumed to have been made. *Silsbee v. Stockle*, 44 Mich., 561. And the amount of the tax will be presumed correct when not expressly shown to be wrong. *Ibid.*

¹ *Kelly v. Herrall*, 20 Fed. Rep., 364, 368; *Cairo, etc., R. Co. v. Parks*, 32 Ark., 181; *Dickerson v. Acosta*, 15 Fla., 614.

less make the deed conclusive evidence of the correct performance of all mere acts of routine, and of acts in which the public rather than the tax payer was specially concerned; in short, of everything except the essentials. In the margin are given the decisions which have a bearing upon this power.¹

¹See *Morrill v. Douglass*, 17 Kan., 291. In Iowa statutes are sustained which make tax deeds conclusive evidence of regularity in the listing and assessment, and that the property was regularly advertised and sold. *Allen v. Armstrong*, 16 Ia., 508; *McCready v. Sexton*, 29 Ia., 356; *Rima v. Cowan*, 31 Ia., 125; *Clark v. Thompson*, 37 Ia., 536; *Madson v. Sexton*, 37 Ia., 562; *Smith v. Easton*, 37 Ia., 584; *Easton v. Perry*, 37 Ia., 681; *Bullis v. Marsh*, 56 Ia., 747; *Robinson v. Nat. Bank*, 48 Ia., 354. The original owner may still contest the liability of the land to any tax; and it is said in general terms by the court that on all *jurisdictional* questions the deed cannot be made conclusive. See *Martin v. Cole*, 38 Ia., 141. It is manifest, however, that this word *jurisdictional* is not employed in the same sense here as it often is in tax cases—a sense that makes each necessary step a jurisdictional requisite to the next; for in Iowa some of the most important steps in the proceedings are held to be conclusively established by the deed. Under the Oregon statute making a tax deed conclusive evidence of regularity save as to certain specified matters, it may be shown that the sale was made after the warrant had expired. *Kelly v. Herrall*, 20 Fed. Rep., 364. It is not competent to make a tax deed conclusive evidence of an assessment. *Immegart v. Gorgas*, 41 Ia., 439; *Phelps v. Meade*, 41 Ia., 470; *Nichols v. McGlathery*, 48 Ia., 189; *Easton v. Savery*, 44 Ia., 654. Or that a sale which was in fact private, fraudulent and illegal was public and legal. *Butler v. Delano*, 42 Ia., 350; *Thompson v. Ware*, 43 Ia., 455. Or that the description of land is accurate. *Immegart v. Gorgas*, 41 Ia., 439.

That statutes undertaking to prescribe conclusive rules are not to be extended by construction, see *Upton v. Kennedy*, 36 Mich., 215. A tax deed of land exempt from taxation is void. If there is any question of the forfeiture of the right of exemption it cannot be raised in a suit between individuals. *Mackall v. Canal Co.*, 94 U. S., 308. It may be shown that the land was exempt from taxation, though the statute undertakes to make the deed conclusive evidence except as against actual fraud or prepayment. *Quiney v. Lawrence*, 1 Idaho, 313. In Iowa a tax deed is not conclusive evidence that the notice was given of the expiration of the time in which to redeem. But where there is proof of notice and a regular deed, the burden is on a party denying the sufficiency of the notice. *Wilson v. Crafts*, 56 Ia., 450. See *Reed v. Thompson*, 56 Ia., 455. If a deed on its face shows an illegal sale, there can be no recovery under it, notwithstanding the statute undertakes to preclude any defense against a tax deed until it is first shown the taxes were paid or tendered. *Allen v. Morse*, 72 Me., 502; *Wiggin v. Temple*, 73 Me., 380. See, for the same principle, *Cooke v. Pennington*, 15 S. C., 185. In Mississippi it is held the legislature has power to make the deed *prima facie* evidence of title, and to provide that it shall not be invalidated except by proof of fraud or mistake in the assessment or sale, or that the taxes were paid. *Griffin v. Dogan*, 48 Miss., 11; *Virden v. Bowers*, 55

Special proceedings. It should be stated here that statutes giving a peculiar effect to conveyances on sales made for taxes, unless in express terms declared applicable to cases of local and special assessments, such as those for paving streets, etc., do not apply to them at all, and the purchaser under proceedings of that nature will be compelled to rely upon the common law rule, and prove regularity.¹

Judicial sales for taxes. In some of the states it has been deemed advisable to provide that, before sales shall be made of lands for the satisfaction of delinquent taxes, a judicial determination of the delinquency shall be had.² A judicial hearing in such a case may fairly be understood to have in view, *first*, the protection of the parties taxed, by giving them the opportunity to inspect the proceedings and make their objections before the final steps are taken which might conclude

Miss., 1; Bell v. Coats, 54 Miss., 538. In Missouri, by act of 1872, tax deeds are conclusive evidence that everything has been done the omission of which would be a mere irregularity, and *prima facie* evidence of all else. See Raley v. Guinn, 76 Mo., 263. A tax deed should have the statutory effect as evidence, even though taken out pending litigation. Hart v. Smith, 44 Wis., 213.

As to what is a mere irregularity, see Phelps v. Meade, 41 Ia., 470. If an assessment was never approved or acted upon by the supervisors, a tax title based thereon must fail, notwithstanding the statute that no title shall be invalidated except on proof of payment or tender of the legal tax. Davis v. Vanarsdale, 59 Miss., 367. As to disproving the assessment, see People v. Lansing, 55 Cal., 393. A statute making a tax deed conclusive after five years is valid at least to the extent of precluding the raising of any question of the failure of the officer to give bond. Powers v. Penny, 59 Miss., 5.

Where the statute makes provision for proceedings to enforce a lien for the taxes when the tax deed proves defective, these must be followed as the sole remedy. Webb v. Bidwell, 15 Minn., 479.

¹ Sharp v. Speir, 4 Hill, 76; Bucknall v. Story, 36 Cal., 67; Kelly v. Medlin, 26 Tex., 48; Stierlin v. Daley, 37 Mo., 483; Glass v. White, 5 Sneed, 475.

² The present constitution of Illinois requires the legislature to provide, in all cases where it is necessary to sell real estate for the non-payment of taxes or assessments for state, county or municipal purposes, that a return shall be made to some general officer of the county having authority to receive state and county taxes; and such officer alone, upon the order or judgment of some court of record, is to have the power to sell. Hills v. Chicago, 60 Ill., 86; Otis v. Chicago, 62 Ill., 299; Webster v. Chicago, 62 Ill., 302. But this provision is not retrospective so as to invalidate a sale made by some other officer for a tax levied before the adoption of the constitution. Garrick v. Chamberlain, 97 Ill., 620.

their rights forever; and, *second*, the greater security of purchasers at the sales, which may reasonably be supposed to follow a judicial determination that the proceedings are such as, under the law, will justify a sale being made. The proceeding is not judicial in the strict sense; it is but a step in an administrative proceeding in which judicial assistance is invoked as a matter of convenience, and because with its assistance the rights of parties can be most surely protected, and the public interest at the same time conserved.¹ The proceeding gives an opportunity for the tax payer to be heard after all the steps to establish his liability have been taken, but before the presumptions arising from a sale and conveyance have attached, and when, if the objections he takes to the official action are overruled, he may by payment escape such loss of property as is inevitable if his land is first sold, and a hearing upon the legality of the sale which results adversely to him is had afterwards. The judicial proceeding before sale seems, therefore, especially favorable to the interests of tax payers, and deserving of further adoption for that reason if properly guarded.

It has not been deemed advisable, in a work so general in its plan as the present, to enter at large into an examination of the proceedings for which provision is made under statutes of different states. The same general principles apply to them all. In some cases — usually cases of street or other special assessments — the judicial proceedings begin when the assessors have

¹ "When the state, or a local division of it acting under a law of the state, seizes and sells lands for the non-payment of taxes, or of public charges in the nature of taxes, imposed on such land, the proceeding is administrative and not judicial. The legislature may or may not make use of judicial forms or judicial tribunals, as shall seem most convenient, or most conducive to the object in view, and most advantageous to the state and to the tax payers. The general laws for the assessment and levying of state and county taxes, and the special statutes under which assessments are laid and collected in cities and villages, are examples of this kind of legislation. No judgment of a court is ordinarily required from the commencement to the conclusion of the process, and if a judicial agency for some part of the proceeding is provided in particular cases, as in the confirmation of the report of commissioners of estimate and assessment in the city of New York, it is not because the matter is judicial in its nature, or because such a mode of determining questions is, in such cases, required by any provision of the constitution, but merely from considerations of convenience and general propriety." *Davis*, Ch. J., in *Matter of New York Prot. Epis. School*, 81 N. Y., 574. See *Pritchard v. Madren*, 24 Kan., 486, 491.

completed their work, and the assessment is examined and confirmed before process for collection is issued; or, if the assessment is found to be defective, or is believed to be unjust, it is set aside at that stage, and the case sent back to the assessors for new action; or the proceedings are simply quashed, leaving the authorities to begin anew if they shall think it advisable to do so.¹ The local statutes differ so much in the authority they confer upon the courts, that the decisions made in one state are commonly of little service as affording a guide to the action of courts in other states. Under some statutes the action of the assessing boards is allowed to be reviewed on the facts as well as on the law; under others, only questions of the regularity and legality of the proceedings are submitted to the court. More generally the court takes up the case at the point where the collector has demonstrated his inability to collect the tax from residents by distress and sale of goods and chattels, and when the tax upon non-resident or unseated lands has remained unpaid, for the period allowed by law for making voluntary payment, before compulsory proceedings are suffered to be resorted to.

In any judicial proceeding the court which assumes to act must have that authority of law for the purpose which is called jurisdiction. This consists in, *first*, authority over the subject-matter, and *second*, authority over the parties concerned. The first comes from the statutory law, which designates the particular proceeding as one of which the court may take cognizance when the parties are properly before it; the second comes from the proper institution of proceedings, and the service

¹ Special assessments for local improvements are required in the state of New York to be reported to a court for confirmation, and the reported cases passing upon them are so numerous that the mere list would occupy several pages. So far as points decided are of general interest they have been given in different parts of this work. That the court in passing upon the assessment cannot review political action, such as the determination of the necessity or propriety of opening the street, or the proper limits of an assessment district, see *Matter of Albany Street*, 11 Wend., 149; *Matter of William and Anthony Streets*, 19 Wend., 678; *Matter of John and Cherry Streets*, 19 Wend., 659; *Matter of Livingston Street*, 18 Wend., 556.

A statutory proceeding is given in Missouri for the collection of special tax bills, in which proceeding judgment is taken against the land. See *Strassheim v. Jerman*, 56 Mo., 105; *Carlin v. Cavender*, 56 Mo., 286; *St. Louis v. Bressler*, 56 Mo., 350.

of process upon the parties concerned, or something which is by the statute made equivalent to such service. Concerning jurisdiction of the subject-matter, it is only necessary to observe that it must come wholly from the constitution or statutes of the state; the common law giving to the courts no authority in such cases. Moreover, that which is conferred is a special and limited jurisdiction. The importance of this fact appears in that familiar principle that nothing is taken by intendment in favor of the action of a court of special and limited jurisdiction, but it must appear, by the recitals of the record itself, that the facts existed which authorized the court to act, and that in acting the court has kept within the limits of its lawful authority. This principle is applicable to the case of a court of general jurisdiction, which in the particular case is exercising this peculiar special and limited authority, as well as to the case of special courts created for such special and limited authority only.¹

Taking up the case after a failure to make collection is supposed to have occurred, the first step commonly required to be

¹ *McClung v. Ross*, 5 Wheat., 116; *Thatcher v. Powell*, 6 Wheat., 119; *Francis' Lessee v. Washburn*, 5 Hayw., 294; *Tift v. Griffin*, 5 Ga., 185; *Dakin v. Hudson*, 6 Cow., 221; *Deming v. Corwin*, 11 Wend., 647; *Sheldon v. Wright*, 5 N. Y., 497; *Bridge v. Ford*, 4 Mass., 641; *Smith v. Rice*, 11 Mass., 511; *Barrett v. Crane*, 16 Vt., 246; *Jennings v. Stafford*, 1 Ired., 404; *Harshaw v. Taylor*, 3 Jones (N. C.), 513; *Perrine v. Farr*, 22 N. J., 356; *Platt v. Stewart*, 10 Mich., 260; *Guisebert v. Etchison*, 51 Md., 478; *Graceland, etc., Co. v. People*, 92 Ill., 616; *Frew v. Taylor*, 106 Ill., 159; *Biggins v. People*, 106 Ill., 270. Proceedings in these cases are governed by the same principles which govern other judicial sales. *Jones v. Gillis*, 45 Cal., 541; *Eitel v. Foote*, 39 Cal., 439. See *Ewart v. Davis*, 76 Mo., 129. If the court acquires jurisdiction, a judgment will not be void because of being a joint judgment against several lots, nor will the deed be void for following the judgment. *Howard v. Stevenson*, 11 Mo. App., 410; *Brown v. Walker*, 11 Mo. App., 226, citing *Norton v. Quimby*, 45 Mo., 388; *Waddell v. Williams*, 50 Mo., 216; *Hewitt v. Weatherby*, 57 Mo., 276; *Whitman v. Taylor*, 60 Mo., 127. See to the same effect, *Gray v. Bolles*, 74 Mo., 419; *Wellshear v. Kelley*, 69 Mo., 343. But the principle of these cases is doubted in *Leroy v. Reeves*, 5 Sawy., 102.

Certain lands were sold for taxes. In all the proceedings, including the order of sale, the lands were described as in A. county. In point of fact two-thirds thereof were in B. county. *Held*, that, as to these at least, the sale was void. *Williams v. Harris*, 4 Sneed, 332. The confirmation of an assessment by the court fixes the character of the property as resident or non-resident, and if a resident becomes non-resident afterwards, the collector will still proceed as against a resident. *Gossett v. Kent*, 19 Ark., 601.

taken is the making by the collector, or some proper officer, of a report to the court showing that the supposed delinquency actually exists. This being the document that calls into activity an authority of the court before latent, it must conform to the law in every substantial requirement, or it will fail entirely to have any efficiency for the purpose.¹

The next step will perhaps be, the giving of notice which shall stand in the place of the process which in ordinary cases brings the parties before the court.

Proceedings of this nature are not usually proceedings against parties,² nor, in the case of lands or interests in lands belonging to persons unknown, can they be. They are proceedings which have regard to the land itself rather than to the owners of the land, and if the owners are named in the proceedings, and personal notice is provided for, it is rather from tenderness to their interests, and in order to make sure that the opportunity for a hearing shall not be lost to them, than from any necessity that the case shall assume that form. As in all other cases of proceedings *in rem*, if the law makes provision for publication of notice in a form and manner reasonably calculated to bring the proceedings to the knowledge of the parties who exercise ordinary diligence in looking after their interests in the lands, it is all that can be required.³

We refer to a few cases as illustrative of the general principles on which the judicial action must be supported. In a lead-

¹ See *Marsh v. Chestnut*, 14 Ill., 223; *Charles v. Waugh*, 35 Ill., 315; *Morrill v. Swartz*, 39 Ill., 108; *Fox v. Turtle*, 55 Ill., 377; *People v. Otis*, 74 Ill., 384; *Andrews v. People*, 75 Ill., 605. The facts stated in the report may be shown to be untrue, but in so far as it is to be made on the collector's information, inquiry cannot be gone into as to the sources of such information. *Andrews v. People*, 75 Ill., 605. For immaterial defects which were held not to defeat affidavits to a delinquent list, see *Prout v. People*, 83 Ill., 154; *Chicago, etc., R. Co. v. People*, 83 Ill., 467. In Kansas errors in form in the petition are immaterial if the land and taxes are correctly described and legal service of process is made. *Pritchard v. Madren*, 24 Kan., 486.

² *Parks v. Miller*, 48 Ill., 360; *Schaeffer v. People*, 60 Ill., 179. Where a sale is to be confirmed by a court, no one is to be heard to oppose it who is not adversely interested. One describing himself simply as "tenant in possession" shows no right to be heard. *Black v. Percifield*, 1 Ark., 472. See *Senichka v. Lowe*, 74 Ill., 274; *People v. Otis*, 74 Ill., 384.

³ If the statute requires an affidavit of sending a certain notice by mail, a copy of the notice should be given in full with the proof. *Fatch v. People*, 8 Ill. Ap., 351. As to form of notice, see *McCauley v. People*, 87 Ill., 123.

ing case in the federal supreme court it appeared that the statute under which the proceeding was had required the sheriff, in the event of non-payment of taxes by a specified time, to levy the same by distress and sale of the goods and chattels of the person in default. Failing thus to collect, he was to report the failure to the county court, whose duty it then was to direct its clerk to make out a certificate of the lands liable for the taxes, together with the amount of the taxes and charges due thereon, and to publish the same, and if the taxes and charges were not then paid within thirty days judgment was to be entered for the amount due, and execution to issue upon which the land might be sold and conveyed. The sheriff made no such report as the statute provided for, and for want of this it was held that the court never obtained jurisdiction to proceed in the case.¹ Moreover, the clerk never made publication of the list, and this failure would have been fatal to the proceedings if the proper report had been made.² In other cases the following errors and imperfections have been held to render the judicial proceedings void: Proceeding to judgment before the time limited for voluntary payment of the taxes had expired;³ rendering the judgment in a proceeding not taken against "all owners and

¹ *Thatcher v. Powell*, 6 Wheat., 119, following, with approval, *Francis' Lessee v. Washburn*, 5 Hayw., 294. To the same effect is *McClung v. Ross*, 5 Wheat., 116. And see *Thacker, Ex parte*, 3 Sneed, 344; *Spellman v. Curtenius*, 12 Ill., 409; *Morrill v. Swartz*, 39 Ill., 108; *Fox v. Turtle*, 55 Ill., 377; *Fortman v. Ruggles*, 58 Ill., 207; *Schaeffer v. People*, 60 Ill., 179; *Mayo v. Ah Loy*, 32 Cal., 477. In Minnesota, by statute, no defect in the affidavit verifying the list is fatal to the jurisdiction of the court. *Mille Lacs Co. Com'rs v. Morrison*, 22 Minn., 178. As to sufficiency of notice of sale, see *Coffin v. Estes*, 32 Minn., 367. The judgment is not void for including taxes which should not have been included. *Kipp v. Dawson*, 31 Minn., 373; *Stewart v. Coulter*, 31 Minn., 385.

² *Thatcher v. Powell*, 6 Wheat., 119. See, also, *Spellman v. Curtenius*, 12 Ill., 409; *Charles v. Waugh*, 35 Ill., 315; *McKee v. Champaign County*, 53 Ill., 477; *Fortman v. Ruggles*, 58 Ill., 207; *Abbott v. Lindenbower*, 42 Mo., 162; *McGahen v. Case*, 6 Ia., 331. If, however, publication was in fact made, the court may allow proof thereof to be made subsequently; at least any time before judgment. *Mille Lacs Co. Com'rs v. Morrison*, 22 Minn., 178.

³ *Williams v. Gleason*, 5 Ia., 284. For the same principle, see *Pickett v. Hartsock*, 15 Ill., 279. Where a tax was entered paid on the books, on the statement of an officer who had nothing to do with the collection that he would pay it, it was held competent to proceed and disprove the payment and take judgment for the amount. *People v. Palmer*, 2 Ill. Ap., 295.

claimants," and by service on the land, as the statute required;¹ rendering judgment upon a collector's report which failed to show, as the statute required, whether the delinquent taxes were state taxes or county taxes;² applying for and obtaining judgment at a different term from that at which the statute required the application to be made.³ And a judgment is void which is given in figures merely, with neither words nor signs to indicate that money is intended, or if it is, what denomination of money the figures stand for.⁴

The defects which were held fatal in the cases referred to, it will be seen, were with one exception, in which the judgment was meaningless, all defects which went to the power of the court to act at all. The proceeding to judgment and sale is an ulterior proceeding which, under the law, must have for its antecedents the proper showing that an attempt to collect has proved ineffectual,⁵ and that the case has been brought before the court by proper notice and at a proper time. But when those facts appear by the record of the court, and the judgment has been rendered, all questions of regularity in the prior proceedings are foreclosed.⁶ And not only that, but irregular action of the court itself will not render its judgment invalid, though it might authorize a reversal in an appellate court if a

¹ *Mayo v. Ah Loy*, 32 Cal., 477.

² *Morrill v. Swartz*, 39 Ill., 108. See, also, *Pickett v. Hartsock*, 15 Ill., 279. The un rebutted return, if in due form, is sufficient to warrant a judgment. *Hosmer v. People*, 96 Ill., 58; *Mix v. People*, 106 Ill., 425; *Frew v. Taylor*, 106 Ill., 159.

³ *Brown v. Hogle*, 30 Ill., 119.

⁴ *Lawrence v. Fast*, 20 Ill., 338; *Lane v. Bommelmänn*, 21 Ill., 148; *Eppinger v. Kirby*, 23 Ill., 521; *Dukes v. Rowley*, 24 Ill., 210; *Bailey v. Doolittle*, 24 Ill., 577; *Woods v. Freeman*, 1 Wall., 398.

In Tennessee the record made up for tax sale is not required to show the preliminary proceedings necessary to valid taxation, *e. g.*, that all property was assessed, the assessors duly elected and qualified, etc. *Nance v. Hopkins*, 10 Lea, 508.

⁵ It can be no objection to a judgment against the land for taxes, that the collector did not make the tax out of the personalty, when the collector did distrain the personalty, and the objector replevied the same out of the collector's hand. *Deerham v. People*, 67 Ill., 414. It is no objection to an application for judgment against lands that the valuation is excessive. *Spencer v. People*, 68 Ill., 510.

⁶ See *Mayo v. Foley*, 40 Cal., 281; *Reeve v. Kennedy*, 43 Cal., 643; *Jones v. Gillis*, 45 Cal., 541; *Coffin v. Estes*, 32 Minn., 367.

review is allowed by statute. It is a principle of general application, that while a judgment which has been rendered without competent jurisdiction may be treated as a mere nullity everywhere, yet that for mere irregularities it can be assailed only in a direct proceeding for that purpose; that is to say, by motion or petition in the same case, or by some proceeding in the nature of a review in error.¹

In the proceedings subsequent to judgment the rules which govern ordinary judicial sales are applicable.² The deed given by the officer who sells by virtue of such a judgment should show, by its recitals, an authority presumptively sufficient to authorize it, and indeed this is usually required by the statute, which prescribes a form reciting the judgment and sale.³ The deed cannot be evidence of the regularity of the proceedings unless made so by statute.⁴

¹ *Chestnut v. Marsh*, 12 Ill., 173, is a leading case in tax matters illustrative of this principle. See, also, *Atkins v. Hinman*, 2 Gilm., 437; *Merritt v. Thompson*, 13 Ill., 716; *Wilkins' Lessee v. Huse*, 9 Ohio, 154; *Eitel v. Foote*, 39 Cal., 439; *Ex parte Kellogg*, 6 Vt., 509; *Edgerton v. Hart*, 8 Vt., 207; *Wall v. Trumbull*, 16 Mich., 228; *Daily v. Newman*, 14 La. An., 580; *Cadmus v. Jackson*, 52 Pa. St., 295; *Wallace v. Brown*, 22 Ark., 118; *Carter v. Walker*, 2 Ohio St., 339. As to the recitals necessary in such cases see *Atkins v. Hinman*, 2 Gilm., 437; *Young v. Thompson*, 14 Ill., 380; *Dukes v. Rowley*, 24 Ill., 210; *Baily v. Doolittle*, 24 Ill., 578; *Dentler v. State*, 4 Blackf., 258; *Williams v. State*, 6 Blackf., 36. In *Cadmus v. Jackson*, 52 Pa. St., 295, it was held that a tax sale under a judgment could not be defeated by showing that the tax was paid before judgment. This showing is sometimes permitted under statutes. See *Curry v. Hinman*, 11 Ill., 420; *Conway v. Cable*, 37 Ill., 82.

² *Jones v. Gillis*, 45 Cal., 541.

³ As to the necessary recitals in the deeds, see *McDermott v. Scully*, 37 Ark., 226; *Brown v. Hogle*, 30 Ill., 119; *Wetherbee v. Dunn*, 32 Cal., 106. To give a tax deed force as evidence in Illinois the judgment and precept for sale on which it is based must appear in evidence. *Cottingham v. Springer*, 33 Ill., 90; *Gage v. Lightburn*, 93 Ill., 248; *Eagan v. Connolly*, 107 Ill., 458. And if the record upon which a sale has been made had no certificate attached, it cannot after sixteen years be amended by order of court so as to support a sale. *Eagan v. Connolly*, 107 Ill., 458. In West Virginia the tax purchaser applies to the court for his deed, and must show in his petition all the facts entitling him to it. *Davis v. Jackson*, 14 W. Va., 227.

⁴ See *Elston v. Kennicott*, 46 Ill., 187; *Little v. Herndon*, 10 Wall., 26. In California, where lands are assessed as an entirety to several, a part of whom pay portions of the tax, the court in rendering judgment should ascertain what interests are delinquent, and exonerate the rest. *People v. Shimmins*, 42 Cal., 121. See *Leroy v. Reeves*, 5 Sawy., 102.

Liens when titles fail. When the tax title proves defective, the purchaser will have no lien upon the land for the sum paid on the purchase, unless the statute in terms gives it. But this, in some states, is provided for, either generally or for particular cases. In Indiana such a lien is given where the tax title fails by reason of imperfect description.¹ In Iowa, if the tax deed is canceled as made without authority, the purchaser has a lien;² and in Mississippi he may charge the land in equity with the amount paid.³ So he may in some other states.⁴

¹*Cooper v. Jackson*, 71 Ind., 244; *Sloan v. Sewell*, 81 Ind., 180; *Parker v. Goddard*, 81 Ind., 294; *Peckham v. Millikan*, 99 Ind., 852.

²*Orr v. Travaciar*, 21 Ia., 68. As to personal remedy against the owner of the land, see *Claussen v. Rayburn*, 14 Ia., 186. And for subsequent taxes paid, see *Thompson v. Savage*, 47 Ia., 522.

³*Cogburn v. Hunt*, 56 Miss., 718; *Meeks v. Whatley*, 48 Miss., 287.

⁴See, as to Nebraska, *Pettit v. Black*, 8 Neb., 52; *Miller v. Hurford*, 11 Neb., 877; *Reed v. Merriam*, 15 Neb., 323. And see chapter XVII.

CHAPTER XVI.

REDEMPTION OF LANDS FROM TAX SALES.

General policy. It is not the policy of the law that any man should forfeit his estate because from inability, or even from negligence, he has failed to meet his engagements or to perform his duties by some exact day which has been prescribed by statute. On the contrary, it is for the welfare of every community that the law should favor the citizen in all reasonable measures for the preservation of his estate against losses which might result from his misfortunes or his faults, extending to him all the liberality that is consistent with justice to others and to a proper regard for the interest of the public. The principle is recognized in the liberality shown to those desirous to redeem from the technical forfeiture of mortgage estates, as well as in the provisions made for redemption from judicial sales. It is also very properly recognized in the laws providing for redemption from tax sales.

General rules. The statutes on this subject have little uniformity, but certain general rules govern the right to redeem under them all; and it may be sufficient for our purposes to give these rules, with such illustrations of practical application as may be found in the reported cases.

1. *Construction of Statutes.* The statutes which give the right are to be regarded favorably and construed with liberality. Abundant reason for this is assigned in the cases which recognize the rule. It has been justly remarked that the right of the government to sell lands for taxes, as it is accustomed to do, can only be maintained on "the absolute sovereignty of the state in the exercise of its taxing power. But it is a severe exercise of power. To divest ownership, without personal notice and without direct compensation, is the instance in which a constitutional government approaches most near to an unrestrained tyranny. Whatever tends to modify this right is favorable to the citizen, and ought to be liberally construed, on the principle that remedial statutes are to be beneficially ex-

pounded. Redemption is the last chance of the citizen to recover his right of property."¹

The right of the party cannot be defeated by any failure of an officer to make the proper record, and sale after a redemption will be a nullity.²

2. *Redemption a Statutory Right.* But though the statutes are to be favorably construed, yet as the right depends upon them, the party coming to redeem must bring himself within their provisions. He must therefore come within the statutory time,³ and circumstances of excuse, like the prevalence of civil war, cannot enlarge the time when the statute does not provide for it.⁴ He must also pay the full amount of the purchase money with statutory interest and penalty, if any, irrespective of equitable circumstances which might seem to entitle him to

¹ *Woodward, J.*, in *Gault's Appeal*, 33 Pa. St., 94, 97. See, also, *Dubois v. Hepburn*, 10 Pet., 1; *Corbett v. Nutt*, 18 Grat., 674, and 10 Wall., 464; *Patterson v. Brindle*, 9 Watts, 98; *Masterson v. Beasley*, 8 Ohio, 801; *Jones v. Collins*, 16 Wis., 594; *Winchester v. Cain*, 1 Rob. (La.), 421; *Rice v. Nelson*, 27 La., 148; *Schenck v. Peay*, 1 Dillon, 267; *Boyd v. Holt*, 62 Ala., 296; *Bonds v. Greer*, 56 Miss., 710; *Karr v. Washburn*, 56 Wis., 303; *Hale v. Penn's Heirs*, 25 Grat., 261. Where the deed was required to lie twelve months in the town clerk's office, during which the party might redeem, it was held that it should be deposited with all convenient speed. Four years after the sale was too late. *Ives v. Lyon*, 7 Conn., 504.

In California, where the time allowed to redeem is six months from the sale, it is held that if the purchaser delays to take his certificate of purchase promptly, the land owner has six months to redeem in after the certificate is taken out, but is liable to lose his land if the tax purchaser conveys to one who buys *bona fide* after six months from the sale have expired. *Maina v. Elliott*, 51 Cal., 8. In Massachusetts one entitled to redeem should make tender to the purchaser, notwithstanding he has while disseized made conveyance to another. *Faxon v. Wallace*, 98 Mass., 44. See *Same v. Same*, 101 Mass., 444.

For various questions as to the right to redeem under the statutes of Illinois, see *Stamposki v. Stanley*, 109 Ill., 210.

² *Fenton v. Way*, 40 Ia., 196. As to the effect of officers allowing a right to redeem when it is disputed, see *Soutter v. Miller*, 15 Fla., 625.

³ *Pearson v. Robinson*, 44 Ia., 413; *Scofield v. McDowell*, 47 Ia., 129. And this even though a deed to the purchaser is not executed. *Ibid.* If two years are allowed, a tender on the second anniversary of the sale is in time. *Hare v. Carnall*, 89 Ark., 196.

⁴ *Finley v. Brown*, 22 Ia., 538. See *Keeley v. Sanders*, 99 U. S., 441.

claim a deduction.¹ The same strict rules which apply to others apply to infants and others under disability, unless the statute in terms makes exception in their favor,² as in some states is done, though the granting of this favor to them is far from general.³ Where the statute makes no provision for the redemption of an undivided interest, the party owning such an interest can only redeem by paying the whole redemption money.⁴

¹ *Towle v. Holt*, 14 Neb., 221. See *Jones v. Duras*, 14 Neb., 40.

Where the owner neglected to pay taxes or to redeem his lands after sale, under a belief that the taxes had been paid, the mistake does not entitle him to relief against the consequences of the omission. *Playter v. Cochran*, 37 Ia., 358. A purchaser of lands which had been sold for taxes prior to his purchase is not entitled to redeem because of having, after the purchase, inquired of the treasurer if there were unpaid taxes, and been told there were not; at the same time making no inquiry for tax sales. *Moore v. Hamlin*, 38 Ia., 482. Compare *Van Benthuyssen v. Sawyer*, 36 N. Y., 150.

² *McCormack v. Russell*, 25 Pa. St., 185; *Smith v. Macon*, 20 Ark., 17; *Heard v. Walton*, 39 Miss., 388.

³ An infant who has a right to redeem may sell it with the land. *Stout v. Merrill*, 35 Ia., 47. As to redemption by infants and married women under statutes making exceptions in their favor, see *Jones v. Collins*, 16 Wis., 594; *Dayton v. Relf*, 34 Wis., 86; *Lynch v. Brudie*, 63 Pa. St., 206.

In Iowa a minor or his representative may at any time during his minority redeem from a tax sale of land devised to him. If such land has been sold for taxes and the purchaser has quitclaimed to another and taken a mortgage back, by foreclosing the mortgage he cannot get a title which will cut off the minor's right to redeem. *Strang v. Burris*, 61 Ia., 375.

A statute providing that, if a minor's land is sold, he may redeem within a year after the removal of the disability, only applies to land owned by the minor when sold, not to that owned by another when sold and vesting in the minor afterwards. *Stevens v. Cassady*, 59 Ia., 118. As to the proof of a minor's right to redeem, see *Walker v. Sargent*, 47 Ia., 448.

Where the statute allowed to minors a year after coming of age in which to redeem, it was held that a minor might redeem within that time though his interest was under a parol trust which the trustee might have refused to recognize. *Karr v. Washburn*, 56 Wis., 303.

⁴ *Quinn v. Kenney*, 47 Cal., 147; *People v. McEwen*, 23 Cal., 54; *Carl v. Watson*, 25 Ia., 35. Where the statute permits redemption of an undivided interest, the right may be enforced by *mandamus*. *People v. Treasurer of Detroit*, 8 Mich., 14. That rents and profits received by the tax purchaser cannot be applied by way of equitable redemption, see *Spengin v. Forry*, 37 Ia., 242. As to the right of one tenant in common who redeems for all to retain the land until the others repay their share, see *Watkins v. Eaton*, 30 Me., 529.

The lien of one tax sale is not removed by redeeming from a later one.

3. *Special Conditions.* A very common condition to redemption is that the party redeeming shall pay a certain specified interest on the sum paid in the purchase; an interest so large that its exaction is in the nature of a penalty. It is not imposed, however, exclusively as a penalty, but is given as an inducement to parties to come forward as bidders at tax sales, and thus make more certain that the state will receive the full amount of the taxes levied by making certain to purchasers a reasonable compensation for any loss of bargains. The right to exact such an interest is undoubted.¹

4. *Judicial Remedies.* It follows from what has been said that the land owner is not in general entitled to relief, either at law or in equity, if for any reason he has failed to claim and exercise his statutory right.² A case of fraud, however, on the

Gray v. Coan, 40 Ia., 327. If a judgment creditor agrees to hold a tax deed as security merely, others interested in the debtor's land can redeem only on complying with such agreement, by reason of which alone their rights are not destroyed by the tax deed. *Jordan v. Brown*, 56 Ia., 281.

¹ An interest of forty per cent. sustained. *Kettle v. Shervin*, 11 Neb., 65. And one of fifty per cent. *Estes v. Stebbins*, 25 Kan., 315. Where land owned by a resident who had personalty from which a tax might have been collected is assessed as non-resident, the owner may redeem on paying the tax and common interest. *Lynam v. Anderson*, 9 Neb., 367.

As to the right to impose penalties on redemption, see *Augustine v. Jennings*, 42 Ia., 198.

Where a municipal ordinance provides that on redemption of a lot sold for city taxes the buyer shall be repaid his principal money with ten per cent. interest, that is his whole indemnity, and he is not entitled to rents of the lot after an offer to redeem made in proper time. *Jones v. Johnson*, 60 Ga., 260.

² Redemption cannot be had in equity. *Michell v. Green*, 10 Met., 101. Except as it may be permitted by statute, and then it must be under such conditions as the statute may attach. *Craig v. Flanagan*, 21 Ark., 319. Where a party by mistake redeems the wrong tract, he has no defense to a suit by a purchaser of his own. *Hollinger v. Devling*, 105 Pa. St., 417. Misinformation by an officer as to the amount to be paid on redemption is no excuse for a failure to make any payment at all. *Ellsworth v. Cordrey*, 63 Ia., 675.

Judgments for state and county taxes and upon special assessments were rendered at the same term of court. The sales were made on them severally in July, August and September. Held that for the purposes of redemption they should be considered one sale, and the purchaser, when an effort was made to redeem, was not bound by the clause of the statute providing that if he suffers the land bought to be sold again within two years he should not

part of the purchaser, or of an officer, whereby the land owner has been induced to withhold the exercise of his right, or prevented from claiming it, may constitute an exception to this general rule.¹ Equity might very justly relieve where the charges demanded on redemption had been officially swelled to illegal proportions;² or where the tax purchaser, by deceiving the land owner as to the land sold, had prevented his redeeming in due season,³ or in any other case where the facts are such as to bring it within any general head of equity jurisprudence. Equitable terms may be imposed in granting relief, but these will commonly be limited to the payment of such sum as the purchaser would have been entitled to on statutory redemption.⁴

5. *Conditions Imposed on the Purchaser.* Whatever the statute may make provision for, subsequent to the sale, in order to the protection of the interest of the parties having the right to redeem, must be strictly performed. The reasons which require this are the same that render imperative a strict compliance with all those provisions which are to be observed in the interest of the tax payer before the sale is made. One of the most usual requirements is the publication of a notice to the tax payer, with perhaps in addition a personal service upon the owner in case he is known and is a resident. Every pro-

be entitled to his deed for two years longer, and if redemption is made in that time he shall only be reimbursed the amount expended in the purchase. *Gage v. Parker*, 103 Ill., 528.

¹ See *Harrison v. Owens*, 57 Ia., 314; *Laing v. McKee*, 18 Mich., 124. The mere fact that the land sold was a trust estate does not dispense with the necessity for redeeming. *Dewey v. Donovan*, 126 Mass., 335. A statutory bill to redeem is allowed in New Jersey for one year from the time the title is perfected. See *Culver v. Watson*, 28 N. J., 548.

² See *Wilder v. Cockshutt*, 25 Kan., 504; *Gage v. Busse*, 102 Ill., 592.

³ *Koon v. Snodgrass*, 18 W. Va., 320.

⁴ A tender of such sum should be made before bringing suit. *Blanton v. Ludeling*, 30 La. An., 1232. But circumstances may excuse a tender. See *Wederstrandt v. Freyhan*, 34 La. An., 705; *Miller v. Montague*, 33 La. An., 1290. If the tender is refused, relief will be given as if it had been accepted. *Herzog v. Gregg*, 23 Kan., 726. The payment required should include not only the taxes technically legal, but any payments which equitably should be refunded, and especially any which the state might exact on reassessment. *Parks v. Watson*, 20 Fed. Rep., 764.

vision of this nature must be strictly complied with.¹ Nothing can be substituted for it by the officers;² the right to it cannot be waived by one who chances to be in possession of the land but who has no interest in it,³ and the owner may rely on his

¹*Thompson v. Burhans*, 61 N. Y., 52; *Blackstone v. Sherwood*, 31 Kan., 35.

²Where a leasehold interest was sold and was to be conveyed at the expiration of two years from the sale, but the statute required the corporation, at least six months before the expiration of two years from the sale, to cause an advertisement to be published at least twice in each week, for six weeks successively, that unless the lands were redeemed by a certain day they would be conveyed, *held*, that this was imperative, and that the six weeks must be completed six months before the expiration of two years. *Doughty v. Hope*, 3 Denio, 594. See *Jackson v. Estey*, 7 Wend., 148; *Comstock v. Beardsley*, 15 Wend., 348; *Westbrook v. Willey*, 47 N. Y., 457; *Jenks v. Wright*, 61 Pa. St., 410; *Wilson v. McKenna*, 52 Ill., 48; *Hendrix v. Boggs*, 15 Neb., 469; *Zahradnick v. Selby*, 15 Neb., 579; *Seaman v. Thompson*, 16 Neb., 546; *Merrill v. Dearing*, 32 Minn., 479. And compare *Wright v. Sperry*, 21 Wis., 331. If lands are improperly grouped and sold, this does not affect the right to redeem in parcels. *Penn v. Clemans*, 19 Ia., 372.

Where notice is required to be served on the party in possession, if it is served on the owner, it will be presumed, in the absence of showing, that he has possession. *Hall v. Guthridge*, 52 Ia., 408. See *Ellsworth v. Low*, 62 Ia., 178. As to what will constitute compliance with the statute as to the contents of the notice in Kansas, see *Long v. Wolf*, 25 Kan., 522, limiting *Sharp v. Union, etc., R. Co.*, 24 Kan., 547; *Watkins v. Inge*, 24 Kan., 612. Where proof of notice of the expiration of the time to redeem is required to be filed ninety days before such expiration, a deed given before the ninety days has expired is void. *Swope v. Prior*, 58 Ia., 412; *Cummings v. Wilson*, 59 Ia., 14. And the land owner may rely on the official entries, in the absence of anything to warn him of their incorrectness for the date of the expiration of the ninety days. *Ellsworth v. Green*, 59 Ia., 622. As to the proof of notice, see *American, etc., Ass'n v. Smith*, 59 Ia., 704; *Ellsworth v. Cordrey*, 63 Ia., 675.

If a notice to redeem is insufficient, so that he gets a void deed, he may give a new notice. If the owner of the land instead of redeeming obtains an injunction staying the issue of a deed until the time to redeem has expired, his right to redeem is gone. *Long v. Smith*, 62 Ia., 329.

³So held under the New York statute. The statute required notice to be given to the party in possession, if any; but it was held that an occupant who had no interest in it could not waive the right to the notice. *Jackson v. Estey*, 7 Wend., 148. As to who is to be deemed in possession, see *Comstock v. Beardsley*, 15 Wend., 348; *Bush v. Davison*, 16 Wend., 550. The occupation intended by the statute is that at the time notice is given. *Hand v. Ballou*, 12 N. Y., 541.

In Illinois notice to the occupant of the date when the right to redeem expires is a condition precedent to the making of a valid deed, and a notice

right to it, and wait until he receives it before taking proceedings to redeem.¹ Notice, when to be given by an officer, is an official act, and should be put in writing; but whether in writing or not must be distinct and full, and the evidence of giving it should be preserved in the proper office.²

6. *Who May Redeem.* The determination of this question may to some extent depend upon the phraseology of the statute. The general rule is, that any one may redeem who has in the land an interest which would be affected by the tax conveyance.³ A statute giving the right to redeem to the "owner" will be construed to embrace the case of the original owner, notwithstanding there is an outstanding tax title.⁴ It may also embrace any one who has a substantial interest in the premises; even a wife having a homestead right in her hus-

is fatally defective which states a wrong date of the expiration of the time, and when it may be by publication not more than five nor less than three months before the expiration of such time if there is no occupant, the property must appear to be unoccupied at the time of publication; i. e., up to within five months of such expiration of time. *Gage v. Bailey*, 100 Ill., 530.

¹ *Arthurs v. Smathers*, 38 Pa. St., 40; *Doughty v. Hope*, 3 Denio, 594; *Dentler v. State*, 4 Blackf., 258. In Iowa a statute required notice to redeem to be given to the owner personally or by publication. The land was erroneously listed to "owners unknown" and notice given by publication accordingly. Held not a good notice. *Hartley v. Boynton*, 17 Fed. Rep., 873; S. C., 5 McCrary, 453. In Illinois it has been decided that where by law notice to redeem was required to be served on the person who was assessed, and the notice was not given, the tax deed was void even though the person assessed had no interest in the land, and though the purchaser had published notice in a newspaper three months before the time to redeem had expired, describing the land, stating his purchase, and also when the redemption would expire. *Barnard v. Hoyt*, 63 Ill., 341. In Missouri the statute required the certificate of purchase to be recorded, and gave the owner two years after the sale in which to redeem. It was held that recording the certificate was essential. *Morton v. Reeds*, 9 Mo., 868.

² *Broughton v. Journeay*, 51 Pa. St., 31.

³ *Dubois v. Hepburn*, 10 Pet., 1; *Schenck v. Peay*, 1 Dillon, 267; *McBride v. Hoey*, 2 Watts, 436. A bankrupt under the act of congress has been held entitled to redeem land which belonged to him before going into bankruptcy. *Hampton v. Rouse*, 22 Wall., 263. One in possession and to whom the tax was assessed may redeem. *Campbell v. Packard*, 61 Wis., 88.

⁴ *Lancaster v. County Auditor*, 2 Dill., 478. A mortgagee held to be "owner" within the meaning of such a statute. *Alter v. Shepherd*, 37 La. An., 207.

band's lands,¹ or a lien creditor,² or a purchaser by executory contract.³ A purchaser at sheriff's sale of the right of one in possession may redeem, though he shows no title in the occupant.⁴ And so may a husband who claims in right of his wife;⁵ or a dowress;⁶ or a mortgagee or his assignee;⁷ or a lessee;⁸ or a guardian or other person acting for another under disability.⁹ It has even been held in a number of cases that one in possession of land by mere color of title may redeem;¹⁰ but this can hardly be universally true under the statutes of different states, which after all, it must be borne in mind, are to control in respect to the persons who are to have the privilege of redeeming as well as in other respects.¹¹ It is held that one interested in lands sold *in solido* may redeem for all,¹² and

¹ *Adams v. Beale*, 19 Ia., 61.

² *Schenck v. Peay*, 1 Dill., 267; *Basso v. Benker*, 33 La. An., 432.

³ *Rich v. Palmer*, 7 Or., 133; *Woodward v. Campbell*, 39 Ark., 580. In Massachusetts it has been held that one who has bought the land by executory contract may compel the purchaser for taxes to assign to him on receipt of the redemption money. *Rogers v. Rutter*, 11 Gray, 410.

⁴ *Shearer v. Woodburn*, 10 Pa. St., 511.

⁵ *Dubois v. Hepburn*, 10 Pet., 1.

⁶ *Rice v. Nelson*, 27 Ia., 148.

⁷ *Faxon v. Wallace*, 101 Mass., 444; *Montgomery v. Burton*, 31 La. An., 330; *Lloyd v. Bunce*, 41 Ia., 660; *Ellsworth v. Low*, 62 Ia., 178; *Duncan v. Smith*, 31 N. J., 325.

Where the statute gave the right to redeem to a "mortgagee of record," it was held sufficient if the mortgage was on record at the time of the offer to redeem. *Hawes v. Howland*, 136 Mass., 267.

⁸ *Byington v. Rider*, 9 Ia., 566.

⁹ *Witt v. Mewhirter*, 57 Ia., 545.

¹⁰ See *Brown v. Day*, 78 Pa. St., 129; *Foster v. Bowinan*, 55 Ia., 237.

The redemption will inure to the benefit of the true owner, and the party paying cannot after the time for redemption expires withdraw the money. *Levick v. Brotherline*, 74 Pa. St., 149.

¹¹ In Mississippi by a recent statute "the owner or any one interested in lands" sold for taxes is not allowed to redeem, but is given the right for twelve months, in preference to all other persons, to enter the lands as purchaser from the holder of the tax title. See *Bonds v. Greer*, 56 Miss., 710. But this purchase is in effect a redemption. *Faler v. McRae*, 56 Miss., 227.

In Iowa the holder of any right in lands, legal or equitable, perfect or inchoate, may redeem from a tax sale, and the officer, it seems, should receive the money of any one coming in apparent good faith to make redemption, leaving the question of his right to be determined afterwards if disputed. *Cummings v. Wilson*, 59 Ia., 14. See *Chapin v. Curtenius*, 15 Ill., 427.

¹² *Loomis v. Pingree*, 43 Me., 299. When an undivided interest in lands the whole of which is subject to a tax sale is sold on execution, the sheriff

probably he would be compelled to redeem for all unless the statute under which the sale was made provided otherwise; for the purchaser seems to be equitably entitled to have either all the land he bought, or all the purchase money refunded.¹ But no one can be entitled to go farther in redemption than may be necessary under the law for the protection of his interest.²

7. *Who May Not Redeem.* A stranger to the title cannot defeat a tax purchase by redemption. The purchaser has acquired a title which is subject only to the right of those interested to redeem; and no payment of the amount by a stranger, and no acceptance of it by any official from a stranger, can affect this right.³ Probably the acceptance of the redemption money by the purchaser himself would preclude his afterwards claiming rights under his purchase; but nothing short of his own recognition of the unauthorized act of one who, if he had no interest, would be a mere intermeddler, could conclude him in such a case.⁴

8. *Imperfect Redemption.* It has sometimes happened that, by reason of fraud or other fault on the part of the officer or purchaser, a party who has in good faith attempted to redeem, and who has done all that was required of him by the party entitled to receive the money, has nevertheless failed in exact and literal compliance with the law. In such a case equity will take notice of the facts as entitling the party to relief, and

may pay the whole tax from the proceeds of sale. *Dungan's Appeal*, 88 Pa. St., 414.

¹ *Rich v. Palmer*, 6 Or., 339. It appears to be the rule in Iowa that one must redeem all he has a right to redeem, and cannot compel the purchaser to accept less. *Curl v. Watson*, 25 Ia., 35; *Jacobs v. Porter*, 34 Ia., 342, 345. The redemption by one lien holder is redemption for all. *Ellsworth v. Low*, 62 Ia., 178. See *People v. McEwen*, 23 Cal., 54. Part of a parcel sold as an entirety cannot be redeemed separately without a statute expressly authorizing it. *State v. Schaack*, 28 Minn., 358. One having only an undivided interest must nevertheless redeem the whole title. *O'Reilly v. Holt*, 4 Woods, 645.

² *Goodrich v. Florer*, 27 Minn., 97; *Lloyd v. Bunce*, 41 Ia., 660.

³ See *Eaton v. North*, 25 Wis., 514; *Cousins v. Allen*, 28 Wis., 232.

⁴ *Byington v. Bookwalter*, 7 Ia., 512; *Penn. v. Clemans*, 19 Ia., 372. The officer to whom redemption is made need have no proof that the person offering to make it is authorized to do so, unless the statute requires this. *Chapin v. Curtenius*, 15 Ill., 427.

will hold the redemption, which has failed in form, to have been effected for all purposes of protecting the estate against a forfeiture which, under the circumstances, the statute did not intend, and would not purposely have authorized.¹ But it is very justly held in all such cases, especially if the party attempting redemption has not paid all that was requisite to complete the statutory right, he shall make a clear showing that no part of the responsibility for the error justly rests upon him. If by the mutual mistake of the officer and of the party the redemption has failed, or if it is left in doubt whether the officer was in fault at all, the case presents no other ground of equity than would exist in any case where, through inadvertence or misapprehension, the party has failed to assert his right in due season; and he will be left by the law where his own negligence or inattention has placed him.²

9. *Waiver of Defects in Redemption.* The holder of the tax purchase may waive strict compliance with statutory conditions, either expressly by contract or indirectly by some act which is inconsistent with a purpose on his part to insist upon his purchase. Thus, if after the time for redemption has expired he receives payment, this will be a waiver by implication;³ but a tender of the amount after redemption has expired will be of no force whatever unless the tender is accepted.⁴

¹See *Price v. Mott*, 52 Pa. St., 315; *Dietrick v. Mason*, 57 Pa. St., 40; *Noble v. Bullis*, 23 Ia., 559; *Corning Town Co. v. Davis*, 44 Ia., 622; *Railroad Co. v. Storm Lake Bank*, 55 Ia., 696; *Gage v. Scales*, 100 Ill., 218.

In *Bubb v. Tompkins*, 47 Pa. St., 359, it was decided that the redemption was effectual, though by mistake of the county treasurer all of the taxes were not included which should have been.

If redemption is prevented by the officer refusing to give a statement and receive the amount, the title is not cut off. *Van Benthuyzen v. Sawyer*, 86 N. Y., 150.

²*Lamb v. Irwin*, 69 Pa. St., 436.

Where a statute provides that, if land struck off to a county remains unredeemed for five years, it may be sold, the five full years must elapse before any steps can be taken towards selling again. The officer cannot make costs by advertising within the five years. *Hier v. Rullman*, 22 Kan., 606.

³*Coxe v. Wolcott*, 27 Pa. St., 154; *Philadelphia v. Miller*, 49 Pa. St., 440.

⁴*Thweatt v. Black*, 30 Ark., 732. In *Rogers v. Johnson*, 70 Pa. St., 234, a written agreement given by the purchaser to the owner, agreeing to convey on being paid the amount of the bid with twenty-five per cent. additional, was regarded as a good redemption. So is a tender to the purchaser suffi-

10. *Unauthorized Conditions.* Neither the purchaser nor the officer can add conditions to the right to redeem. A direct attempt to do this would so manifestly be an attempt to legislate to the prejudice of the owner, that nothing could be said in justification of it. But peculiar cases, which would amount to this in legal effect, sometimes require to be tested by the general principle. Thus, where the land of one person was irregularly sold with that of others, but the infirmity in the sale was afterwards cured by a healing act, it was held that the owner could not be required, as a condition to redemption, to pay any more than the proportion of the bid that was fairly chargeable to his land; this being all that he could have been charged with had the sale been regular.¹ So if the purchaser has paid taxes, subsequently assessed upon the land, he cannot demand these as a condition to redemption, unless this is the provision of the statute.² And, if a resident's lands have been assessed and sold as non-resident, their character has been fixed for all the purposes of that proceeding, and the owner cannot be required to redeem on any different terms from a non-resident.³

11. *Rights Pending Redemption.* The purchaser has no title to the land until the time for redemption has expired. He has consequently no constructive possession of the premises, and no more right to go upon and make use of them than any stranger to the title would have. His entry upon the premises would be a trespass upon the possession, actual or constructive.

cient, though under the law redemption is to be made to the treasurer. *Broughton v. Journeay*, 51 Pa. St., 81. And see *Price v. Mott*, 53 Pa. St., 315. A sufficient tender always works a redemption. *Burns v. Ledbetter*, 34 Tex., 374; *Basso v. Benker*, 33 La. An., 432; *Sperry v. Gibson*, 3 W. Va., 523; *Brooks v. Hardwick*, 5 La. An., 675. And tender is an act in pais, and may be proved to defeat a tax deed. *Cooper v. Shepardson*, 51 Cal., 298. But a receipt by the officer given after the time to redeem has expired is a nullity. *Thornton v. Smith*, 36 Ark., 508.

If the purchaser accepts a part of the redemption moneys, the owner will be allowed to redeem from a grantee by quitclaim deed from the purchaser. *Taylor v. Courtney*, 15 Neb., 190.

¹ *Dietrick v. Mason*, 57 Pa. St., 40. As to the right to redeem from the counties in Kansas, see *Tarr v. Haughey*, 5 Kan., 625.

² *Stephens v. Holmes*, 26 Ark., 48.

³ *Garabaldi v. Jenkins*, 27 Ark., 453.

of the owner, who might recover against him for any injury committed.¹

12. *Effect Upon Title.* Redemption gives no new title; it simply relieves the land from the sale which had been made. And this is true whether redemption is made before the statutory time had expired, or by consent of the purchaser afterwards.² If the purchaser had any other title or interest in the land besides that redeemed from, it remains entirely unaffected; his acceptance of the redemption money cannot estop him from setting it up and relying upon it.³

This principle is one of importance not only as between the party redeeming and the purchaser, but also as between the former and any third party who may have an interest in the land that would be affected by the tax purchase. As has been seen, it may often happen that one to redeem his own interest is compelled to redeem for others also, and it may seem reasonable to him that under such circumstances he should acquire the title. But the law which gives him a privilege of redemption will not suffer him to convert it into a privilege of purchase; and whatever form the transaction may assume as between him and the tax purchaser, the law will hold it to be in fact a redemption.⁴ The remedy of the party redeeming under such circumstances will be to call upon the other party or parties interested for such reimbursement or contribution as under the facts would be equitable. If, however, in any case the party redeeming would stand in no such relation to others, and be under no such restraint of an equitable nature as should have precluded his becoming purchaser of the

¹*Shalemiller v. McCarty*, 55 Pa. St., 186. See *Gault's Appeal*, 33 Pa. St., 94; *Lightner v. Mooney*, 10 Watts, 407. This may possibly be otherwise under some statutes, but there can be no question that the general rule is stated in the text. In Kansas the purchaser has no right to commit acts of waste before obtaining his deed. *Douglass v. Dixon*, 81 Kan., 310.

²*Coxe v. Wolcott*, 27 Pa. St., 154. For the general rule, see *Phillips v. Improvement Co.*, 25 Pa. St., 56; *Cuttle v. Brockway*, 33 Pa. St., 45; *Jenks v. Wright*, 61 Pa. St., 410; *Gray v. Coan*, 30 Ia., 536.

³*Cooper v. Bushley*, 72 Pa. St., 252.

⁴See *Coxe v. Sartwell*, 21 Pa. St., 480; *Coxe v. Wolcott*, 27 Pa. St., 154; *Steiner v. Coxe*, 4 Pa. St., 18. A land owner who buys in a tax title he knows to be void will be held to redeem, and to have no claim upon the county for reimbursement. *Jones v. Miami Co.*, 30 Kan., 278.

land when it was offered for sale for the taxes for which it was actually sold, no reason will then appear why he may not, instead of redeeming from the tax title, buy and hold it in his own interest as purchaser. He would certainly have a right to do this in any case as to all the world except such persons as could show how they were wronged in their own interests by his doing so. And as to such persons it might be held to be a redemption though as to all others a purchase.¹

13. *Legislative Power Over Purchases.* In the matter of tax sales it is important to understand what authority, if any, the legislature retains over them, especially in view of the very frequent and radical changes which are made in the law, and which in terms, if not in intent, apply to inchoate transactions previously had, as well as to those which are to take place under the new law. The question, for instance, whether a statute extending the right to redeem can be applied to previous sales, is one constantly liable to arise, and which, in fact, has arisen in several cases.

If the time to redeem has already expired before the passage of the new law, it is manifest such law can have no effect upon the sale. The title has now become absolute, and the legislature can no more create rights in the land in favor of the former owner than it can in favor of any other person. But if the time has not expired, and redemption is still open to the owners, the want of power is not so entirely beyond dispute.

In one case it has been decided that the time for redemption might lawfully be extended from one year to two, after the sale had taken place. The decision is reasoned on the liberal construction which should be put upon redemption laws; and

¹ In a recent case in Pennsylvania it is said: "There is no valid reason why either the owner of land sold for taxes, or a stranger to the title, may not, within the time allowed for redemption, take from the purchaser at the treasurer's sale a conveyance of his inceptive title, and hold the same until it ripens into a complete tax title. Where as in this case the consideration paid is more than would be required to redeem the land, and a regular assignment of the tax title is executed, it would be unreasonable to infer that the transaction is a redemption and not a purchase." *Sterrett, J.*, in *Arthurs v. King*, 95 Pa. St., 167, 174.

Where parties are in litigation respecting the title to land, one has no right to insist that the other is under obligation to pay the taxes. See *Barr v. Patrick*, 59 Ia., 134.

the conclusion was just, if no other considerations need be taken into the account.¹ Other cases have held the contrary, and, as we believe, on reasons that are conclusive. They plant themselves upon the principle that the obligation of contracts is inviolable. Now the purchase at a tax sale is clearly a contract. It is made under the law as it then exists, and upon the terms prescribed by the law. No subsequent statute can import new terms into the contract, or add to those before expressed. If it could be changed in one particular, it could be in all; if subject to legislative control at all, it is wholly at the legislative mercy.² The same rule ought in morals to apply to a statute shortening the time to redeem; as it is equally unjust to legislate against the owner of the land in such circumstances as in his favor. But with him there is no contract when the sale is made, and perhaps the remedy by redemption which the statute gives him, like remedies in general, is subject to legislative discretion.³

Where lands are struck off to the state, there is unquestionable power in the legislature to favor or relieve the owner of the land to any extent it may see fit.⁴

Foreclosing redemption. In some states it has been thought proper to provide for a foreclosure of the right to redeem in a judicial proceeding instituted by the purchaser. In such a proceeding all questions of law going to the validity of the proceedings, as well as all questions of equity which should entitle the land owner to relief, can be considered and settled finally.

¹Gault's Appeal, 33 Pa. St., 94.

²Robinson v. Howe, 13 Wis., 341; Dikeman v. Dikeman, 11 Paige, 484; Goenen v. Schroeder, 8 Minn., 387; Merrill v. Deering, 32 Minn., 479; Wolfe v. Henderson, 28 Ark., 304. And see Cargill v. Power, 1 Mich., 369; Forqueran v. Donnally, 7 W. Va., 114; Sutton v. Stone, 4 Neb., 819. A statutory provision allowing the repayment of taxes to a purchaser if the sale proves invalid is part of the contract of purchase and cannot be taken away after the sale by statute. Morgan v. Miami Co. Com'rs, 27 Kan., 89.

³It was so intimated in Robinson v. Howe, 13 Wis., 341, and Smith v. Packard, 12 Wis., 371. The right to shorten the time to redeem from a mortgage sale was affirmed in Butler v. Palmer, 1 Hill, 324, but denied in Cargill v. Power, 1 Mich., 369, on the ground that the right pertained to the contract itself which the parties had made, that is to say, to the mortgage. And see State v. Commissioners of School, etc., Lands, 4 Wis., 414.

⁴See Hodgdon v. Burleigh, 4 Fed. Rep., 111.

The proceeding is only to be instituted at the time¹ and in the manner prescribed by law, and the statute should be followed strictly. It is to some extent a proceeding in the nature of a suit to quiet title, but with more latitude of discretion in the court to adapt the relief to the equities appearing.²

Defective title; purchaser's lien. It was shown in the last chapter that the rule of *caveat emptor* applies to tax purchases. The purchaser at a tax sale therefore either gets a title to the land subject to the statutory redemption, or he gets nothing. If he receives a deed which for any reason is subject to fatal infirmity, he will lose what he has paid. This is the rule unless the statute shall recognize an equity in him and provide for it. Sometimes the statute does this by making a provision for the refunding of his money from the public treasury. But sometimes also statutes give him a lien upon the land.³

¹ Peet v. O'Brien, 5 Neb., 360; Dayton v. Relf, 34 Wis., 86.

² See Dentler v. State, 4 Blackf., 258; Gaylord v. Scarff, 6 Ia., 179; McGahan v. Carr, 6 Ia., 330; Byington v. Buckwalter, 7 Ia., 512; Abell v. Cross, 17 Ia., 171; Carter v. Hadley, 59 Miss., 180; McNish v. Perrine, 14 Neb., 582.

³ See Peet v. O'Brien, 5 Neb., 360; Covell v. Young, 11 Neb., 510; Sullivan v. Merriam, 13 Neb., 157; Bryant v. Estabrook, 16 Neb., 217; McClure v. Warner, 16 Neb., 447; Barber v. Evans, 27 Minn., 92; Sheppard v. Clark, 58 Ia., 371; Whitmore v. Learned, 70 Me., 276; Stephenson v. Martin, 84 Ind., 160. Where the statute gave a lien, and also made the "proprietor" personally liable, it was held that the proprietor intended was the person on whose default the land was sold, but that the land itself was subject to the lien in the hands of a subsequent owner. Hunt v. Curry, 37 Ark., 100. In Indiana, where the land owner brought suit against the purchaser to quiet title, the latter was held entitled to establish a lien for the taxes by his answer. Reed v. Earhart, 88 Ind., 159. The mere payment of taxes on another person's land does not entitle the party paying to a lien. Sohn v. Wood, 75 Ind., 17. The tax purchaser's lien is made to include twenty-five per cent. interest, Flinn v. Parsons, 60 Ind., 573; Duke v. Brown, 65 Ind., 25; Hosbrook v. Schooley, 74 Ind., 51; and it may be foreclosed in an action to quiet title or recover possession. Jenkins v. Rice, 84 Ind., 342; Barton v. McWhinney, 85 Ind., 481. On the death of the purchaser the lien passes to his heir, Stephenson v. Martin, 84 Ind., 160; it may be enforced though the land was assessed in the wrong name, Jenkins v. Rice, 84 Ind., 342; but not unless the land is sufficiently identified, Sharpe v. Dillman, 77 Ind., 280; Ford v. Kolb, 84 Ind., 198; though a merely imperfect description will not prevent a lien attaching. Parker v. Goddard, 81 Ind., 294. It is immaterial to the lien that the tax should have been collected of personally. Sloan v. Sewell, 81 Ind., 180; Barton v. McWhinney, 85 Ind., 481. See Crecelius v. Mann, 84 Ind., 149; McWhinney v. Brinker, 64 Ind., 380.

There is a limit to state power to give such a lien which will be understood on a perusal of the chapter respecting the cure of defects in tax proceedings. It was there shown that if a tax was merely irregular, either in its assessment or levy, or in the steps taken for its enforcement, it was competent for the

And as to limitation of suit to enforce the lien, *Brown v. Fodder*, 81 Ind., 291; *Bowen v. Striker*, 87 Ind., 817. In Iowa, if a tax deed is set aside, the tax purchaser is entitled to be reimbursed by the owner such sum as would have been necessary to discharge the land from taxes if they had not been paid by the purchaser. *Besore v. Dosh*, 43 Ia., 211; *Sexton v. Henderson*, 45 Ia., 160; *Miller v. Corbin*, 46 Ia., 150; *Springer v. Bartle*, 46 Ia., 688. He is also entitled to be reimbursed for taxes subsequently paid by him. *Light v. West*, 42 Ia., 138; *Thompson v. Savage*, 47 Ia., 522. But he must observe the statutory conditions on the subject. *Kennedy v. Bigelow*, 43 Ia., 74. As to how the right to reimbursement may be affected by subsequent transfers of title, see *Forey v. Bigelow*, 56 Ind., 381.

Where the title to land is in doubt, if one claimant pays taxes and afterwards is adjudged to have no title, he cannot recover from the other the amount so paid. *Garrigan v. Knight*, 47 Ia., 525.

As to the right to reimbursement in Louisiana, see *Fix v. Succession of Dierker*, 30 La. An., 175; *Person v. O'Neal*, 32 La. An., 228; *Shannon v. Lane*, 33 La. An., 489; *Davenport v. Knox*, 34 La. An., 409; *Hickman v. Dawson*, 35 La. An., 1086. And in Texas, see *Cantagrel v. Von Lupin*, 58 Tex., 570. And in Mississippi, *Ingersoll v. Jeffords*, 55 Miss., 37; *Cogburn v. Hunt*, 56 Miss., 718; S. C., 57 Miss., 681. And in Wisconsin, *Hart v. Smith*, 44 Wis., 213. In Michigan the lien must be enforced in a special proceeding. *Weimer v. Potter*, 42 Mich., 569; *Ellsworth v. Freeman*, 43 Mich., 488. The payment of taxes is not proved by the mere receipt in these cases. *Ibid.* The right to the lien will be cut off by subsequent tax sales to others. *Robbins v. Barron*, 33 Mich., 124; S. C., 34 Mich., 517. In Kansas a lien may be established in an action of ejectment in which the holder of the tax title fails to recover. *Russell v. Hudson*, 28 Kan., 99; *Arn v. Hoppin*, 25 Kan., 707; *Fairbanks v. Williams*, 24 Kan., 16. But not in a suit to quiet title, the statute giving other relief in that case. *Corbin v. Young*, 24 Kan., 198. See, further, *Saline Co. Com'rs v. Geis*, 22 Kan., 381; *Lincoln Co. Com'rs v. Faulkner*, 27 Kan., 164; *Richards v. Wyandotte Co. Com'rs*, 28 Kan., 326.

If the tax was vicious in its inception there can be no lien. *Early v. Whittingham*, 43 Ia., 162; *Nichols v. McGlathery*, 43 Ia., 189; *Roberts v. Deeds*, 37 Ia., 320; *Harper v. Rowe*, 53 Cal., 233. The same is true if by law the land was exempt from taxation. *Sully v. Poorbaugh*, 45 Ia., 453; *Gaither v. Lawson*, 31 Ark., 279; *Jeffries v. Clark*, 23 Kan., 448; *Hoffmire v. Rice*, 23 Kan., 749.

In Nebraska the purchaser at a tax sale may pay all subsequent taxes and add the amount to his lien. *Schoenheit v. Nelson*, 16 Neb., 235; *Holmes v. Andrews*, 16 Neb., 296, and cases cited. This applies to counties as purchasers also. *Otoe Co. v. Brown*, 16 Neb., 394.

legislature to provide for its reassessment in a subsequent year, while if it was illegal, the power to reassess would be wanting. This principle is applicable here, and whenever the state would have power to reassess, it may more directly, if the land has been sold for the irregular tax, reach the same end, by giving the purchaser a lien on the land for the sum justly payable. Such a lien is a creature of the statute, and governed and limited by it.

CHAPTER XVII.

PROCEEDINGS AT LAW TO RECOVER LANDS SOLD FOR TAXES.

General rule. Where lands have been sold and conveyed in satisfaction of delinquent taxes, the claims of the respective parties to the title are to be determined in the customary methods. The purchaser, if he finds the land occupied, may bring ejectment in the common law courts to obtain possession, and if, on the other hand, he finds the land unoccupied and takes possession without suit, the original owner may have the like remedy against him. Though the tax deed be made by law *prima facie* evidence of title in the purchaser, it is not competent by statute to provide for putting him in possession forcibly and without a judicial hearing.¹ No entry is necessary before bringing suit,² but if the statute requires the service of written notice by the tax purchaser on the adverse claimant for a certain length of time before instituting proceedings to recover, the notice is a condition precedent, and the giving of it must be proved by competent common law evidence.³

Special rule for tax cases. It has in some states been thought proper to restrict the right to contest a tax title to such persons as can show an apparent title in themselves derived either from the state or from the United States. How far it is competent for the legislature to impose such a restriction, it

¹ Calhoun v. Fletcher, 63 Ala., 574; Fischel v. Mercier, 32 La. An., 704; Mayenno v. Millaudon, 32 La. An., 1123. In Illinois a tax purchaser on recovering in ejectment does not obtain the growing crops. Brock v. Leighton, 11 Ill. App., 361.

² But in Wisconsin the tax deed must be first recorded. Hewitt v. Butterfield, 53 Wis., 384; Hewitt v. Week, 59 Wis., 444. Probably this is the rule in some other states. And doubtless in any state it would be held essential that it be executed with the statutory formalities. See Bowen v. Striker, 100 Ind., 45. In Pennsylvania, if the land was sold as unseated, the tax purchaser must prove that it was so or his purchase will be void. Miller v. McCullough, 104 Pa. St., 624. Where the certificate of purchase or the deed is made *prima facie* evidence of title, it is not necessary that the holder should prove that there was no redemption. Stewart v. Coulter, 31 Minn., 385.

³ People v. Walsh, 87 N. Y., 481.

is perhaps not important now to inquire, as a title presumptively derived from the state or the United States is shown when a *prima facie* case sufficient under common law rules is made out, and the right to make the contest under the statute is thereby established.¹

Repayment to Purchaser. It has also been sometimes thought politic and just to impose upon the owner of the original title an obligation to do what is equitable under the circumstances as a condition either to the institution of any suit as plaintiff for the recovery of the land or to any judgment in his favor grounded on the invalidity of the tax title. One of these, imposed in some states, is that, before instituting suit, the original owner shall bring into court, for conditional payment to the tax purchaser in case his title shall be held invalid, the amount for which the land was sold, with interest.² Generally it is required also that some further sum shall be added which will be in the nature of a penalty for failure to pay the tax in due season.

It has been decided in one case that an act which provided that "no person shall be permitted to institute any proceedings to set aside any assessment or special tax, hereafter levied or assessed upon any lot or tract of land, or to set aside any deed executed in consequence of non-payment of such taxes, and the sale of the premises therefor, unless such person shall first pay or tender to the proper party, or deposit for his use with the treasurer, the amount of all state, county and city taxes that may remain unpaid upon such lot or tract, together with the

¹*Gamble v. Horr*, 40 Mich., 561; *Hintrager v. Kline*, 62 Ia., 605. See *Chandler v. Keeler*, 46 Ia., 596. In a suit to confirm a tax title, the question whether the United States patent was not void for fraud cannot be gone into. *Chrisman v. Currie*, 60 Miss., 858. In Louisiana a tax title cannot be assailed collaterally by one claiming under a mortgage from the former owner, but only in a direct suit for the purpose. *Ludeling v. McGuire*, 35 La. An., 893, citing *Coco v. Thieneman*, 25 La., 237; *Hickman v. Dawson*, 33 La. An., 441, and other cases. Nor can a creditor of the former owner attack it collaterally if the tax purchaser is in possession. *Ludeling v. McGuire*, *supra*.

²Also the taxes which the purchaser has subsequently paid, if any. But it has been held in Missouri that, if one without color of title pays taxes on land, the owner cannot be compelled, as a condition to recovery of possession from him, to refund the amount paid. *Napton v. Leaton*, 71 Mo., 353.

interest and charges thereon," was void as being inconsistent with that clause in the constitution that declares that every person "ought to obtain justice freely and without purchase."¹ If this statute were confined to the requirement of a payment or tender of legal taxes and costs for which the sale may have been made, the soundness of the conclusion might well be made a question. No one is denied a remedy in the courts when he is merely required to submit to a condition which, under the circumstances, is reasonable. Conditions to the assertion of a right in court are imposed in many cases, none of which are supposed to work to the detriment of justice. The requirement of security from a plaintiff in replevin or attachment are instances, and the payment of taxes upon the legal process or upon the entry of the suit is another. Courts of equity, on general principles of right, are frequently in the habit of imposing conditions where one seeks in equity to restrain a tax, only a part of which is illegal. The authority of the legislature over the whole subject of legal remedies is very ample, and it is not to be supposed that any general declaration of the right of the citizen to his day in court was intended to preclude the legislature from exercising its authority to require him to do equity when he did come. Other cases have distinctly affirmed the right to require payment of the taxes as a condition precedent to a recovery of the land from the tax purchaser, when it was proposed to do so on the ground of the invalidity of the tax proceedings.²

¹ *Conway v. Cable*, 87 Ill., 82. In Nebraska it is held that a short statute of limitations for the protection of tax purchasers should not apply to deeds given before its passage. *Sutton v. Stone*, 4 Neb., 319.

² *Tharp v. Hart*, 2 Sneed, 569; *Glass v. White*, 5 Sneed, 475; *Craig v. Flanagan*, 31 Ark., 319; *Pope v. Macon*, 23 Ark., 644; *Coonradt v. Myers*, 31 Kan., 30; *Belz v. Bird*, 31 Kan., 139; *Lombard v. Antioch College*, 60 Wis., 459. Compare *Wakely v. Nicholas*, 16 Wis., 588. In *Henderson v. Starritt*, 4 Sneed, 470, it was decided that the plaintiff in ejectment to recover land sold for taxes may show that any necessary proceeding subsequent to the judgment and order of sale, such as the advertisement of the sale itself, was irregular and void, without first being required to show that the taxes had been paid anterior to such judgment and order of sale. A constitutional provision that "appeals and writs of error shall be allowed from the final determination of county courts as may be provided by law" is not violated by a statute which, in tax cases, requires the appellant to deposit with the county treasury the amount of the judgment. *Andrews v. Rumsay*, 75 Ill.,

These decisions, if limited in their application to cases in which taxes were justly and equitably a charge upon the land, and only failed to become a legal charge by reason of the negligence or mistakes of officers in the discharge of their duties under the tax law, may fairly be said to rest upon sound reasons of broad equity, and to be supported on the same grounds which support remedial laws in general. If the tax purchaser has, by his purchase, paid a charge which the state might fairly and justly make a legal one upon the land, and which the owner of the land ought himself to have paid to the state, there is no reason why the state should not give to the purchaser, when he loses the expected benefit of the purchase, a remedy to recover the amount of the tax from the party who ought to have paid it. This is the province of remedial laws; to give new remedies where none at all or only inadequate remedies existed before. And so favorably are such laws regarded that they always receive at the hands of the courts a benign and favorable construction.¹

But if the tax itself were vicious; if it were laid for a private and not a public purpose; if it were a special and arbitrary exaction from one person while the rest of the community

598, citing *People v. Wallace*, in same court, same term. . A statute precluding the owner from contesting a tax sale, unless he has paid or tendered the taxes, cannot be extended by construction to embrace the case of lands forfeited to the state. *Williamsburg v. Lord*, 51 Me., 599. Nor can it be applied to a case where the owner, before the tax sale, went to the proper office with his list of lands and paid all taxes except one road tax, which, by mistake of the officer, was not included. *Breisch v. Cox*, 81 Pa. St., 336.

A decree settling the title to land in the original holder, as against a tax purchaser, does not bar an action to recover for taxes paid by the latter in good faith upon the land in controversy. *Stewart v. Corbin*, 38 Ia., 571. As to lien for taxes paid after the bar of the statute of limitations has attached, see *Brown v. Fodder*, 81 Ind., 491.

¹ A statute provided that the holder of a tax title should not be entitled to possession as against the holder of a subsequent tax deed until he should have paid or tendered to the latter the amount of tax for which the subsequent deed was given. *Held*, that the subsequent title intended was not necessarily a legal title, though the tax on which it was based must not have been one that was merely arbitrary, but have some warrant in law. *Sinclair v. Learned*, 51 Mich., 335.

Payment of an arbitrary amount could not be coerced in this indirect way. *Ibid.*

equally interested was not taxed at all, or if for any similar reason the charge was not just and equitable as against the owner of the land or the land itself, so that the legislature could not have validated it retrospectively by a direct enactment, it is not perceived on what grounds an authority to validate it by this indirect and circuitous method can be supported. The legislature can have no more authority to compel the land owner to pay a lawless exaction to a third person than it has to compel a like payment to the state directly. The one as much as the other would be robbery. If the land owner performs all his duty to the state, nothing which the tax officers can do without his consent, and in the direction of depriving him of his freehold, can raise against him an equity requiring him to do more. The rule *caveat emptor* applies to the purchaser. He takes all the risks of his purchase, and if he finds in any case that he has secured neither the title he bid for nor any equitable claim against the owner, the state may, if it see fit, make reparation itself; but it has no more authority to compel the owner of the land to do so than to exercise the like compulsion against any other person.¹

¹ This is the substance of the decision in *Hart v. Henderson*, 17 Mich., 218. How far it may be just, and therefore competent, to compel the land owner, in cases where the tax was just but the proceedings to make it a charge on person or property void, to pay the cost of such void proceedings, is a question that will be very likely at some time to come up for determination. It is certainly difficult to perceive how any equitable claim can exist against any one for the cost of void proceedings. See *Sinclair v. Learned*, 51 Mich., 335. The Illinois statute of 1839 provided that "no person shall be permitted to question the title acquired by a sheriff's deed without first showing that he or she, or the person under whom he or she claims title, had title to the land at the time of the sale, or that the title was obtained from the United States or this state after the sale, and that all taxes due upon the land have been paid by such person or the person under whom he claims title aforesaid." It has been decided that notwithstanding this statute, the party defendant may contest the tax title, if the taxes due to the state have been paid, no matter by whom. *Curry v. Hinman*, 11 Ill., 420. See *Conway v. Cable*, 37 Ill., 82. Also that if one was in possession of the land claiming title when the sale was made, that is sufficient evidence of title. *Luak v. Harber*, 8 Ill., 158; *Curry v. Hinman*, 11 Ill., 420. The following cases throw light on the construction of this statute: *Hinman v. Pope*, 6 Ill., 181, 188; *Bestor v. Powell*, 7 Ill., 119; *Atkins v. Hinman*, 7 Ill., 437, 453; *Spellman v. Curtenius*, 12 Ill., 409; *Hope v. Sawyer*, 14 Ill., 254; *Billings v. Detten*, 15 Ill., 218; *Polk v. Hill*, 15 Ill., 130; *Chapin v. Curtenius*, 15 Ill., 427, 432. In Wisconsin it is held that the requirement of payment of the

What is said above regarding lawless exactions is applicable in full force to a case in which the sum demanded may be lawful in part, but is swelled by unjust and illegal additions.¹

Payments for Betterments. Another common provision is that the owner of the original title, in the event of his establishing his title to the land, shall pay to the tax purchaser the enhanced value of the land in consequence of the expenditures the latter has made upon it. The requirement that payment shall be made of the fair value of betterments which an adverse claimant has made in good faith upon the land, and which the party making them must now lose, is one that, under ordinary circumstances, is eminently just and proper. No serious question of the right of the legislature to make such requirements can well arise, and if it could, it must now be considered as conclusively settled by the decisions in its favor.² The requirement is at this time very generally made.

tax before the original owner can contest the tax title can only be applied to cases where the tax is irregular, and not to those where the objections go to the groundwork of the tax. *Philleo v. Hiles*, 42 Wis., 537; *Marsh v. Supervisors*, 42 Wis., 502; *Plumer v. Supervisors*, 46 Wis., 163; *Tierney v. Lumbering Co.*, 47 Wis., 248.

¹ A provision that before any person claiming title to real property sold for taxes shall be entitled to prosecute or defend any suit against any person claiming such property under any tax sale, he shall deposit double the purchase money, and all taxes and interest since sale, the value of improvements and probable costs of suit, is an unreasonable condition attached to the right to suit and is therefore unconstitutional. *Lassetter v. Lee*, 68 Ala., 287.

² *Brown v. Storm*, 4 Vt., 37; *Whitney v. Richardson*, 31 Vt., 300, 306; *Armstrong v. Jackson*, 1 Blackf., 374; *Fowler v. Halbert*, 4 Bibb, 52, 54; *Bracket v. Norcross*, 1 Me., 89, 92; *Withington v. Corey*, 2 N. H., 115; *Hunt's Lessee v. McMahan*, 5 Ohio, 133; *Longworth v. Wolfington*, 6 Ohio, 9, 10; *Bacon v. Callender*, 6 Mass., 303; *Jones v. Carter*, 12 Mass., 314; *Scott v. Mather*, 14 Tex., 235; *Saunders v. Wilson*, 19 Tex., 194; *Childs v. Shower*, 18 Ia., 261; *Pacquette v. Pickness*, 19 Wis., 219; *Coney v. Owen*, 6 Watts, 435; *Steele v. Spruance*, 22 Pa. St., 256; *Lynch v. Brudie*, 68 Pa. St., 206; *Dothage v. Stuart*, 35 Mo., 251; *Fenwick v. Gill*, 38 Mo., 510; *Craig v. Flanagan*, 21 Ark., 319; *Pope v. Macon*, 23 Ark., 644; *Marlow v. Adams*, 24 Ark., 109; *King v. Harrington*, 18 Mich., 213; *Howard v. Zeyer*, 18 La. An., 407; *Love v. Shartzler*, 31 Cal., 487; *Stebbins v. Guthrie*, 4 Kan., 353; *Haney v. Cole*, 28 Ark., 299; *Smith v. Smith*, 15 Kan., 290; *Clewis v. Hartman*, 71 Ga., 810.

Some of the statutes give the value of the improvements to those only who have been in possession, claiming title in good faith. In Texas it has been held that the tax purchaser is not a possessor in good faith, and conse-

Short Statutes of Limitation. It has also been thought wise in some states to prescribe a short time within which actions may be brought by owners of the original title to test the validity of the sale. If the owner was not entitled to compensation for improvements, if his deed was void for want of authority in the officer to sell, and by proper diligence he might have known the fact. *Robson v. Osborn*, 13 Tex., 298, 307. In Indiana the claimant must have had at least color of title. *Cain v. Hunt*, 41 Ind., 466. But in Pennsylvania, and, perhaps, in most of the states, the owner, recovering his lands, may have judgment against him for improvements, though the tax proceedings were wholly void. *Gilmore v. Thompson*, 3 Watts, 106 (where the tax had been paid before sale); *Coney v. Owen*, 6 Watts, 435 (where the land was exempt from taxation); *Lynch v. Brudie*, 63 Pa. St., 206. See *Zweitusch v. Watkins*, 61 Wis., 615; *Hickman v. Dawson*, 35 La. An., 1086, citing several cases. But it would be otherwise if the lands were seated so that the sale would be void, not because of defective proceedings, but because of the absence of jurisdiction to proceed at all. See *Lamberton v. Hogan*, 2 Pa. St., 22, and cases cited. In *Rogers v. Johnson*, 87 Pa. St., 43, 47, *Agnew, J.*, gives the explanation of the difference: "The distinction between a sale absolutely void, from want of jurisdiction to sell, and one merely void because of a fatal defect in the proceedings, is palpable. Thus in *McKee v. Lamberton*, 2 W. & S., 107, 114, and *Cranmer v. Hall*, 4 W. & S., 36, where the land was seated and the treasurer had no authority to sell, it was held that the purchaser was not entitled to be compensated for his improvements; while in *Coney v. Owen*, 6 Watts, 435, and *Gilmore v. Thompson*, 3 Watts, 106, where the lands were unseated and the treasurer had general jurisdiction, but the sales were void because, in the first place, of exemption from taxation, and in the second, because of a prior payment of the taxes, the purchaser was held to be entitled to his improvements. There are other cases, even where the irregularity has deprived the owner of his surplus bond, where the sales have been sustained. Thus, the sales were supported in *Gibson v. Robbins*, 9 Watts, 156, where the treasurer charged too much costs and appropriated the whole bid, where a surplus would have existed for which a bond should have been taken; and in *Peters v. Heasley*, 10 Watts, 208, and *Russell v. Reed*, 27 Pa. St., 166, where the commissioners of the county bid more than the taxes and costs, and the owner was thereby deprived of his security for the surplus. So, also, the sale was supported in *Frick v. Sterrett*, 4 W. & S., 269, where the treasurer, by mistake, took the bond for less than the true surplus. To these cases may be added *Bayard v. Inglis*, 5 W. & S., 465, and *Burd v. Patterson*, 22 Pa. St., 219, where no bonds were given when the sale was made and deed delivered. In the former the bond was not given until nearly two years afterwards, and it was never filed."

Betterments, made before the tax title accrued, cannot be recovered for. *Wheeler v. Merriman*, 30 Minn., 372; *Jacks v. Dyer*, 31 Ark., 334. Nor can those which were made only in part under the tax title. *Sands v. Davis*, 40 Mich., 14. Nor, if they were made while the land belonged to the United States, can a purchaser from the United States be required to pay for them. *Gaither v. Lawson*, 31 Ark., 279.

ity of the tax deed, and to bar them of all remedy if the time is suffered to elapse without suit. Such statutes are enacted under the sovereign power of the state to limit within reasonable bounds the time for which its courts shall remain open for the adjustment of controversies, and when the time is not unreasonably short they are grounded in sound policy. But like every other power of government, the power to limit the time for bringing suits is not altogether arbitrary and unrestricted, and it is not unlikely that it will be found to have been in some cases exceeded in the enactment of laws not warranted by constitutional principles.

The most common limitation of time for actions for the recovery of land is twenty years from the time when the right of action accrued, and the right of action at the common law accrues when adverse possession begins. But this period the legislature has undoubted right to shorten, either generally as to all classes of cases, or specially as to some classes, as in its wisdom shall be deemed just and politic. Having this authority it has in some cases been persuaded to so exercise it for the special class of land controversies in which tax titles are brought in question, as to reduce the time for contesting the validity of a tax title to five years, or even to a still shorter period. The statutes to this effect have not always been couched in the ordinary terms of statutes of limitation; they have not been simply statutes limiting a time for the bringing of suits after cause of action has accrued, but if literally interpreted they have seemed to fix a time after the lapse of which, irrespective of possession or other circumstance, the tax title should be deemed legal, and not be open to question. This feature of such statutes has raised serious doubts whether the legislature in adopting it has not exceeded its constitutional power. The short period of limitation it is entirely competent for the legislature to prescribe,¹ but it may be questioned whether an act which merely limits a time within which a bad title may ripen into a good

¹ *Thomas v. Stickle*, 32 Ia., 71 (citing *Henderson v. Oliver*, 28 Ia., 20; *Elbridge v. Kuehl*, 27 Ia., 160); *Shiek v. McElroy*, 20 Pa. St., 25; *Edgerton v. Bird*, 6 Wis., 527, 532; *Sprecker v. Wakeley*, 11 Wis., 432. The short statute of limitation can have no application in a case in which, though a tax deed was given, there was in fact no tax laid. *Florida Sav. Bank v. Brittain*, 20 Fla., 507.

one is, either in spirit, purpose or effect, an act in the nature of an act of limitation.

Three different classes of cases may be affected by such statutes: 1. Those in which the owner of the original title remains in possession after the tax sale. 2. Those in which the land is then and remains afterward unoccupied. 3. Those in which the tax purchaser enters and holds possession claiming title.

In the third class of cases there can be no sufficient reason why the holder of the original title should not be required to bring suit in a time less than twenty years. By the adverse possession he is excluded from the enjoyment of any right he may claim, and public policy no less than justice to the tax purchaser requires that he should bring his suit within a reasonable time, in order that all contested questions may be put at rest while the facts are recent and presumably susceptible of proof. And it cannot be said that five years,¹ or perhaps even three years,² is not a reasonable time for the institution of such a suit.

In the first class of cases it would be manifest and most gross injustice to make lapse of time alone extinguish the title of the original owner. Being in the full possession of his rights, it is the adverse claimant and not himself who seems to be negligent in not bringing suit. And it is not surprising that, under such circumstances, question should be made whether it is competent to limit a period at the expiration of which the tax title shall become a perfect title and not open to controversy or dispute.³ If distinct notice were required to be given to the original owner that title was claimed under the tax deed, and a

¹ *Lassiter v. Lee*, 68 Ala., 287. A statute fixing a five-year limitation should be strictly construed, and it will not be applied to an equitable action to quiet title claimed to be clouded by a tax deed. *Farrar v. Clark*, 85 Ind., 489; *Gabe v. Root*, 93 Ind., 256.

² A Kansas statute required the holder of a tax title to bring suit within two years from the recording of his deed. He delayed to record it for eight years. Held that he then had two years in which to bring suit. *Estes v. Stebbins*, 25 Kan., 315. In Minnesota a statute required that proceedings to test the validity of a tax title should be brought within three years. This being afterward repealed, it was held that actions might then be brought in cases in which the time had fully run before the repeal. *Kipp v. Johnson*, 31 Minn., 360. Compare *Taylor v. Courtney*, 15 Neb., 190.

³ *Groesbeck v. Seeley*, 13 Mich., 329. See *Conway v. Cable*, 37 Ill., 82; *Case v. Dean*, 16 Mich., 12; *Wain v. Shearman*, 8 S. & R., 357.

reasonable opportunity afforded for contesting the title in some convenient form of proceeding thereafter, there would be less reason for criticism of such a law; but the notice most commonly provided for is such constructive notice as is derived from the recording of the tax deed; which notoriously is of little value.

In the second class of cases the proper rule is not so clear. If no provision is made by statute under which ejectment can be brought in the case of a vacant possession, it would seem that neither claimant could be considered in law negligent, so as to render his claim the proper subject of a statute of repose, until possession was taken by his adversary; but if ejectment is allowed in such cases, then it may possibly be within the power of the legislature to declare that the title of that one of the parties who, constructively,¹ is to be regarded as in possession, shall become absolute if not questioned by suit within the time by the statute limited for that purpose.

The Pennsylvania statute of 1804 declared that no action for the recovery of lands sold under the act should lie, unless brought within five years after the sale. But this the courts refused to apply literally, because, in the case of a vacant possession, it would cut off the original owner without giving him the opportunity to contest the title; there being no statute permitting ejectment in such cases. They therefore held that the statute began to run, not from the sale, but from the time of possession taken under it.¹ Subsequently, when the right to maintain ejectment for an unoccupied tenement had been conferred by the statute, it was held that the statute began to run in favor of the tax purchaser at the time the sale was perfected by deed, he being constructively in possession of the unoccupied premises from that time.² These decisions have perhaps

¹ *Waln v. Shearman*, 8 S. & R., 357; *Cranmer v. Hall*, 4 W. & S., 36. See also, *Baker v. Kelly*, 11 Minn., 490; *Boeck v. Merriam*, 16 Neb., 199. See *Dreutzer v. Baker*, 60 Wis., 179.

² "It was argued that the limitation in the act of 1804 does not apply to a case where the owner is in possession. That is true, as was determined in *Bigler v. Karnes*, 4 W. & S., 137, and *Shearer v. Woodburn*, 10 Pa. St., 511. But that is where the possession is *actual*, and the owner is thus daily and hourly challenging the validity of the tax title. It is not so, however, in any other case, and it is settled that in all other cases the limitation runs from the time of the sale, and not from the time when possession is taken

given effect to the statute as nearly as was possible, consistent with fundamental rules of right.¹

The Wisconsin statute provides that "any suit or proceeding for the recovery of lands sold for taxes, except in cases where the taxes have been paid or the lands redeemed as provided by law, shall be commenced within three years from the time of recording the tax deed of sale, and not thereafter." That this statute is valid does not seem to have been very seriously questioned.² That it applies against the holder of the tax title

by the purchaser. *Parish v. Stevens*, 3 S. & R., 298, the first case decided under the act of 1804, on this point, was overruled by *Waln v. Shearman*, 8 S. & R., 357, on the ground that an ejectment would not lie against a vacant possession. But the act of 29th March, 1824, having provided a remedy for the owner in the case of a vacant possession, this court returned to the doctrine of *Parish v. Stevens*, and it is now held that the limitation runs from the time of the sale, and not of possession. *Robb v. Bowen*, 9 Pa. St., 71; *Sheik v. McElroy*, 20 Pa. St., 25; *Burd v. Patterson*, 23 Pa. St., 219; *Stewart v. Trevor*, 56 Pa. St., 374. In the last case, Justice Strong, summing up the cases, says: 'Since the act of 29th March, 1824, the limitation is perfect at the end of five years from the delivery of the deed to the purchaser, without regard to possession.' *Agnew, J.*, in *Rogers v. Johnson*, 67 Pa. St., 43, 48. See, also, to the same effect, *Johnston v. Jackson*, 70 Pa. St., 164.

¹ A statute providing that no action for the recovery of land sold for taxes shall lie, "unless brought within five years after the sale thereof for taxes, as aforesaid," will not benefit the holder of the tax title when suing as plaintiff; and if he sues after five years he must show a valid title. *Bigler v. Karnes*, 4 W. & S., 137; *Shearer v. Woodburn*, 10 Pa. St., 511; *Hole v. Rittenhouse*, 19 Pa. St., 305; *McReynolds v. Longenberger*, 57 Pa. St., 18. It has been decided in Pennsylvania that, as against a mere intruder, the tax deed, with evidence of title out of commonwealth, is sufficient. *Crum v. Burke*, 25 Pa. St., 377, 381, citing *Foust v. Ross*, 1 W. & S., 501; *Foster v. McDivitt*, 9 Watts, 344; *Dikeman v. Parrish*, 6 Pa. St., 210. And see *Shearer v. Woodburn*, 10 Pa. St., 511; *Troutman v. May*, 33 Pa. St., 455; *Wheeler v. Winn*, 53 Pa. St., 122; *Hess v. Herrington*, 73 Pa. St., 438.

² For decisions sustaining like statutes where the tax purchaser has been in possession, see *Pillow v. Roberts*, 13 How., 472; *Vancleave v. Milliken*, 13 Ind., 105; *Doe v. Hearick*, 14 Ind., 242; *Cofer v. Brooks*, 20 Ark., 542; *Sprague v. Pitt*, *McCahon*, 212; *Bowman v. Cockrill*, 6 Kan., 311. See *De Graw v. Taylor*, 37 Mo., 310; *Pease v. Lawson*, 33 Mo., 35; *McNamara v. Estes*, 22 Ia., 246; *Eldredge v. Kuehl*, 27 Ia., 160; *Henderson v. Oliver*, 28 Ia., 20; *Case of Albee*, 28 Ia., 277; *McCready v. Sexton*, 29 Ia., 356; *Henley v. Street*, 29 Ia., 429; *Thomas v. Stickle*, 32 Ia., 71; *Douglas v. Tullock*, 34 Ia., 262; *Jeffrey v. Brokaw*, 35 Ia., 505. The three-year limitation applies though the land is unoccupied. *Hiles v. La Flesh*, 59 Wis., 465. After the three years has run the tax deed cannot be impeached by proof that there was no valid assessment. *Oconto Co. v. Jerrard*, 46 Wis., 317, citing *Marsh*

as well as in his favor has been the conclusion of the courts, and it therefore cuts off either the original owner or the tax purchaser, if the adverse claimant has been in the occupation of the land for the period named.¹ It is also decided that, when the land is unoccupied, the holder of the tax title has constructive possession, and if the owner of the original title does not bring ejectment (which the statute permits in such case) within the three years he is barred,² but that if the tax deed is void on its face, the grantee in it has no constructive possession, and in such case the statute does not run in his favor,³ though it would do so, even under a void deed, if his possession were actual, open and notorious.⁴ On the other

v. Supervisors, 42 Wis., 502; *Lawrence v. Kenney*, 32 Wis., 281; *Wood v. Meyer*, 36 Wis., 308. Nor because in the sum for which sale was made a revenue stamp was included. *Milledge v. Coleman*, 47 Wis., 184.

¹ *Edgerton v. Bird*, 6 Wis., 527; *Sprecher v. Wakeley*, 11 Wis., 432; *Knox v. Cleveland*, 13 Wis., 245; *Jones v. Collins*, 16 Wis., 594; *Parish v. Eager*, 15 Wis., 532; *Whitney v. Marshall*, 17 Wis., 174. These decisions held applicable to the Iowa statute. *Brown v. Painter*, 38 Ia., 456; *Lavery v. Sexton*, 41 Ia., 435; *Peck v. Sexton*, 41 Ia., 566; *Wallace v. Sexton*, 44 Ia., 257; *Barrett v. Holmes*, 102 U. S., 651. In Mississippi the running of the statute in favor of the original owner is not affected by the pendency of statutory proceedings by the tax purchaser to confirm his title. *Bell v. Coats*, 56 Miss., 776. Under a similar Indiana statute it is held that a purchaser who has been prevented by litigation from asserting his rights till after five years may then have relief in equity. *Union, etc., Ins. Co. v. Dice*, 14 Fed. Rep., 523.

² *Gunnison v. Hohne*, 18 Wis., 268; *Lawrence v. Kenney*, 32 Wis., 281. See *Hill v. Kricke*, 11 Wis., 442; *Dean v. Earley*, 15 Wis., 100.

³ *Lain v. Shepardson*, 18 Wis., 59; *Cutler v. Hurlbut*, 29 Wis., 152. To the same effect are *Taylor v. Miles*, 5 Kan., 498; *Shoat v. Walker*, 6 Kan., 65. See *Leffingwell v. Warren*, 2 Black, 599; *Hall v. Dodge*, 18 Kan., 277.

The rule was laid down in *Sydnor v. Palmer*, 29 Wis., 226, that, under statutes of limitations, "evidence of adverse possession is always to be strictly construed, and every presumption is to be made in favor of the true owner." In *Wilson v. Henry*, 35 Wis., 241, 245, this rule is explained as applying to the holder of the tax title when he claims by constructive possession, and the "true owner" is in such case to be regarded as the original owner, notwithstanding any technical defects that may be found in his claim of title. See *Dreutzer v. Baker*, 60 Wis., 179.

⁴ *Lindsay v. Fay*, 25 Wis., 460. On this point, see also *Cofer v. Brooks*, 20 Ark., 542; *Hoffman v. Harrington*, 28 Mich., 90; *Washburn v. Cutter*, 17 Minn., 361. The statute does not apply to a tax title fraudulently obtained, as, for example, by an agent who bought in his principal's land when he should have paid the tax. *McMahon v. McGraw*, 26 Wis., 614. And see

hand a similar possession on the part of the original owner would interrupt the running of the statute against him, notwithstanding the tax deed is recorded.¹

In Iowa the decisions under a statute corresponding to that of Wisconsin have been essentially the same as in the latter state. The statute begins to run as against the owner of the tax title as soon as his right to a deed becomes complete, and he cannot by his own act prevent it; but as against the owner of the original title, it dates from the recording of the tax deed.² Irregularities in the assessment or in the subsequent proceedings will not preclude the five years bar in favor of the

Carithers v. Weaver, 7 Kan., 110. Nor does it apply where the tax sale was based upon an assessment made by a town having no jurisdiction of the land. *Wadleigh v. Marathon Co. Bank*, 58 Wis., 546, citing *Smith v. Sherry*, 54 Wis., 114.

¹ *Lewis v. Disher*, 32 Wis., 504; *Wilson v. Henry*, 35 Wis., 241, and 40 Wis., 594; *Coleman v. Eldred*, 44 Wis., 210; *Smith v. Ford*, 48 Wis., 115; *Stephenson v. Wilson*, 50 Wis., 95; *Haseltine v. Mosher*, 51 Wis., 443; *Smith v. Sherry*, 54 Wis., 114. This is but just, as until the tax purchaser takes possession ejectment cannot be maintained against him. *Lombard v. Culbertson*, 59 Wis., 433.

The special statute of limitations in tax deed cases must be pleaded (*Morgan v. Bishop*, 56 Wis., 284), provided there is opportunity for it. *Dreutzer v. Baker*, 60 Wis., 179. But the plaintiff may give in evidence any facts which would defeat the deed without pleading them. *Morgan v. Bishop*, 56 Wis., 284, citing *Kent v. Agard*, 24 Wis., 378; *McMahon v. McGraw*, 26 Wis., 614; *Nielson v. Schuckman*, 53 Wis., 638. The recording of a tax deed by one in possession at the time must be deemed for the purposes of the statute of limitations a new entry. *Link v. Doerfer*, 42 Wis., 391.

Under a statute which made the time for limitation of action to contest a tax title run from the filing an affidavit that the land was unoccupied, an affidavit was made by one having no knowledge of the fact, but the land was in truth unoccupied. Held that the want of affiant's knowledge would not prevent running of statute. *McDonald v. Daniels*, 58 Wis., 426. As to the requisites of such an affidavit, see *Dreutzer v. Smith*, 56 Wis., 292; *Howe v. Genin*, 57 Wis., 268.

As to the possession which would be sufficient to interrupt the running of the statute as against the tax title, see *Lewis v. Disher*, 32 Wis., 504; *Wilson v. Henry*, 40 Wis., 594; *Coleman v. Eldred*, 44 Wis., 210; *Smith v. Ford*, 48 Wis., 115; *Stephenson v. Wilson*, 50 Wis., 95; *Haseltine v. Mosher*, 51 Wis., 443.

² *Hintrager v. Hennessy*, 46 Ia., 600. See *Bailey v. Howard*, 55 Ia., 290; *Thornton v. Jones*, 47 Ia., 397; *Barrett v. Holmes*, 102 U. S., 651. As to the effect of disability of infancy, see *Gibbs v. Sawyer*, 48 Ia., 443.

tax purchaser;¹ but if there is neither a valid assessment nor levy, the statute has no application;² neither has it when the tax title is held by agreement as security merely,³ nor when the person against whom action is brought is a stranger to the patent title, and was not in possession when the tax deed was made;⁴ nor when the holder of the tax title is tenant in common with the other party, and as such would not be entitled to cut off the right of the other by buying at a tax sale.⁵ The statute runs against a city or county as well as against natural persons.⁶ Where the owner of the patent title has retained possession until the tax purchaser is barred, he may bring suit in equity to remove the cloud upon his title;⁷ and the tax purchaser, if in possession, has a corresponding right.⁸ An assignee has no better right than his assignor; and a tenant or licensee in possession cannot, by becoming assignee of a tax title already barred, make defense under it to a suit to quiet title.⁹ The rule that the owner of the tax title is deemed to be con-

¹ *Pierce v. Weare*, 41 Ia., 378; *Bullis v. Marsh*, 56 Ia., 747; *Monk v. Corbin*, 58 Ia., 503.

² *Early v. Whittingham*, 43 Ia., 162; *Patton v. Luther*, 47 Ia., 236.

³ *Jordan v. Brown*, 56 Ia., 281.

⁴ *Lockridge v. Daggett*, 47 Ia., 679; S. C., 54 Ia., 332.

⁵ *Austin v. Barrett*, 44 Ia., 488.

⁶ *Burlington v. Railroad Co.*, 41 Ia., 184; *Brown v. Painter*, 44 Ia., 368. As to what will constitute actual possession within the meaning of the statute, see *Forey v. Bigelow*, 56 Ia., 381. The purchaser from a minor is allowed five years from the date of his purchase in which to bring an action to recover the land as against the holder of the tax title, but the latter has no extension of time by reason of the minor's disability. *McCaughan v. Tatman*, 53 Ia., 508. The tax purchaser whose title fails may bring suit to recover taxes paid within five years from the purchase, but not afterwards. *Sexton v. Peck*, 48 Ia., 250.

⁷ *Peck v. Sexton*, 41 Ia., 566; *Tabler v. Callanan*, 49 Ia., 362; *Patton v. Luther*, 47 Ia., 236.

⁸ *Shawler v. Johnson*, 52 Ia., 472.

⁹ *Keokuk, etc., R. Co. v. Lindly*, 48 Ia., 11. And this notwithstanding any defects in the title of the complainant. *Ibid.*

While equity will usually follow the statutes of limitation, it will not, in any case, cut off the rights of parties to relief within a time shorter than that prescribed by the statute for bringing actions at law, unless the other party is shown to have been prejudiced by delay in some manner, which would render it inequitable to grant the relief sought. *Light v. West*, 42 Ia., 188.

structively in-possession is applied in Iowa as well as in Wisconsin, and it is held that he need not bring action to vindicate his title until actual hostile possession is taken by another, and the bar of the statute will be complete in his favor after five years if such hostile possession is not taken.¹ But if actual possession is taken within the five years by the owner of the patent title, he will be deemed to have claimed title from the time the right of the tax purchaser accrued, and the right of the latter will be barred when the five years are completed, as it would have been if the hostile possession had covered the whole period.² In Maryland a short statute of limitations for cases in which lands have been sold for taxes is held not applicable to the case of a sale for non-payment of an assessment for paving a street.³ In Arkansas a statute that "all suits brought to avoid the sale of land for taxes shall be commenced within two years from the date of sale" does not prevent a defense, after the two years, to a suit in ejectment brought by the tax title purchaser.⁴ In Louisiana a statute which precludes taking advantage of irregularities in tax proceedings after the lapse of five years will not apply to cases in which the assessment is radically defective;⁵ nor to cases where, by the recitals of the tax deed or otherwise, it appears that the tax sale was not legal.⁶ But the statute covers all cases of mere informalities.⁷ In Alabama it is said the purpose of the five years' statute of limitations is to give repose to the title of the tax purchaser, if in possession, and to quiet all litigation if he is not in possession,⁸ and the statute runs from the time the tax deed is ex-

¹ *Moingona Coal Co. v. Blair*, 51 Ia., 447; *Lewis v. Soule*, 52 Ia., 11; *McCaughan v. Tatman*, 53 Ia., 508; *Gosler v. Tearney*, 52 Ia., 455; *Bullis v. Marsh*, 56 Ia., 747; *Monk v. Corbin*, 58 Ia., 503. In case of unoccupied land the true owner may bring trespass, though the defendant has a tax title fair on its face. *Wadleigh v. Marathon Co. Bank*, 58 Wis., 546, citing *Austin v. Hold*, 32 Wis., 478.

² *Barrett v. Love*, 48 Ia., 103; *McCaughan v. Tatman*, 53 Ia., 508.

³ *Gould v. Baltimore*, 59 Md., 378; *Moore v. Baltimore*, 61 Md., 224.

⁴ *Cairo, etc., R. Co. v. Parks*, 32 Ark., 131.

⁵ *Davenport v. Knox*, 34 La. An., 407; *Wederstrandt v. Freyhan*, 34 La. An., 705; *Person v. O'Neal*, 32 La. An., 228.

⁶ *Person v. O'Neal*, 32 La. An., 228.

⁷ *Roberts v. Zansler*, 34 La. An., 205.

⁸ *Pugh v. Youngblood*, 69 Ala., 296.

ecuted.¹ In Michigan the short statute of limitation does not apply in favor of one who was in possession under another claim at the time of acquiring his tax deed.² In Kansas one out of possession claiming under a tax deed must bring action within two years after the deed is recorded, and one out of possession holding the record title must bring action against the tax purchaser within five years from the recording of the tax deed.³ But the statute limiting the owner of the record title to five years is mandatory only when he is out of possession; it is permissive only as to one in possession, since the initiative in respect to litigation does not lie with him.⁴ If the land is unoccupied during the two years from the recording of the tax deed, and the owner of the record title takes possession afterwards, the tax purchaser is not barred by the previous lapse of time.⁵ The statute will not apply in favor of the tax title if the deed is void on its face,⁶ but a showing of irregularities will not defeat it if there was an actual sale;⁷ not even so serious an irregularity as that the description was fatally defective in the assessment roll and certificate of sale.⁸ In Colorado the statute does not run in favor of a tax purchaser whose deed is void on its face unless he is in actual possession.⁹

These references will be sufficient to exhibit the general current of decision under these short statutes of limitation.

¹ *Jones v. Randle*, 68 Ala., 253; *Pugh v. Youngblood*, 69 Ala., 296.

² *Gilman v. Riopelle*, 18 Mich., 145. A person claiming under a tax title is a proper party to an action of ejectment, though not in possession. *Anderson v. Courtright*, 47 Mich., 161.

³ *Thornburgh v. Cole*, 27 Kan., 490.

⁴ *Myers v. Coonradt*, 28 Kan., 211.

⁵ *Myers v. Coonradt*, 28 Kan., 211.

⁶ *Waterson v. Devoe*, 18 Kan., 223.

⁷ *Jordan v. Kyle*, 27 Kan., 190.

⁸ "If the proceedings must be so regular as to make a valid sale before the statute of limitations will start to run upon a tax deed good upon its face, then the statute would be of little value in these cases as a statute of repose, for upon a valid sale a valid deed can be compelled, and the statute will rarely be invoked except in cases where it is not needed." *Maxson v. Huston*, 22 Kan., 643. See *Geskie v. Kirby, etc., Co.*, 106 U. S., 379, for the same ruling.

⁹ *Gomer v. Chaffee*, 6 Col., 314. *Quære*, whether it would then? Compare *Waterson v. Devoe*, 18 Kan., 223. And see *Geskie v. Kirby, etc., Co.*, 106 U. S., 379.

Constructive Possession. There is serious objection in point of policy to making the tax deed give constructive possession of the land, with the consequences that have been made to follow, whether there are, or are not, any impediments in point of law. The principal hardships perhaps under any system of tax sales spring from the fact that, in a considerable portion of the cases in which valuable lands are lost to the owners from delinquency, it is not so much in consequence of culpable neglect of the owners themselves as through the negligence of agents, or through circumstances which have cast the ownership upon children or other persons unaccustomed to business, who are found to be in default before they have fully become possessed of a knowledge of either their rights or their duties. In all these cases the tax purchaser knows that he has bought a title which, if legal, is to dispossess some title previously valid; while the adverse claimant frequently does not know or suspect that he or his land has been proceeded against for delinquency, and he may for a series of years thereafter continue to pay taxes without any suspicion that he is paying upon the land of another. No man thinks of making periodical visits to the records, in order to see that his land is clear of liens, when he is not conscious of any default; and to allow the tax purchaser to lie by under such circumstances, without asserting a claim by entry or notice, until, by the lapse of a few years, his deed shall ripen into an indisputable title, is to encourage him to commit what, in morals at least, in many cases becomes fraud upon the original owner. And the wrong is still more gross and palpable if, in point of fact, the original owner was not at all in default, and his land has been sold and conveyed in consequence of the carelessness, incompetency or fraud of public officers. Nevertheless these considerations appeal to the legislature rather than to the courts; for it probably cannot be said that it is beyond the constitutional power of the legislature to give the recorded tax deed conclusive effect as evidence of title after the lapse of five years' time, in any case where the adverse claimant has no actual possession.¹

¹ A statute which bars the remedy of the tax purchaser in five years from the recording of his deed is constitutional, he being at liberty to sue within that time whether the land is occupied or not. The tax purchaser knows the effect of the deed, and "what he must do to protect his title under it,

Possession of a vacant tenement is and must be purely a matter of fiction. Constructive possession is recognized for some purposes, because, under our peculiar forms of action, it is found necessary in order to the protection of the rights of the owner against trespassers. The fiction is accepted, as all fictions in the law are, for the sake of justice; never to do injustice.¹ But if one's freehold has been illegally sold under adverse proceedings, there is no justice in resorting to a fiction of law in order to sustain the sale. What equity could exist in such a case, if one has honestly paid all that was demanded of him, or all that he has any reason to believe he owed?²

In the very worst light in which the equities of the original owner may be viewed, they are at the least equal to those of the tax purchaser; and to make a fiction the instrument by which he is to be debarred of his rights is a very severe, if not excessive, exercise of authority, where the legislature had

for all this is plainly written in the law. . . . He took the risk of being able to make his deed effectual under the rules prescribed by the legislature. He gets all he bargained for. So that when the statute of limitation cuts him off, he having, as he imagined, been unable to bring his suit for want of a party in adverse possession, he has been deprived of no right which he ever possessed." *Barrett v. Holmes*, 102 U. S., 651.

¹ *Truett v. The Justices*, 20 Ga., 102; *Low v. Little*, 17 Johns., 346; *Johnson v. Ballou*, 28 Mich., 379, 396. In *Taylor v. Miles*, 5 Kan., 498, in which it is held that the recording of a void tax deed cannot be made the date from which the statute of limitations shall run, *Valentine, J.*, says (p. 515): "*First.* A statute of limitations can only be applied where one person has received or suffered some injury from another person, either in contract or tort. It must operate to bar a *cause of action*, for it seems absurd to say that a cause of action can be barred, if no cause of action has ever accrued. *Second.* Every statute of limitation must give the injured party a reasonable time in which to commence his action, or the statute itself is void, tending to disturb vested rights. *Third.* When the statute has run its full time, the effect is to leave the parties in possession of just what they had before, nothing more and nothing less, and neither party has a right of action against the other; the injured party has lost his remedy." Compare *Bowman v. Cockrill*, 6 Kan., 311.

² The language here employed is that of *Agnew, J.*, in *Brown v. Hays*, 66 Pa. St., 229, 236. The case was one in which a single warrant of one thousand and twenty-six acres had been assessed as two of seven hundred and twenty-six and three hundred, respectively, and the owner had paid the assessment on the warrant by the number. *Held*, that the assessment of the warrant at seven hundred and twenty-six acres was not, by implication, notice to him that the three hundred acres were assessed separately.

already put him quite sufficiently at disadvantage. Rules of evidence are subject to legislative control; and therefore the legislature may make the tax deed evidence of title. Rules of limitation are also subject to its control, and therefore the statute may quiet an open and public exercise of a right which remains unchallenged; but a purely nominal and fictitious exercise of a right by means of the recording of a paper, or even without that, if the legislature shall think proper to dispense with it, is a very unsubstantial basis for a conclusive muniment of title to land. Constructive possession in any case, it would seem, should be in the party having the legal title; and this would leave questions of title open so long as actual possession was had by no one.¹

Claim or Color of Title. Peculiar questions arise under some statutes regarding the nature of the claim under which possession is held. The Illinois statute of 1839 declared the person in possession of land "under claim and color of title," who should continue in possession for seven years, and pay all taxes, should be held and adjudged the legal owner, "to the extent and according to the purport of his or her paper title." Here was a distinct requirement of a paper title of some kind, and of one also that should give "color" of title. Where the tax deed is made *prima facie* evidence of title, it is plain that it gives color of title; and the decisions have been that the seven years' possession under the circumstances required by the statute was sufficient with such a conveyance.² The same de-

¹ Possession and cultivation of a few acres cannot be constructive possession of a whole township. *Chandler v. Spear*, 22 Vt., 888. Neither the fact that one is assessed for the land, or that he has paid taxes for a series of years thereon, is sufficient proof that he is in the adverse possession of it. *McDermott v. Hoffman*, 70 Pa. St., 81, 84; *Chapman v. Templeton*, 58 Mo., 463. And merely cutting timber, without actual possession, cultivation or inclosure, is not adverse possession, but a mere trespass on the constructive possession of the owner. *Washburn v. Cutter*, 17 Minn., 361; *Safford v. Basto*, 4 Mich., 406; *Rivers v. Thompson*, 46 Ala., 335.

² *Dawley v. Van Court*, 21 Ill., 460; *Fell v. Cessford*, 26 Ill., 522, 525; *Halloway v. Clark*, 27 Ill., 493; *Bride v. Watt*, 23 Ill., 507; *Webster v. Webster*, 55 Ill., 325; *Wettig v. Bowman*, 47 Ill., 17; *Morrison v. Norman*, 47 Ill., 477; *Dickerson v. Breeden*, 30 Ill., 279, 325; *Hardin v. Crate*, 60 Ill., 215. To constitute color of title it is only necessary that the deed purports to convey title, and has been received in good faith. *Winstanlay v. Meacham*, 58 Ill.,

eisions hold, however, that the deed must be one, not by reason of defects, or of its recitals, void on its face.¹ But in Wisconsin even a deed void on its face, with possession under it, is sufficient for the purposes of such a statute.²

In Iowa the statutes protect the occupant who has been in possession under "claim" of title for the requisite period, and this may be with or without a deed or other documentary evidence giving color of right to the claim.³ And probably in any state a tax deed based upon an actual sale, and not void upon its face, would be held sufficient color of right for the purposes of the statute.⁴

97. See *Halloway v. Clark*, 27 Ill., 483, 486, per *Walker, J.*; *Dalton v. Lucas*, 63 Ill., 337. But where he goes into possession and continues to hold the land and pay taxes for seven years, he will be protected, although the deed is void on its face; and good faith will be presumed, but the contrary may be shown. *Dalton v. Lucas*, 63 Ill., 337. An instrument which merely purports to contain an agreement to convey title at a future time cannot constitute color of title. *Osterman v. Baldwin*, 6 Wall., 116. "What is meant by *color of title*? It may be defined to be a *writing*, upon its face professing to pass title, but which does not do it, either from want of title in the person making it, or from the defective conveyance that is used — a title that is imperfect, but not so obviously that it would be apparent to one not skilled in the law;" per *Lumpkin, J.*, in *Beverly v. Burke*, 9 Ga., 440, 443. A void tax deed held to give color of title. *Stovall v. Fowler*, 72 Ala., 77.

¹ See, besides the Illinois cases above referred to, *Shoat v. Walker*, 6 Kan., 65; *Carithers v. Weaver*, 7 Kan., 110; *Sapp v. Morrill*, 8 Kan., 677; *Wofford v. McKinna*, 28 Tex., 36; *Kilpatrick v. Simeras*, 28 Tex., 114; *Cain v. Hunt*, 41 Ind., 466. A tax deed which does not show that the land it purports to convey was sold for delinquent taxes is void on its face; and where the holder of such deed has not been in actual possession of the property, the statute of limitations will not run so as to bar the right to bring an action in two years to have the deed declared void. *Hubbard v. Johnson*, 9 Kan., 632. In Wisconsin a deputy of the county clerk may execute the tax deed in his own name. *Gilkey v. Cook*, 60 Wis., 133.

² *Edgerton v. Bird*, 6 Wis., 527; *Sprecher v. Wakeley*, 11 Wis., 433; *Lindsay v. Fay*, 25 Wis., 460; *Oconto Co. v. Jerrard*, 46 Wis., 817; *McMillan v. Wehle*, 55 Wis., 685. See *Cutler v. Hurlbut*, 29 Wis., 152; *North v. Hammer*, 34 Wis., 432; *Cowley v. Monson*, 10 Biss., 182.

³ *Hamilton v. Wright*, 30 Iowa, 480. And see *Taylor v. Buckner*, 2 A. K. Marsh., 18; *McCall v. Neeley*, 3 Watts, 69, 72.

⁴ See *Dillingham v. Brown*, 38 Ala., 311; *Rives v. Thompson*, 43 Ala., 633, 641; *Ladd v. Dubroca*, 61 Ala., 25; *Stovall v. Fowler*, 72 Ala., 77; *Stubblefield v. Borders*, 92 Ill., 279; *Cofer v. Brooks*, 20 Ark., 542; *Pleasants v. Scott*, 21 Ark., 370, 374; *Chapman v. Templeton*, 53 Mo., 463; *King v. Harrington*, 18 Mich., 213; *Moore v. Brown*, 4 McLean, 211; S. C. in error, 11

It is a principle of the law that where the statute of limitations has run in favor of any party, this perfects his right, and he may make it the ground of affirmative proceedings thereafter. This principle applies in favor of the tax title, and dispenses with any necessity for proof of the proceedings when the title is subsequently brought in question, and precludes its being attacked.¹

How., 414; *Pillow v. Roberts*, 13 How., 472; *Flannagan v. Guinmet*, 10 Grat., 421; *Wheeler v. Merriman*, 30 Minn., 372. But a tax deed not authenticated by the seal of the county as required by the statute is not color of title. *Sutton v. Stone*, 4 Neb., 319. The same is true of one whose description is void for indefiniteness. *Humphries v. Huffman*, 33 Ohio St., 395.

The statute of limitations in force when a sale is made does not make part of the contract of sale, and that statute may be repealed and one extending the time against the interest of the purchaser may be enacted without violating the constitution. *Keith v. Keith*, 26 Kan., 26. But in the absence of any provision saving rights of action already accrued, or words to give it retrospective effect, a statute passed in 1872 will not bar an action brought in 1875 on a sale made in 1869, although only five years are allowed from the date of sale in which to sue. *Dale v. Frisbie*, 59 Ind., 530.

¹*Sprecher v. Wakeley*, 11 Wis., 432; *Knox v. Cleveland*, 13 Wis., 245, 249; *Pleasants v. Rohrer*, 17 Wis., 557; *Lawrence v. Kenney*, 32 Wis., 281; *Morton v. Sharkey*, *McCahon*, 118; *McKinney v. Springer*, 8 Blackf., 506; *Stipp v. Brown*, 2 Ind., 647; *Lewis v. Webb*, 3 Me., 326; *Atkinson v. Dunlap*, 50 Me., 111; *Thompson v. Caldwell*, 3 Lit., 137; *Couch v. McKee*, 1 Eng. (Ark.), 484, 495; *Girdner v. Stephens*, 1 Heisk., 280; S. C., 2 Am. Rep., 700; *Bradford v. Shine*, 13 Fla., 393; S. C., 7 Am. Rep., 239; *Holden v. James*, 11 Mass., 396; *Wright v. Oakley*, 5 Met., 400; *Woart v. Winnick*, 3 N. H., 473; *Martin v. Martin*, 35 Ala., 560; *Briggs v. Hubbard*, 19 Vt., 86; *Wires v. Farr*, 25 Vt., 41; *Davis v. Minor*, 1 How. (Miss.), 183; *Moore v. Luce*, 29 Pa. St., 260; *Hinchman v. Whetstone*, 23 Ill., 185; *Chiles v. Davis*, 58 Ill., 411; *Taylor v. Courtney*, 15 Neb., 190. *Kipp v. Johnson*, 31 Minn., 360, seems to lay down a different doctrine.

CHAPTER XVIII.

TAXATION OF BUSINESS AND PRIVILEGES.

The general right. It has been seen that the sovereignty may, in the discretion of its legislature, levy a tax on every species of property within its jurisdiction, or, on the other hand, that it may select any particular species of property, and tax that only, if in the opinion of the legislature that course will be wiser. And what is true of property is true of privileges and occupations also; the state may tax all, or it may select for taxation certain classes and leave the others untaxed. Considerations of general policy determine what the selection shall be in such cases, and there is no restriction on the power of choice unless one is imposed by constitution.¹ In another chapter it has been shown that constitutional provisions requiring the taxation of property by value have no application to the taxation of other subjects, and do not, therefore, by implication, forbid the taxation now under consideration.²

Federal taxation. The government of the United States has general power to levy taxes on all the subjects of taxation within the several states and territories, and in the District of Columbia.³ The exceptions to this general power have been mentioned in preceding pages⁴ and need not be repeated. But although it has this general power, its exercise is commonly limited to comparatively few subjects, and the government

¹ *Butler's Appeal*, 73 Pa. St., 448, 451, per *Mercur*, J., citing *Durach's Appeal*, 62 Pa. St., 491. See *Rome v. McWilliams*, 53 Ga., 251; *Decker v. McGowan*, 59 Ga., 805.

² Chapter VI. It is competent for a state to require the vendor of an article to take out a license, notwithstanding its invention is patented under the laws of the United States. *Webber v. Virginia*, 103 U. S., 344, and 33 Grat., 898. See *Patterson v. Kentucky*, 97 U. S., 501; *People v. Russell*, 49 Mich., 617. Persons engaged in hiring laborers within a state to be employed outside of it may be required to take out a license for the privilege, and this violates no constitutional principle. *Shepperd v. Sumter Co. Com'rs*, 59 Ga., 535.

³ *Loughborough v. Blake*, 5 Wheat., 317.

⁴ See chapter III.

revenues are collected in the main from taxes levied in various forms upon business.

Customs duties are levied by the United States exclusively, but internal taxes on business may be laid by the states as well as by the general government; and what is said in this chapter is applicable to taxation by both, where the contrary is not indicated.

The methods in which business shall be taxed are also in the legislative discretion. The taxes which are most customary are: 1. On the privilege of carrying on the business. 2. On the amount of business done. 3. On the gross profits of the business. 4. On the net profits or profits divided. But the tax may be measured by other standards prescribed for the purpose as well as by these.¹

It has been seen that it is no conclusive objection to any such tax that it duplicates the burden to the person who pays it. To tax a merchant upon his stock as property, and also upon his gross sales, may seem burdensome, but it is not unconstitutional when the people have not seen fit expressly to forbid it.² The two taxes are not identical, and though it may operate unjustly in individual cases to impose both, such will not be a necessary result, and it is always to be presumed that all the burdens of taxation have been distributed by the legislature with due regard to equality in the final results of collection. A tax, therefore, which at first blush appears to be invidious and partial may nevertheless in its ultimate results prove to be as just and equal as any.

Taxes on privileges. The following of one of the ordinary employments of life is not to be regarded as a privilege unless expressly made so by statute; and authority conferred by a municipal charter to tax privileges could not, therefore, without further designation, be held to embrace such employments.³

¹ A law which provides that occupation taxes shall be placed by the county treasurer to the credit of the contingent fund of the township, city or village where collected, sufficiently meets a constitutional requirement for a specification of the purpose to which they are to be applied. *Westinghausen v. People*, 44 Mich., 265.

² See *Washington v. State*, 13 Ark., 752; *Straub v. Gordon*, 27 Ark., 625; *Mabry v. Tarver*, 1 Humph., 94; *Lewellen v. Lockharts*, 21 Grat., 570.

³ See *Columbia v. Guest*, 3 Head, 413; *Charleston v. Oliver*, 16 S. C., 47.

And when employments are expressly permitted to be taxed as privileges, the burden is usually restricted to those which in some particular are exceptional, either because they are thought to be specially profitable, or because they require special regulations, or because the privilege is in the nature of a franchise, or because they supply a general demand, so that the burden imposed will be generally distributed. But no employment is absolutely exempt from the liability to be taxed. The necessities of the government may require that the lowest employment as well as the most lucrative shall contribute to its support, and if any is exempted, motives of policy will govern the discrimination.¹

When the tax takes the form of a tax on the privilege of following an employment, convenience in collection will commonly dictate the requirement of a license, and the person taxed will be compelled to pay the tax as a condition to the right to carry on the business at all.² In such a case the business carried on without a license will be illegal, and no recovery can be had upon contracts made in the course of it.³ This distinguishes such a case from one of neglect to pay taxes in general; for except where payment is thus made a condition to the right to transact business, a default therein cannot affect the validity of business transactions.⁴ But license and tax do not necessarily go together; a license may be required when no tax is imposed, and an unconditional license does not exempt the

¹The legislature has general power to tax occupations and to authorize municipalities to do so. *San Jose v. Railway Co.*, 53 Cal., 475; *Albrecht v. State*, 8 Tex. Ap., 216; *Siebenhauer, Ex parte*, 14 Nev., 365.

If the state taxes an occupation by license tax, *e. g.*, the keeping of a gaming table, it is precluded from treating it as a misdemeanor. *Overby v. State*, 18 Fla., 178. Under the proper legislation the payment of privilege taxes may be compelled under criminal penalties. *St. Louis v. Sternberg*, 69 Mo., 289; *St. Louis v. Green*, 70 Mo., 562; *State v. Hayne*, 4 S. C., 408.

²*License Tax Cases*, 5 Wall., 462. As to the nature of licenses as taxes, see *Lucas v. Lottery Commissioners*, 11 Gill & J., 490.

³*Bancroft v. Dumas*, 21 Vt., 456; *Alexander v. O'Donnell*, 12 Kan., 608. See *Anding v. Levy*, 57 Miss., 51; *Decell v. Lewenthal*, 57 Miss., 331; *Page v. State*, 11 Ala., 649; *Doran v. Phillips*, 47 Mich., 228.

⁴*Larned v. Andrews*, 106 Mass., 435, citing *Smith v. Mawhood*, 14 M. & W., 452. Where a privilege tax is payable before the business is begun, no formal assessment is requisite. *Texas Banking, etc., Co. v. State*, 49 Tex., 636; *Blessing v. Galveston*, 42 Tex., 641.

licensee from being taxed upon the privilege it gives him. In this particular all valuable privileges stand upon the same footing; they are all liable to taxation at the will of the state, unless the state has bargained to exempt them. As is said in one case, "there is a clear distinction recognized between a license granted or required as a condition precedent, before a certain thing can be done, and a tax assessed on the business which that license may authorize one to engage in. A license is a right granted by some competent authority to do an act which, without such authority, would be illegal. A tax is a rate or sum of money assessed upon the person, property, etc., of the citizen."¹ The privilege obtained by the license may therefore be taxed in consideration of the property value it possesses,² and this not only by the state directly, but by the county and town also, if proper authority has been conferred upon them for the purpose.³

¹*Trippe, J.*, in *Home Ins. Co. v. Augusta*, 50 Ga., 530, 537. And see *Savannah v. Charlton*, 36 Ga., 460; *Burch v. Savannah*, 42 Ga., 596; *Robinson v. The Mayor, etc., of Franklin*, 1 Humph., 156; *Ould v. Richmond*, 23 Grat., 464; *Drexel v. Commonwealth*, 46 Pa. St., 31; *Reed v. Beall*, 42 Miss., 472.

²See authorities cited in last note. Also *Coulson v. Harris*, 43 Miss., 723, in which a license for which a large sum was paid was held taxable as property. Also *Drysdale v. Pradat*, 45 Miss., 445.

³Where one is licensed by the state to carry on any particular business, a county, city or town cannot compel him to take out a further license as a condition of doing business within it. *Dunham v. Rochester*, 5 Cow., 462; *Ould v. Richmond*, 23 Grat., 464; *Napier v. Hodges*, 31 Tex., 287; *Floyd v. Eatonton*, 14 Ga., 354; *Cuthbert v. Conly*, 32 Ga., 211; *Savannah v. Charlton*, 36 Ga., 460; *Burch v. Savannah*, 42 Ga., 596; *Ordinary v. Retailers of Liquors*, 42 Ga., 325; *Home Ins. Co. v. Augusta*, 50 Ga., 530. So a town cannot defeat a county license by requiring a town license in addition. *Dunham v. Rochester*, *supra*; *Rome v. Lumpkin*, 5 Ga., 447. But these several cases recognize the right of the state to give to the municipalities the authority to tax occupations licensed by the state. And see *Siebenhauer, Ex parte*, 14 Nev., 365. In *Heise v. Columbia*, 6 Rich., 404, it was decided that a license granted by the state could not be forfeited by a municipal corporation for breach of condition, any more than could any other thing of value. Where a state occupation tax is required to be paid before a town license issues, although the statute does not direct to whom the payment shall be made, by implication it is to be made to the body granting the license. *Williams v. Commonwealth*, 13 Bush, 304. Collection of a license tax by suit may be authorized. *Los Angeles v. Railroad Co.*, 61 Cal., 59.

Construction of municipal powers. The general rule that the powers of a municipal corporation are to be construed with strictness is peculiarly applicable to the case of taxes on occupations,¹ and the authorities concur in holding that if it is not manifest that there has been a purpose by the legislature to give authority for collecting a revenue by taxes on specified occupations, any exaction for that purpose will be illegal.² If a minimum tax is prescribed by statute, one measured by the business, and which may exceed the sum named, is unauthorized and void;³ but where a discretionary power is conferred, its exercise will not be interfered with, unless it clearly appears to have been abused.⁴

¹ *Latta v. Williams*, 87 N. C., 126; *New Iberia Trustees v. Migue*, 32 La. An., 923.

² See *Kip v. Patterson*, 26 N. J., 298, in which the requirement of a fee of five cents from every person selling hay or other produce within the city was held unauthorized, the power to tax in that manner not having been conferred, and the requirement not appearing to be made as a police regulation. For the general principle, see *Robinson v. Franklin*, 1 Humph., 156; *St. Louis v. Laughlin*, 49 Mo., 559; *Dubuque v. Life Ins. Co.*, 29 Ia., 9. A charter vested a city with "full power and authority to make such assessments on the inhabitants, or those who hold taxable property within the same, for the safety, convenience, benefit and advantage of the said city as shall appear to them expedient." Held to give no power to impose license taxes on business. *Charleston v. Oliver*, 16 S. C., 47.

³ *Kniper v. Louisville*, 7 Bush, 599. On the principle of a strict construction of powers, it was held in *Butler's Appeal*, 73 Pa. St., 448, that the authority to impose a license fee did not carry with it authority to punish the failure to pay the fee by fine and imprisonment. See *ante*, p. 458.

Authority given in the charter of a city to raise money for its purposes by taxes and assessments in such manner as the common council shall deem expedient in accordance with the laws of the state and of the United States will authorize license fees. *Ould v. Richmond*, 23 Grat., 464; *W. U. Tel. Co. v. Same*, 26 Grat., 1.

⁴ *Burlington v. Putnam Ins. Co.*, 81 Ia., 102; *Kniper v. Louisville*, 7 Bush, 599, citing *Mason v. Lancaster*, 4 Bush, 406. It was decided in the case first named, that the city might graduate the rate of licenses when not restricted in that regard. And see *East St. Louis v. Wehrung*, 46 Ill., 392. Authority "to make such assessment on the inhabitants of Augusta, or those who hold taxable property within the same, as may seem expedient," will warrant a tax on a foreign insurance company doing business within the city. *Home Ins. Co. v. Augusta*, 50 Ga., 530. See *Commonwealth v. Milton*, 12 B. Monr., 212. That special powers conferred upon towns to charge license fees are valid, though the like licenses are not allowed by the general

Customary business taxes. If taxes were levied on any well matured or intelligible system, it might be practicable to classify those which are levied upon business, with reference to the special reasons which have induced the selection of particular branches of business for taxation, and the exemption of others. But this is wholly impracticable. Many impolitic taxes are laid, and many unjust taxes, without any purpose to do what is not for the public interest, or what is unfair and unequal. A vast number of subjects are sometimes selected for taxation, because it is supposed justice requires it, when, had the same burden been laid upon a few, it would have been quite as just, quite as equally distributed, and the tax collected with greater economy. Classification will, therefore, not be attempted, but some reference may be made to those occupations which are most often selected for taxation.

It may be remarked in passing that if one person is found carrying on two or more distinct kinds of business, he is taxable in respect to each;¹ and if a copartnership is conducting a business, the privilege tax in respect of the business may be levied on the members severally.²

Bankers. It has been shown in another chapter that there are various methods of taxing the business of banking. When it is carried on under corporate powers the franchise is sometimes subjected to a specific tax; but taxes are also imposed which are measured by the business done, the deposits received, the profits made, etc. Brokers are taxed after similar standards.³

laws of the state, see *Woodward v. Turnbull*, 3 Scam., 1; *Ottawa v. La Salle*, 12 Ill., 339; *Byers v. Olney*, 16 Ill., 35.

¹ *Savannah v. Feeley*, 66 Ga., 31; *Kelly v. Atlanta*, 69 Ga., 533; *Wilder v. Savannah*, 70 Ga., 760; *Hirsh v. Commonwealth*, 21 Grat., 785. Whether an occupation is to be deemed single or not — *e. g.*, when one is commission merchant and factor, and is also agent for steamboats and other vessels — may depend on practice and general understanding. *Wilder v. Savannah*, *supra*.

² *Wilder v. Savannah*, 70 Ga., 760.

³ As to definition of bankers and brokers under the federal revenue laws, see *Northrup v. Shook*, 10 Blatch., 243; *U. S. v. Cutting*, 3 Wall., 441; *U. S. v. Fisk*, 3 Wall., 445. Of cattle brokers, see *U. S. v. Kenton*, 2 Bond, 97. Of brokers, *State v. Field*, 49 Mo., 270. As to tax on real estate and insurance brokers, see *Braun v. Chicago*, 110 Ill., 186. An institution is a bank, within the meaning of the law imposing a license tax on banks, if it receives

Carriers of Goods and Persons. While railway corporations are generally taxed upon their property, they are also sometimes taxed in other modes. In some states they are taxed a specific rate on their capital, in others the franchise is taxed, in others the business or profits.¹ The vehicle by means of which the business is carried on may also be taxed, when the tax does not amount to a regulation of interstate commerce.²

Members of Learned Professions. Practitioners of law and medicine are not uncommonly taxed a specific sum upon the privilege of pursuing their calling for a year or other specified time. Such a tax is not a poll tax, and may therefore be levied when poll taxes are forbidden.³ Sometimes the tax is graduated by the supposed value of the privilege.⁴

deposits, allows interest thereon and makes loans. *New Orleans v. Savings Inst.*, 32 La. An., 527. A statute of Tennessee required those buying notes at a greater shave than six per cent. to take out a license, make a statement of the amount employed in the business the preceding year, and pay thereon a tax of five cents on each \$100. The penalty for a failure to comply with it was \$500. This act enforced. *Young v. The Governor*, 11 Humph., 147. Bankers whose whole capital is invested in government securities held not taxable as such. *Chicago v. Lunt*, 52 Ill., 414. Under a power to tax all persons exercising any trade, calling or business whatever, a city may tax the business of a chartered bank as well as that of a private banker. *Macon v. Savings Bank*, 60 Ga., 133; *Johnston v. Macon*, 62 Ga., 645. The payment of a tax as banker does not authorize doing business as a pawnbroker without further license. *New Orleans v. Metropolitan, etc., Bank*, 31 La. An., 310.

¹ See *State Tax on Gross Receipts*, 15 Wall., 284.

² See *ante*, p. 96. A wharfage tax may be levied by a city as a tax on all vessels touching at its wharves. *Marshall v. Vicksburgh*, 15 Wall., 146. As to duties on tonnage, see *ante*, p. 91.

³ *Egan v. County Court*, 3 H. & McH., 169. Authority to tax "trades, occupations and professions" does not authorize a tax on notaries public. *New Orleans v. Bienvenu*, 23 La. An., 710.

⁴ See *Simmons v. State*, 12 Mo., 268; *Ould v. Richmond*, 23 Grat., 464. A tax on the "privilege" of a lawyer may be enforced (under proper legislation) by levy on the body. *Stewart v. Potts*, 49 Miss., 749. See *Jones v. Page*, 44 Ala., 657; *Cousins v. State*, 50 Ala., 113; *McCaskell v. State*, 53 Ala., 510; *Montgomery v. Knox*, 64 Ala., 463. Where the charter of a city enumerated certain classes that should be compelled to take out a license before exercising their vocation in the city, and then followed with these words, "and all other business, trades, avocations or professions whatever," it was held that if the profession of "law" was not specifically enumerated in the section that the city had no power to lay a license tax on lawyers.

The right to impose an occupation tax on practitioners of law has been much contested, as being in effect a tax on the privilege of seeking justice in the courts; but it has, nevertheless, been sustained with only faint dissent.¹ As well might it be said that a tax on physicians was a tax on the privilege of preserving the health.

Clergymen are sometimes subjected to an occupation tax,² and so are college professors and other teachers.³

Auctioneers and Commission Dealers. These are commonly taxed either a specific sum periodically, or a sum measured by the extent of their dealings.⁴ It has been held that a tax "on

The rule is, where general words follow particular ones, to construe them as applicable only to persons or things of the same general character or class. *City of St. Louis v. Laughlin*, 49 Mo., 559.

¹*Ould v. Richmond*, 23 Grat., 464; *Cousins v. State*, 50 Ala., 113; *Goldthwaite v. Montgomery*, 50 Ala., 486; *State v. Hayne*, 4 S. C., 403; *Stewart v. Potts*, 49 Miss., 749; *Languille v. State*, 4 Tex. Ap., 312; *St. Louis v. Sternberg*, 69 Mo., 289, and 4 Mo. Ap., 453; *Young v. Thomas*, 17 Fla., 169; *Holland v. Isler*, 77 N. C., 1; *Wilmington v. Macks*, 86 N. C., 88; *Lanier v. Macon*, 59 Ga., 187. A power in a city to tax inhabitants who transact business therein will support a tax on the business of lawyers. *Savannah v. Hines*, 53 Ga., 616. If the state licenses a practitioner a city cannot make the payment of a city tax a condition to practicing, but it may nevertheless assess a city tax and collect it by suitable methods. *Wright v. Atlanta*, 54 Ga., 645. See *McCaskell v. State*, 53 Ala., 510; *Siebonhauer, Ex parte*, 14 Nev., 365.

²*Miller v. Kirkpatrick*, 29 Pa. St., 226.

³See *Union County v. James*, 21 Pa. St., 525. That it is admissible to tax the professions generally, see *State v. Hayne*, 4 S. C., 403; *Cousins v. State*, 50 Ala., 118.

⁴*Moseley v. Tift*, 4 Fla., 402; *Paddleford v. Savannah*, 14 Ga., 438. In *Pearce v. Augusta*, 37 Ga., 597, it was decided that a general authority to levy taxes on *taxable property* would support a tax on the amount of gross sales and on the commissions received. In *Lott v. Ross*, 38 Ala., 156, it was held that a tax on "the gross amount of sales of merchandise" is not a property tax, but an occupation or privilege tax, the amount being regulated by the extent to which the privilege has been enjoyed. (Citing *Moseley v. Tift*, 4 Fla., 402; *State v. Stephens*, 4 Tex., 137; *State v. Bock*, 9 Tex., 369; *De Witt v. Hays*, 2 Cal., 468; *Nathan v. Louisiana*, 8 How., 80.) Such a tax would therefore not be leviable under a power to levy a tax "not exceeding twenty cents upon each hundred dollars of taxable property" within the county. *Ibid.* A tax on auctions of \$5 a day sustained though the party was taxed as a merchant also. The one tax applies to the party who has goods to be sold, the other to the party making the auction sale. *Fretwell v. Troy*, 18 Kan., 271.

the gross amount of auction sales made in and during the tax year" is to be assessed against and paid by the auctioneer, and not by the owner of property sold.¹ This is doubtless correct, though in the end such a tax is paid by the employer. Where a city is given power to tax, license and regulate the business of auctioneers, all means used to carry out the power must be reasonable. "The city may not directly prohibit the business, nor can it adopt such unreasonable regulations as would produce such results, or even be oppressive and highly injurious to the business." But an ordinance imposing a license tax of \$200 a year, requiring the giving of a bond for the proper performance of duty, and empowering the mayor to revoke the license for misconduct, is not unreasonable.²

Merchants. This class of persons is often selected for taxation.³ The fact that they pay taxes on their stock in trade as property does not preclude their occupation being specially taxed.⁴ If a merchant, paying a tax as such, adds to the occu-

¹ *State v. Lee*, 38 Ala., 223.

² *Wiggins v. Chicago*, 68 Ill., 372. In this case as in many others the principle is recognized that the imposition of a state tax upon an occupation is not inconsistent with a municipal tax also. See *Decker v. McGowan*, 59 Ga., 805. Where, however, the general law provided that every drummer who sold goods must obtain a state license, and that no county should tax him on his sales, it was held that this excluded a further license tax by a town. *Latta v. Williams*, 87 N. C., 126.

³ As to what constitutes a "merchant," see *State v. Whittaker*, 33 Mo., 457; *State v. West*, 34 Mo., 424. What a "dealer in tobacco," *Carter v. State*, 44 Ala., 29. Right to tax merchants unquestionable. *Commonwealth v. Moore*, 25 Grat., 951. A merchant's license is not a contract, and the rate of taxation upon it may be changed at the pleasure of the state. *Kelly v. Dwyer*, 7 Lea, 180.

⁴ *Woolman v. State*, 2 Swan, 353; *State v. Stephens*, 4 Tex., 137; *State v. Bock*, 9 Tex., 869; *Albertson v. Wallace*, 81 N. C., 479; *State v. Cohen*, 84 N. C., 771. A merchant selling drugs in connection with his merchandise may be required to pay both a merchant's and a druggist's license. *State v. Holmes*, 28 La. An., 765.

As to taxes on merchants in general, see *Wilmington v. Roby*, 8 Ired., 250; *Commissioners v. Patterson*, 8 Jones' L., 182; *Cousins v. Commonwealth*, 19 Grat., 807; *French v. Baker*, 4 Sneed, 193. A statute required a license to be obtained by every person selling goods by sample who was not a "resident merchant." Held, that, as a man may be a resident citizen and not a resident merchant, and the reverse, there was no discrimination in favor of citizens of the state, and therefore the statute was constitutional.

pation that of a junk dealer, he may be taxed for that also;¹ but a municipality having power to tax merchants cannot by definition bring persons within the power whose occupation is not that of a merchant as the term is popularly understood and applied.²

Peddlers and transient dealers are commonly taxed a specific sum by the year, because they are likely to escape any other.³ A peddler's tax is on the occupation, not the goods, and one who engages in the business, whether as agent or owner, must pay it.⁴ It is held in Louisiana that the license tax may be im-

Such a statute is not a regulation of commerce between the states. *Speer v. Commonwealth*, 23 Grat., 935; S. C., 14 Am. Rep., 164.

The Singer Manufacturing Co. pays license in Richmond as a merchant, and by law has a right to sell by sample in other counties. But this does not authorize it to take its wares into other counties for sale without taking out merchant's license there. *Webber v. Commonwealth*, 33 Grat., 898.

The tax may be graded by the amount of sales. *Gatlin v. Tarboro*, 78 N. C., 119; *State v. Chapeau*, 4 S. C., 378. Or by the amount of purchases. *Albertson v. Wallace*, 81 N. C., 479; *State v. Cohen*, 84 N. C., 771.

License fees imposed upon persons carrying on the business of selling goods, wares, etc., at a fixed place in a certain county are a tax within that provision of the California constitution which denies to the legislature the power to impose taxes upon municipalities, or their inhabitants, for local purposes. *People v. Martin*, 60 Cal., 153.

¹*Hirsh v. Commonwealth*, 21 Grat., 785; *New Orleans v. Kaufman*, 29 La. An., 283.

²*Mays v. Cincinnati*, 1 Ohio St., 268 (case of a tax on hucksters). A planter is held not liable to a merchant's tax who sells goods on his plantation to employees only, to promote the better administration of his own business. *Luling v. Labranche*, 30 La. An., 972. As to when an auctioneer must take out license as a commission merchant also, see *Neal v. Commonwealth*, 21 Grat., 511; *Fretwell v. Troy*, 18 Kan., 271.

³For definition of "peddler," see *State v. Hodgdon*, 41 Vt., 139. The following are cases of such taxes: *Wynne v. Wright*, 1 Dev. & Bat., 19; *Cowles v. Brittain*, 2 Hawks, 204; *Wilmington v. Roby*, 8 Ired., 250; *Whitfield v. Longest*, 6 Ired., 268; *Plymouth v. Pettijohn*, 4 Dev., 591; *State v. City Council*, 10 Rich., 240; *State v. Pinckney*, 10 Rich., 474; *City Council v. Ahrens*, 4 Strob., 241; *Keller v. State*, 11 Md., 525; *Morrill v. State*, 38 Wis., 428. For case of a tax on those canvassing to buy or actually buying means of subsistence, see *Sledd v. Commonwealth*, 19 Grat., 813. For taxes on drummers, see *Robinson, Ex parte*, 12 Nev., 263; *Latta v. Williams*, 87 N. C., 126.

⁴*Temple v. Sumner*, 51 Miss., 13. The license fee required of peddlers in Wisconsin is held to be imposed under the police power. *Morrill v. State*, 38 Wis., 428.

posed on peddlers upon the boats navigating the public waters of the state.¹

Butchers. A privilege tax on butchers, including offices and stores for the sale of meat, is payable by a grocer who sells meat at retail, though only for a small part of the year.²

Manufacturers and Dealers in Liquors. This is a class of dealers commonly selected for exceptional taxation. Their occupation is sometimes taxed for federal, state and municipal purposes, though their stocks are taxed as property, and whatever has been imported has paid a heavy duty. The right to levy these several taxes has almost ceased to be contested.³

¹ "The state," says the court, "may not levy a tax on goods merely passing through to an ultimate destination, or sent here for sale; nor on imports; but he who pursues the business of selling such goods, come whence they may, can claim no exemption from the general laws of the state, which impose the same license taxes upon all who pursue that business, citizen of this state or of any other state, or unnaturalized foreigner." *Cole v. Randolph*, 31 La. An., 535. See, also, *Steamer Block v. Richland*, 26 La. An., 642. As to who are itinerant traders, see *Burr v. Atlanta*, 64 Ga., 225; *Gould v. Atlanta*, 55 Ga., 678. Whether a tax measured by sales is a tax on property, query? *Gould v. Atlanta*, 55 Ga., 678.

² *Eastman v. Jackson*, 10 Lea, 162. It is competent to require a license of private market men, even though it is not required of persons keeping stalls in a public market. *New Orleans v. Dubarry*, 33 La. An., 481. A butcher living outside a city, but having his place of sale within it, may be required to take out a license in it for his cart, though he is taxed for it as property in the county. *Frommer v. Richmond*, 31 Grat., 646.

A butcher who kills his animals and sells the meat is not a dealer who "buys and sells goods," within the statute imposing a privilege tax upon such a dealer. *State v. Yearby*, 82 N. C., 561. The payment to the city by the occupant of a market stall of a certain price per day, and a certain sum on each animal offered for sale, is rent and not an occupation tax. *Barthel v. New Orleans*, 26 La. An., 340. Exemption of agricultural products from taxation for three months after arrival in the city will not preclude taxation of the business of bringing meat within the city for sale within two weeks after killing. *Davis v. Macon*, 64 Ga., 128. The power to collect a tax on all kinds of business is broad enough to cover retailing meat by a non-resident butcher who delivers meat to his customers from his wagon. He may be taxed on his business, and his wagon may be taxed as a means of carrying on his business. *Davis v. Macon*, 64 Ga., 128.

³ See *Durach's Appeal*, 62 Pa. St., 491; *Aulanier v. The Governor*, 1 Tex., 653; *Baker v. Panola County*, 30 Tex., 86; *Kitson v. Ann Arbor*, 26 Mich., 325; *Block v. Jacksonville*, 36 Ill., 301. Such taxes, when laid by municipalities, are not void because of their discriminating as between different

Regulation is generally had in view in such taxes, and they will be referred to again in the next chapter. Some of the cases which have considered taxes of this nature are referred to in the note.¹ A right to sell liquors is not covered by a license to carry on a confectioner's business, even though a custom prevails for a confectioner to sell them to his customers.²

Theatrical Exhibitions and Shows. These are a very proper subject for special taxation, and are commonly charged either a specific tax by the year or for single representations. Such

localities therein. *East St. Louis v. Wehrung*, 46 Ill., 392. The power in a city to tax cannot be delegated to its mayor. *Kinmundy v. Mahan*, 72 Ill., 462. License cannot be refused to one who comes within the statutory conditions. *Zanone v. Mound City*, 103 Ill., 552. As to the difference between a manufacturer and a dealer, see *Commonwealth v. Campbell*, 33 Pa. St., 380.

¹ It was once a question whether license to keep a tavern included authority to sell liquors, and the following cases have considered it, or points bearing upon it: *Hirn v. State*, 1 Ohio St., 15; *Page v. State*, 11 Ala., 849; *Commissioners, etc., v. Jordan*, 18 Pick., 228. Compare *State v. Chamblyss*, 1 Cheves, 220; *Commissioners of Roads v. Dennis*, 1 Cheves, 229. As to tavern licenses, see further, *State v. Prettyman*, 3 Harr., 570; *Bonner v. Welborn*, 7 Ga., 296; *Hannibal v. Guyott*, 18 Mo., 515; *St. Louis v. Siegrist*, 46 Mo., 593; *Commonwealth v. Thayer*, 5 Met., 246; *Overseers of Crown Point v. Warner*, 3 Hill, 150. That under the power to "tax" and also to "restrain" the liquor traffic, a town may license it, see *Mt. Carmel v. Wabash County*, 50 Ill., 69. A liquor license fee held not to be a tax. *Lovington v. Trustees*, 99 Ill., 564. The conductor of a Pullman palace car licensed as a hotel car sold intoxicating drinks therein without paying the occupation tax as a dealer in liquors. Held, that his license did not protect him. *La Norris v. State*, 13 Tex. Ap., 33. But a boat plying upon navigable waters between different states cannot be considered as conducting or doing business at each and every point where she touches, so as to become subject to taxation at each of such points in respect to sales of liquor at its bar. *State v. Frappart*, 31 La. An., 340. The "Bell-punch law" held constitutional. *Albrecht v. State*, 8 Tex. Ap., 216. And as to the constitutionality of taxation of liquor dealers, see, further, *Harris v. State*, 4 Tex. Ap., 131; *Languille v. State*, 4 Tex. Ap., 312; *Tonella v. State*, 4 Tex. Ap., 325; *Carr v. State*, 5 Tex. Ap., 153; *Youngblood v. Sexton*, 32 Mich., 406. A saloon license tax may be imposed, though the sale of liquors is illegal. *Wolf v. Lansing*, 53 Mich., 867. See, on this subject, the cases of *State v. Hipp*, 38 Ohio St., 199; *King v. Cappeller*, 42 Ohio St., 218; *Butzman v. Whitbeck*, 42 Ohio St., 223.

² *New Orleans v. Jané*, 34 La. An., 667. A retail grocer, however, is not, in Louisiana, liable to a license tax as a liquor dealer, unless he sells by the glass, to be drunk on the premises. *State v. Sies*, 30 La. An., 918.

taxes call for little remark.¹ The business of a traveling circus is not a trade, so as to be exempt from a carriage tax imposed in respect of "carriages used solely for the conveyance of any goods or burden in the course of trade."²

Hackmen, Draymen, etc. While these classes of persons are usually required to take out a license for purposes of regulation, they are also sometimes charged a substantial sum for revenue purposes. A few cases are referred to in which the license fee was construed to be a tax.³ It is competent to lay the tax in proportion to the number of vehicles employed by the persons licensed respectively.⁴ But one cannot be taxed in respect of a carriage used only in his own business under an authority in a city charter to tax the vehicles used by common carriers for hire.⁵ Nor does a farmer by hauling two loads of flour into a city for a miller render himself liable to the city tax imposed on carters and draymen.⁶ And where a livery-stable and the hacks in it are taxed as property and the owner has paid a license tax as keeper of a livery-stable, he cannot be compelled to pay in addition a license tax on the several hacks he owns and uses in his business, since the occupation tax covers the right to use such vehicles.⁷

¹ See *Mabry v. Tarver*, 1 Humph., 94, 98; *Trapp v. White*, 35 Tex., 387; *Orton v. Brown*, 35 Miss., 426; *Germania v. State*, 7 Md., 1. The license fee not a tax on property. *Orton v. Brown*, *supra*. See *Baker v. Cincinnati*, 11 Ohio St., 534.

² *Speak v. Powell*, L. R., 9 Exch., 25. A company maintaining a driving park where horse races are held annually is not liable to a tax as holding an exhibition of feats of horsemanship, or as keeping a show open to the public for pay, within the act of congress of 1864. *United States v. Buffalo Park*, 16 Blatch., 189.

³ *Bennett v. Birmingham*, 31 Pa. St., 15; *Commonwealth v. Stodder*, 2 Cush., 562. For some special questions the following cases may be consulted: *St. Charles v. Nolle*, 51 Mo., 122; *Gartside v. East St. Louis*, 43 Ill., 47; *Snyder v. North Lawrence*, 8 Kan., 82; *Cincinnati v. Bryson*, 15 Ohio, 625.

⁴ *Goodwin v. Savannah*, 53 Ga., 410; *Johnston v. Macon*, 62 Ga., 645; *Howland v. Chicago*, 108 Ill., 496.

⁵ *Joyce v. East St. Louis*, 77 Ill., 156; *Farwell v. Chicago*, 71 Ill., 269. See *Johnston v. Macon*, 62 Ga., 645.

⁶ *Collinsville v. Cole*, 78 Ill., 114.

⁷ *Williams v. Garignes*, 30 La. An., 1094. But where one has paid a property tax on his vehicle where he lives, he may be required to pay a tax on it as an instrument of business in the city where he conducts such business.

Hotels. License taxes on hotels may be proportioned to the number of the rooms, irrespective of the question whether the rooms are actually used.¹

Taxes on Manufactures. These are generally excise taxes. For a time, during the civil war, nearly all manufactures were taxed by the federal government, but only a few kinds are now taxed, either by the nation or by the states. Any or all may be taxed by both.²

Taxes on Offices. The United States may tax the salaries or compensation of its officers, and the states may tax those of

Davis v. Macon, 64 Ga., 128. See Johnston v. Macon, 62 Ga., 645. A liveryman who has taken out a license to let out horses and vehicles except drays cannot be compelled to take out a drayman's license for occasionally hiring out a wagon by the day to haul freight. Griffin v. Powell, 64 Ga., 625.

If it does not appear that the business of keeping a public stable necessarily includes running omnibuses and hacks to trains, the imposition of a license tax on keeping a public stable does not prevent the imposing of a separate license tax upon persons engaged in running omnibuses and hacks to railroad depots. Mayor, etc., of Savannah v. Feeley, 66 Ga., 81.

Under a power to regulate the proper government of carts, drays, etc., and to require that the owners shall take a license, and to fix fees and charges of all vehicles kept for hire, a city cannot, in addition to a tax on the business, require the owner to pay for a pair of license plates, costing twenty cents, to be tacked to his vehicle, fees of from \$5 to \$20. Say the court: "The city may — for purposes of identification and inspection — require that plates be attached to vehicles kept for hire, and prescribe the form of those plates; but it cannot — under the pretense of securing that distinctive mark — impose on an already taxed and legitimate industry an exaction which, by whatever name it may be called, is but a disguised and additional license." Walker v. New Orleans, 31 La. An., 828.

Sprinkling carts are taxable as "public vehicles." St. Louis v. Woodruff, 71 Mo., 92.

¹St. Louis v. Bircher, 7 Mo. Ap., 169. What is a "hurdy gurdy" house, see State v. Tilley, 9 Or., 125.

²See Commonwealth v. Byrne, 20 Grat., 165. A gas company is a "manufacturing company." Commonwealth v. Lowell Gas Light Co., 13 Allen, 75. But an aqueduct company is not. Dudley v. Jamaica Pond Aqueduct Co., 100 Mass., 183. One who buys timber and manufactures it into lumber and boards is a manufacturer and taxable as such, but he is not a trader. A trader buys and sells without altering in substance the form of goods bought. State v. Chadbourne, 80 N. C., 479. A confectioner is not a manufacturer so as to be exempt from paying a confectioner's license tax. New Orleans v. Mannessier, 32 La. An., 1075. One who converts hogs into bacon, lard and cured meat is. Engle v. Sohn, 41 Ohio St., 691.

the state officers, though neither can tax the compensation received by the officers of the other.¹ And the state may authorize its subdivisions to tax state, county or township offices if it shall be deemed proper to do so.²

Other "Privilege" Taxes. Where "privileges" are taxed, any occupation which is not open to all, but can only be exercised under license from some constituted authority, is to be regarded as a privilege.³ The keeping of a ferry may therefore be taxed under state authority, as an occupation, even though the ferry be upon navigable waters and from a town in one state to a town in another.⁴ So may the operating of a railway in a city.⁵ And succession to an inheritance may be taxed as a privilege, notwithstanding the property of the estate is taxed, and taxes on property are required by the constitution of the state to be uniform.⁶ Where a tax is laid on all "pursuing any occupation, trade or profession," one keeping a billiard-table for profit is included; though if he kept it for amusement merely he would not be.⁷ It is no objection to a tax on a business that it operates indirectly as a tax on the consumer.⁸ That may perhaps be the very reason why it has been deemed desirable to levy it.

A tax on a business should be laid where the business is carried on; not where the party has his residence, if it is elsewhere.⁹ But if only the property employed in the business

¹ *Collector v. Day*, 11 Wall., 113; *ante*, p. 84. The compensation of a clerk in a postoffice is taxable by the state. *Melcher v. Boston*, 9 Met., 73.

² *Gilkeson v. The Frederick Justices*, 13 Grat., 577.

³ *French v. Baker*, 4 Sneed, 193, 195.

⁴ *Conway v. Taylor*, 1 Black, 603; *Wiggins Ferry Co. v. East St. Louis*, 107 U. S., 365; *Chilvers v. People*, 11 Mich., 43; *Marshall v. Grimes*, 41 Miss., 27. A license fee imposed on the keeper of a ferry held not to be imposed under the taxing power. *Wiggins Ferry Co. v. East St. Louis*, 103 Ill., 560.

⁵ *San Jose v. Railway Co.*, 53 Cal., 475; *Los Angeles v. Sou. Pac. R'y Co.*, 61 Cal., 59; *State v. McFetridge*, 56 Wis., 256.

⁶ *Eyre v. Jacob*, 14 Grat., 422.

⁷ *Tarde v. Benseman*, 31 Tex., 277. The business tax may be imposed though the property is taxed also. *Lewellen v. Lockharts*, 21 Grat., 570.

⁸ *Wiley v. Owens*, 39 Ind., 429.

⁹ *Bates v. Mobile*, 46 Ala., 158. See *Miner v. Fredonia*, 27 N. Y., 155; *Gardiner, etc., Co. v. Gardiner*, 5 Greenl., 133. For other cases of business or occupation taxes, see *Simmons v. State*, 12 Mo., 268; *St. Louis v. Laughlin*,

were taxed, the owners respectively might be assessed for their interests at their places of residence.¹

49 Mo., 559; *Carroll v. Tuscaloosa*, 12 Ala., 178; *Gunter v. Leckey*, 30 Ala., 591; *Portland v. O'Niell*, 1 Or., 218.

A provision in a city charter that its taxes should "be apportioned in the same manner as the state tax" would preclude its discriminating against an occupation in a degree beyond that made against that occupation by the state. *Marshall v. Snediker*, 25 Tex., 460.

A lumber yard, used for storing the owner's lumber, is not subject to a license tax laid upon a "cotton or lumber yard or other place of storage for hire." *State v. Walker*, 28 La. An., 636.

¹ See *Gardiner, etc., Co. v. Gardiner*, 5 Greenl., 133.

CHAPTER XIX.

TAXES UNDER THE POWER OF POLICE.

Taxation and regulation compared. There are some cases in which levies are made and collected under the general designation of taxes, or under some term employed in revenue laws to indicate a particular class of taxes, where the imposition of the burden may fairly be referred to some other authority than to that branch of the sovereign power of the state under which the public revenues are apportioned and collected. The reason is, that the imposition has not for its object the raising of revenue, but looks rather to the regulation of relative rights, privileges and duties as between individuals, to the conservation of order in the political society, to the encouragement of industry, and the discouragement of pernicious employments.¹ Legislation for these purposes it would seem proper to look upon as being made in the exercise of that authority which is inherent in every sovereignty, to make all such rules and regulations as are needful to secure and preserve the public order, and to protect each individual in the enjoyment of his own rights and privileges by requiring the observance of rules of order, fairness and good neighborhood, by all around him. This manifestation of the sovereign authority is usually spoken of as the police power.

The distinction between a demand of money under the police power, and one made under the power to tax, is not so much one of form as of substance. The proceedings may be the same in the two cases, though the purpose is essentially different. The one is made for regulation and the other for revenue.² If, therefore, the purpose is evident in any particular

¹ Mr. Walker, in his *Science of Wealth*, adds this to Adam Smith's four cardinal rules of taxation: "V. The heaviest taxes should be imposed on those commodities the consumption of which is especially prejudicial to the interests of the people."

² Under a power to license, taxes cannot be imposed, and the power to tax does not confer the authority to license — the objects to be attained in the exercise of the two powers not being the same. *Burlington v. Bumgardner*, 42 Ia., 673. A license fee of \$300 cannot be imposed on auctioneers under

instance, there can be no difficulty in classifying the case and referring it to the proper power. But in what has been said regarding the apportionment of taxes, it has been seen that other considerations than those which regard the production of a revenue are admissible, and that regulation may be kept in view when revenue is the main and primary purpose. The right of any sovereignty to look beyond the immediate purpose to the general effect, neither is nor can be disputed; the government has general authority to raise a revenue and to choose the methods of doing so; it has also general authority over the regulation of relative rights, privileges and duties, and there is no rule of reason or policy in government which can require the legislature, when making laws with the one object in view, to exclude carefully from its attention the other. Nevertheless, cases of this nature are to be regarded as cases of taxation. Revenue is the primary purpose, and the regulation results from the methods of apportionment that are resorted to in obtaining the revenue. Only those cases, where regulation is the primary purpose, can be specially referred to the police power.

Custom has much to do in determining whether certain classes of exactions are to be regarded as taxes or as duties imposed for regulation. If by the common understanding and general custom of the country, a particular duty is regarded as being imposed upon certain individuals, not as their proportionate share in the burdens of government, but because of some special relation to property peculiarly located, or to business peculiarly troublesome or dangerous, so that a requirement that the duty shall be performed by such individuals is usually regarded as only in the nature of regulation of relative obligations and duties through the neighborhood or the municipality, there is no sufficient reason why this may not be considered a mere police regulation, though the proceedings assume the form of taxation, and are even designated by that name. The summoning of the people once a year to put the highways of their neighborhood in order has sometimes been looked upon as a case of this description; to some extent, at

the police power, nor can they be taxed by license without clear authority. *Mankato v. Fowler*, 32 Minn., 364, citing *St. Paul v. Traeger*, 25 Minn., 248.

least, in the nature of a police regulation,¹ notwithstanding that, on a failure to obey the summons, the value of the labor is collected in money. A public purpose, such as is usually accomplished by an expenditure of public moneys, is indeed had in view in such a case; but the custom of requiring highway labor seems to have come down to us from a period when regular taxes were unknown or only collected in kind, and when it was looked upon as a neighborhood duty to keep the roads in order, as it was also to prevent riots and arrest criminals, or make compensation for their offenses. A like practice, based upon a similar idea, has prevailed in other countries.²

Sidewalk assessments. The cases of assessments for the construction of walks by the side of the streets, in cities and other populous places, are more distinctly referable to the power of police. These foot walks are not only required, as a rule, to be put and kept in proper condition for use by the adjacent proprietors, but it is quite customary to confer by the municipal charters full authority upon the municipalities to order the walks of a kind and quality by them prescribed to be constructed by the owners of adjacent lots at their own expense, within a time limited by the order for the purpose, and in case of their failure so to construct them, to provide that it shall be done by the public authorities, and the cost collected from such owners, or made a lien upon their property. When this is the law the duty must be looked upon as being enjoined as a regulation of police, because of the peculiar interest such owners have in the walks, and because their situation gives them peculiar fitness and ability for performing, with promptness and convenience, the duty of putting them in proper state, and of afterwards keeping them in a condition suitable for

¹ See *State v. Halifax*, 4 Dev. Law, 345; *Sawyer v. Alton*, 8 Scam., 127, 130; *Pleasant v. Kost*, 29 Ill., 490; *Overseers of Amenias v. Stamford*, 6 Johns., 92; *Draining Company Case*, 11 La. An., 338, 372.

² A license fee for the right to collect tolls for the use of one's own wharf is in a large sense a tax, "as being a charge or burden imposed upon persons, property or business to raise money for public purposes." *Santa Barbara v. Stearns*, 51 Cal., 499.

Where a city has granted the privilege to supply water to its people without let or hindrance, the water-works are taxable as property, but a license fee cannot then be imposed on the privilege of supplying the water. *Stein v. Mobile*, 49 Ala., 362; *Mobile v. Stein*, 54 Ala., 23.

use. Upon these grounds the authority to establish such regulations has been supported with little dissent.¹

No doubt this requirement is sometimes in a measure oppressive, since the actual cost may exceed the pecuniary advantages to the lot owner;² but this, in the case of police regulations, is never a conclusive objection. It has been held competent to order a sidewalk constructed on one side of a street when none is ordered on the other;³ and to order it even though the street is not as yet graded;⁴ and to collect the cost before the walk is built.⁵ And the owner of a corner lot may be required to pave the sidewalk on each of the streets.⁶ In New Jersey it is held that the lot owner, in case the street is unpaved, may be required, as a part of the expense of the walk, to construct a gutter necessary for its security.⁷

¹ The leading case is *Godard, Petitioner*, 16 Pick., 504, where the subject is examined at length. The following cases support the same view: *Lowell v. Hadley*, 8 Met., 180; *Paxson v. Sweet*, 13 N. J., 196; *Washington v. Nashville*, 1 Swan, 177; *Whyte v. Nashville*, 2 Swan, 364; *Franklin v. Mayberry*, 6 Humph., 868; *Bonsall v. Lebanon*, 19 Ohio, 418; *Deblois v. Barker*, 4 R. I., 445; *O'Leary v. Sloo*, 7 La. An., 25; *Hart v. Brooklyn*, 36 Barb., 236; *Buffalo City Cemetery Co. v. Buffalo*, 46 N. Y., 503; *Greensburg v. Young*, 53 Pa. St., 280; *Hydes v. Joyes*, 4 Bush, 464; *Macon v. Patty*, 57 Miss., 378; *Palmer v. Way*, 6 Col., 106; *White v. People*, 94 Ill., 604, explaining *Ottawa v. Spencer*, 40 Ill., 211. And see *Hudler v. Golden*, 36 N. Y., 446; *Woodbridge v. Detroit*, 8 Mich., 274, 309.

² In New Jersey, where it is held that the assessment for an improvement on the adjoining land owners must not exceed the *actual* benefit conferred by such improvement, it is also held that the whole expense of a sidewalk may be assessed upon the lot in front of which it is constructed, regardless of absolute benefits. *Van Tassel v. Jersey City*, 37 N. J., 128.

³ *State v. Portage*, 12 Wis., 562.

⁴ *Parker v. Challiss*, 9 Kan., 155; S. C., 11 Kan., 384.

⁵ *Mix v. Shaw*, 106 Ill., 425.

⁶ *Sands v. Richmond*, 31 Grat., 571. See *Wolf v. Keokuk*, 48 Ia., 129. In *Twycross v. Fitchburg R. R. Co.*, 10 Gray, 293, 295, a lessee's covenant to pay "all taxes or duties," levied or to be levied on the premises during the term, was held not to apply to an assessment for paving the sidewalk in front; that not being a tax or duty levied or to be levied on the premises demised. "It is a permanent improvement of the estate, the benefit of which is to be found in the increased value of the estate, and in the increased rent which it would permanently command." Per *Thomas, J.* In Illinois it is held not competent to make the cost of the sidewalk a personal charge against the owner. *Craw v. Tolono*, 96 Ill., 255; *Virginia v. Hall*, 96 Ill., 278.

⁷ *Robins v. New Brunswick*, 44 N. J., 116. In *Williams v. Bruce*, 5 Conn., 190, it was decided that the building of a railing on the inner side of a

Sewer assessments. There seems to be no legal impediment to a requirement under the police power that lot owners in cities and villages shall be at the expense of constructing that portion of the public sewer in front of their respective premises. It is true, that the levies for the purpose of constructing sewers and of keeping them in repair are commonly spoken of as taxes;¹ but, as has been justly remarked, there is as much reason to subject the owners of land abutting to contribution to their expenditure, as there is to oblige them to pave the footways in front of their grounds, or to keep the same in repair, when the city shall pave the streets adjoining. It should be a charge on the land, just as is the requisition on the owners of land abutting on the streets to clear away the snow at their own expense, which has been determined to be a reasonable provision. It is a charge upon real estate thus situated, and requisite for the comfort and convenience of all the citizens.² By this is not meant that the expense of sewers may not be borne by general tax, as indeed is often done; what is meant is only this: that the purpose to be accomplished is of that peculiar nature that the duty to provide for it seems intimately associated with the ownership of adjacent property, the value of which will be increased and the use facilitated by means thereof; and it is therefore within the competency of the legislature to impose upon the owners of such property the duty to make provision for it.

Levee assessments. Assessments for the construction of embankments or levees, to protect from overflow and destruction

sidewalk could not be compelled under a general authority to require the sidewalk to be constructed. In *Wright v. Briggs*, 2 Hill, 77, it was held that authority to a village council to require adjoining owners to construct sidewalks in front of their premises would not warrant imposing upon them a tax for improving the street. A power in a municipal charter to "regulate and improve" sidewalks does not authorize an assessment for their construction. *Fairfield v. Ratcliffe*, 20 Ia., 396.

¹ See *Philadelphia v. Tryon*, 35 Pa. St., 401; *Stroud v. Philadelphia*, 61 Pa. St., 255; *Boston v. Shaw*, 1 Met., 130; *Hildreth v. Lowell*, 11 Gray, 345; *Cone v. Hartford*, 28 Conn., 363; *State v. Jersey City*, 29 N. J., 441; *State v. Charleston*, 12 Rich., 702, 733.

² *Putnam, J.*, in *Boston v. Shaw*, 1 Met., 130, 133. In this case it is decided that the levy of a sewer rate by the value of estates is void, as it could not be equal or just.

large tracts of country, are commonly levied on the owners of lands bordering on or lying near the streams or bodies of water from which the danger is anticipated, and are generally looked upon as a species of local tax.¹ But if it should be imposed as a duty upon residents or property owners in the neighborhood of such a danger, that they should turn out periodically, or in emergencies, and give personal attention and labor to the construction of the necessary defenses against overflow and inundation, it is not perceived that there could be any difficulty in supporting such a requirement as one of police, or of resting it upon the same grounds which sustain the regulations in cities, by which duties are imposed on the occupants of buildings to take certain precautions against fires, not for their own benefit exclusively, but for the protection of the public.²

Drainage laws. Similar considerations apply in the case of drainage laws, which are enacted in order to relieve swamps, marshes and other low lands of the excessive waters which detract from their value for occupation and cultivation, and perhaps render them worthless for use, and are likely at the same time to diffuse through the neighborhood a dangerous nuisance. If these may be drained at the expense of the owner, by special tax, there can be no doubt of the right of the state to make it his duty to drain them, as a matter of police regulation; the state coming forward to perform the duty at

¹ *Crowley v. Cropley*, 2 La. An., 329. See *Sessions v. Cronkinton*, 20 Ohio St., 349; *Egyptian Levee Co. v. Hardin*, 27 Mo., 495; *Yeatman v. Crandall*, 11 La. An., 220; *Wallace v. Shelton*, 14 La. An., 498; *Bishop v. Marks*, 15 La. An., 147; *Richardson v. Morgan*, 16 La. An., 429; *McGehee v. Mathis*, 21 Ark., 40; *Jones v. Boston*, 104 Mass., 461.

² It is said by *Elmer, J.*, in *State v. Newark*, 27 N. J., 185, 194, that "laws for the drainage and embanking of low grounds, and to provide for the expense for the mere benefit of the proprietors, without reference to the public good, are to be classed, not under the taxing, but the police, power of the government; and so also the regulation of fences and party walls." To the same effect is *Boro v. Phillips Co.*, 4 Dill., 216. In that case the acts in question provided for paying for all levee work by assessment on the land benefited, and declared that other lands and property in the county should not be taxed for the purpose. Held that the county at large was not liable though the county court had failed in its duty to levy a tax upon the benefited lands to pay for work done. The liability rests solely on the levee districts.

his expense, in case of its not being suitably or expeditiously performed by himself.¹

It is not to be doubted that other cases which may not have yet been the subject of judicial consideration would fall within the same reasons; but it might be presumptuous to attempt an enumeration of them, especially as there can be little or no occasion for doing so, when the taxing power is commonly sufficient to meet all their requirements. A safer ground will be occupied in the consideration of those cases, so often the subject of judicial review, in which burdens in the shape of license fees have been imposed upon business, trades or occupations.

License fees in general. License fees may be imposed:

1. For regulation. 2. For revenue. 3. To give monopolies. 4. For prohibition. The third purpose is inadmissible in any free government, and has not avowedly been had in view at any time in this country, nor in England since the period immediately preceding the revolution of 1688, so fruitful of arbitrary exactions of every available nature.² The fourth purpose

¹ In *State v. Charleston*, 12 Rich., 702, 733, the power to require sewers, drains and sidewalks to be constructed by the owners of the property adjacent is plainly referred to the police power. "From a very early period sewers and pavements have constituted exceptional subjects in reference to assessments. Statutes of drains and sewers were known before the time of Henry VIII., when the general statutes on the subject were enacted, and the mode of assessment prescribed. In like manner the act of 1764 provided for assessments for drains or sewers and sidewalks. Various reasons have been assigned for these exceptions. Among others, it has been plainly urged that, as a sanitary regulation, and under the power to abate nuisances, the corporation might require every citizen to drain his own lot, or, in case of neglect, exact a penalty; and so by the old act of 1698 (7 Stat., 12), every inhabitant of Charleston was required to mend and raise the sidewalk in front of his house in the manner and to the dimensions therein prescribed, on penalty of forfeiting for each house a penalty to be collected under the warrant of a justice of the peace. In order the better to carry into effect these objects, and to do what each individual might be required to do for himself, the act of 1764 authorized the commissioners of streets to construct drains and level and pave the footways, etc., and to assess the proprietors of lands and houses fronting on the street," etc. *Dunkin*, Chancellor, p. 733.

² Taxation for the benefit of individuals is compared to monopolies by *Lowrie*, Ch. J., in *Philadelphia Association, etc., v. Wood*, 39 Pa. St., 67, 82. The very heavy license fees exacted from pawnbrokers in Dublin are said to

is entirely admissible in the case of pursuits or indulgencies which in their general effect are believed to be more harmful than beneficial to society, and which, consequently, the public interest requires should be put an end to. A case of this nature is that of heavy fees imposed on the keepers of implements of gaming.¹ When, however, prohibition is the object, the end may generally be more directly accomplished by legislation which in its terms is prohibitory, than by the circuitous method of imposing a burden difficult or impossible to be borne; and the direct method is consequently the one usually adopted. But it is often found that the prohibition of an occupation which excites or gratifies the vices or passions of large numbers

owe their origin to a purpose to give a monopoly of the business to a few favored retainers of the court. Of course the weight of such fees rests finally on the persons whose necessities make them the pawnbroker's customers. A power to license and regulate will not warrant the conferring of a license upon one person to carry on a business to the exclusion of all others. But a power to license and refuse licenses will. *Logan v. Pyne*, 43 La., 524; *Burlington v. Davis*, 48 La., 133. The legislature may give a city the right to grant an exclusive ferry license. *Ibid.*

¹ *State v. Doon*, R. M. Charlt., 1. The fee in this case was of \$1,000, and it was sustained, although it was manifestly imposed for the purposes of prohibition, and its payment would not give to the owner of the table the privilege of making use of it, which was illegal under another statute. The constitution of Arkansas of 1868 provided that "the general assembly shall tax all privileges, pursuits and occupations that are of no real use to society; all others shall be exempt." Art. 10, § 17.

Two constitutional provisions were as follows:

"No political corporation shall impose a greater license than is imposed by the general assembly for state purposes."

"The regulation of the sale of alcoholic or spirituous liquors is declared a police regulation, and the general assembly may enact laws regulating their sale and use."

A parish had undertaken to require a higher license fee from a liquor seller than had the state, on the ground that such larger fee was as a police regulation. Held, that the second provision quoted did not relate to the sale of liquors but only to such regulations as the preservation of order, etc., may require, and that the action of the parish was not warranted. *State v. Chase*, 33 La. An., 287.

Under authority to a municipality to impose a license tax on a coffee house where theatrical plays are performed, the amount of the tax is a question of expediency and police regulation of which the municipal authorities are sole judges. A tax of \$2,500 sustained. The keeper of the house has a right to require only that all who pursue the same business shall pay the same amount of tax. *Goldsmith v. New Orleans*, 31 La. An., 646.

of people is met by a resistance so steady and powerful as to render the law wholly ineffectual, when a heavy tax might lessen the evils and possibly in the end make the occupation unprofitable. A belief that this might be the result has influenced many persons to favor a repeal of the prohibitory liquor laws, and the substitution therefor of laws for the regulation and taxation of the traffic. And this is held to be competent even when the business taxed is one the legislature is forbidden by the constitution to license; the tax not necessarily implying either protection to the business by the state or consent to its being carried on.¹

¹ "The popular understanding of the word license undoubtedly is a permission to do something which, without the license, would not be allowable. This, we are to suppose, was the sense in which it was made use of in the constitution; but this is also the legal meaning. The object of a license, says Mr. Justice *Manning*, is to confer a right that does not exist without a license. *Chilvers v. People*, 11 Mich., 43, 49. Within this definition a mere tax upon the traffic cannot be a license of the traffic, unless the tax confers some right to carry on the traffic which otherwise would not have existed. We do not understand that such is the case here. The very act which imposed this tax repealed the previous law which forbade the traffic and declared it illegal. The trade then became lawful whether taxed or not; and this law in imposing the tax did not declare the trade illegal in case the tax was not paid. So far as we can perceive, a failure to pay the tax no more renders the trade illegal than would a like failure of a farmer, to pay the tax on his farm, render its cultivation illegal. The state has imposed the tax in each case, and made such provision as has been deemed needful to insure its payment; but it has not seen fit to make the failure to pay a forfeiture of the right to pursue the calling. If the tax is paid the traffic is lawful, but if not paid the traffic is equally lawful. There is consequently nothing in the case that appears to be in the nature of a license. The state has provided for the taxation of a business which was found in existence, and the carrying on of which it no longer prohibits; and that is all.

"But it is urged that by taxing the business the state recognizes its lawful character, sanctions its existence and participates in its profits, all of which is within the real intent of the prohibition of license. The lawfulness of the business, if by that we understand it is no longer punishable, and is capable of constituting the basis of contracts, was undoubtedly recognized when the prohibitory law was repealed; but as the illegality of the traffic depended on the law, so its lawfulness now depends upon its repeal. The tax has nothing to do with it whatever. Now it is not claimed, so far as we are aware, that the repeal of the prohibitory law was incompetent; and, if not, mere recognition of the lawfulness of the traffic cannot make the tax law or any other law invalid. It is only the recognition of an existing and a conceded fact; and the courts could not refuse to recognize it if they would.

"The idea that the state lends its countenance to any particular traffic by

In general, however, prohibition is not the purpose in mind when license fees or similar burdens are imposed; but the state has in view either the regulation of that in respect of which the exaction is made, or it contemplates a revenue therefrom; and it may intend both regulation and revenue. The requirement of a license fee, as a condition to carrying on an occupation requiring regulation, cannot be objected to as a restraint of trade, however necessary may be the employment;

taxing it seems to rest upon a very transparent fallacy. It certainly overlooks or disregards some ideas that must always underlie taxation. Taxes are not favors; they are burdens. They are necessary, it is true, to the existence of government; but they are not the less burdens, and are only submitted to because of the necessity. It is deemed advisable to make careful provision to preclude these burdens becoming needlessly oppressive; but it is conceded by all the authorities that under some circumstances they may be carried to an extent that will be ruinous to individuals. It would be a remarkable proposition, under such circumstances, that a thing is sanctioned and countenanced by the government, when this burden, which may prove disastrous, is imposed upon it, while on the other hand it is frowned upon and condemned when the burden is withheld. It is safe to predict that if such were the legal doctrine, any citizen would prefer to be visited with the untaxed frowns of government rather than with testimonials of approval, which are represented by the demands of the tax-gatherer.

"It may be supposed that some idea of special protection is involved when a business is taxed; taxation and protection being reciprocal. If the tax upon any particular thing was the consideration for the thing given to the owner in respect to it, this might be so; but the maxim of reciprocity in taxation has no such meaning. No government ever undertakes to tax all it protects. If the government were to levy only poll taxes, it would not be on the idea that it was to protect only the persons of its citizens, leaving their property open to rapine and plunder. In this state our taxes are derived mainly from real estate; but it has never been suggested that real estate was entitled to special consideration in consequence. In Great Britain, real estate pays a relatively insignificant portion of the taxes, although in the social and political state it is more important than any other property. As a general fact the United States has not taxed real property, and though during the recent rebellion it taxed most kinds of business for war purposes, the number of subjects taxed has been several times reduced by legislation since, and may reasonably be expected to be further reduced hereafter. But the business taxed is no more protected than the business not taxed; and the fisheries which are favored by bounties are as much protected as either. All this is only an apportionment of taxation by the selection of subjects which, under all the circumstances, it is deemed wise and politic to subject to the burden. Whether a person in respect to his property or his occupation falls within the category of taxables, or not, is immaterial as affecting his claim to protection from the government. It is enough for him that the government has selected for itself its own subjects

and the legislature must be the judge when regulation is needful.¹

A license is a privilege granted by the state, usually on payment of a valuable consideration,² though this is not essential. To constitute a privilege the grant must confer authority to do something which without the grant would be illegal; for if what is to be done under the license is open to every one without it, the grant would be merely idle and nugatory, conferring no privilege whatever.³ But the thing to be done may be some-

for taxation, and prescribed its own rules. It is his liability to taxation at the will of the government that entitles him to protection, and not the circumstance of his being actually taxed; and the taxation of a thing may be, and often is, when police purposes are had in view, a means of expressing disapproval instead of approbation of what is taxed. . . .

"Taxes upon business are usually collected in the form of license fees; and this may possibly have led to the idea that seems to have prevailed in some quarters, that a tax implied a license. But there is no necessary connection whatever between them. A business may be licensed and yet not taxed, or it may be taxed and yet not licensed. And so far is the tax from being necessarily a license, that provision is frequently made by law for the taxation of a business that is carried on under a license existing independent of the tax.

"Such is the case where cities under proper legislative authority tax occupations that are carried on under licenses from the state. *Ould v. Richmond*, 23 Grat., 464; *Napier v. Hodges*, 81 Tex., 287; *Cuthbert v. Conley*, 32 Ga., 211; *Wendover v. Lexington*, 15 B. Monr., 258. The license confers the privilege, but it is not perceived why a privilege thus conferred should not be taxed as much as any other. The federal laws give us illustration of the taxation of illegal traffic. A case in point was that of the taxation of the liquor traffic in the state previous to the repeal of the prohibitory law; the federal law found a business in existence, and it taxed it without undertaking to give it any protection whatever. *McGuire v. Commonwealth*, 3 Wall., 387; *Puryear v. Commonwealth*, 5 Wall., 475." *Youngblood v. Sexton*, 32 Mich., 406. Compare *State v. Hipp*, 38 Ohio St., 129; *Butzman v. Whitbeck*, 42 Ohio St., 223; *State v. Sinks*, 42 Ohio St., 345. And see *Richland County v. Richland*, 18 N. W. Rep., 497. The Civil Damage Act, allowing the recovery of damages for injuries resulting from the sale of liquor, is not repugnant to a law taxing the sale. *Kehrig v. Peters*, 41 Mich., 475.

¹ *Brooklyn v. Breslin*, 57 N. Y., 591, case of a city cartman.

² *Heise v. Columbia*, 6 Rich., 404.

³ *Chilvers v. People*, 11 Mich., 43, 49; *Home Ins. Co. v. Augusta*, 50 Ga., 530. The imposition of a license tax is in the nature of a sale of a benefit or privilege to a party who would not otherwise be entitled to the same. *Ieavenworth v. Booth*, 15 Kan., 627.

Where a municipal corporation has power to prohibit the doing of a thing and also the power to license the same thing to be done, the license fee de-

thing lawful in itself, and only prohibited for the purposes of the license; that is to say, prohibited in order to compel the taking out of a license.¹ This is always the case where that which is licensed was not unlawful at the common law.

The grant of a license may be made by the state directly, or it may be made indirectly through one of the municipal corporations of the state. Of the indirect grant it is to be observed that a municipal corporation as such has no inherent power to grant licenses or exact license fees; it must derive all its authority in this regard from the state, and the power must come by direct grant and cannot be taken by implication.²

Fees, when a tax. The terms in which a municipality is empowered to grant licenses will be expected to indicate with sufficient precision whether the grant is conferred for the purposes of revenue, or whether, on the other hand, it is given for regulation merely. It is perhaps impossible to lay down any rule for the construction of such grants that shall be general and at the same time safe; but as all delegated powers to tax are to be closely scanned and strictly construed, it would seem that when a power to license is given, the intendment must be that regulation is the object, unless there is something in the language of the grant, or in the circumstances under which it is made, indicating with sufficient certainty that the raising of revenue by means thereof was contemplated. If a revenue authority is what seems to be conferred, the extent of the tax, when not limited by the grant itself, must be under-

manded by ordinance for the doing of such thing is not a tax but a price paid for the privilege, and funds raised from such fees may be applied to schools if the corporation shall so determine, though by the constitution municipal taxes are required to be applied to municipal purposes. *East St. Louis v. Trustees of Schools*, 102 Ill., 489.

¹How far the grant of a patent by the United States precludes state regulations in respect to the sale of the patented article, see *Patterson v. Kentucky*, 97 U. S., 501; *Helm v. National Bank*, 43 Ind., 167; *Cranston v. Smith*, 37 Mich., 309; *Hollida v. Hunt*, 70 Ill., 109; *Crittenden v. White*, 23 Minn., 24.

²A daily charge of twenty-five cents for keeping a private butcher shop is a license tax, and the right to impose it exists only when there is express power granted to lay a revenue license tax. *Delcambre v. Clere*, 84 La. An., 1050. Neither a power to tax nor a power to regulate gives authority to license. *Burlington v. Bumgardner*, 42 Ia., 673.

stood to be left to the judgment and discretion of the municipal government, to be determined in the usual mode in which its legislative authority is exercised; but the grant of authority to impose fees for the purposes of revenue would not warrant their being made so heavy as to be prohibitory, thereby defeating the purpose.¹

Where the grant is not made for revenue, but for regulation merely, a much narrower construction is to be applied. A fee for the license may still be exacted, but it must be such a fee only as will legitimately assist in the regulation; and it should not exceed the necessary or probable expense of issuing the license and of inspecting and regulating the business which it covers.² If the state intends to give broader authority, it is a reasonable inference that it will do so in unequivocal terms. But the limitation of the license fee to the necessary expenses will still leave a considerable field for the exercise of discretion when the amount of the fee is to be determined. The fee, of course, must be prescribed in advance, and when it cannot be

¹ *Ex parte Burnett*, 80 Ala., 461; *Craig v. Burnett*, 82 Ala., 728; *Burlington v. Insurance Co.*, 81 Ia., 102; *Kitson v. Ann Arbor*, 26 Mich., 325; *Mason v. Lancaster*, 4 Bush, 406; *Kniper v. Louisville*, 7 Bush, 599.

² *Freeholders v. Barber*, 7 N. J., 64; *Kip v. Patterson*, 26 N. J., 296; *State v. Hoboken*, 83 N. J., 280; *State v. Roberts*, 11 Gill & J., 506; *Boston v. Schaffer*, 9 Pick., 415; *Commonwealth v. Stodder*, 2 Cush., 562; *Mobile v. Yuille*, 3 Ala., 137; *Bennett v. Birmingham*, 81 Pa. St., 15; *Cincinnati v. Bryson*, 15 Ohio, 625; *Mays v. Cincinnati*, 1 Ohio St., 268; *Baker v. Cincinnati*, 11 Ohio St., 534; *Cincinnati Gas Light Co. v. State*, 18 Ohio St., 237; *Chilvers v. People*, 11 Mich., 43; *Ash v. People*, 11 Mich., 347; *Collins v. Louisville*, 2 B. Monr., 134; *St. Louis v. Boatman's Ins. & Trust Co.*, 47 Mo., 150; *State v. Herod*, 29 Ia., 123; *Burlington v. Insurance Co.*, 31 Ia., 102; *Ward v. Maryland*, 12 Wall., 429; *Dillon, Mun. Corp.*, § 609. The fact that the license fee is payable into the treasury of the municipality, provided the fee be a reasonable one, does not impress it with the character of a tax. *Frankford, etc., R. R. Co. v. Philadelphia*, 58 Pa. St., 119; *Johnson v. Philadelphia*, 60 Pa. St., 445; *State v. Herod*, 29 Ia., 123. Upon the question when a license fee imposed on the cars of street railways is a tax and when not, the following cases may be consulted with profit in connection with the Pennsylvania cases above cited: *New York v. Second Avenue R. R. Co.*, 32 N. Y., 261; *Louisville City R. R. Co. v. Louisville*, 4 Bush, 478; *S. C.*, 2 Withrow's Corp. Cases, 358.

It has been held in Arkansas that if a police regulation is directed to the end of raising a revenue, a court of equity may declare it void to the extent that it imposes fees which exceed reasonable costs and expenses. *Taylor v. Pine Bluff*, 34 Ark., 603.

determined with any accuracy what the cost of regulation is to be: it must therefore be based upon the estimates, with more or less probability that the result will fail to come anything near a verification of the calculations. Moreover, in fixing upon the fee, it is proper and reasonable to take into account not the expense merely of direct regulation, but all the incidental consequences that may be likely to subject the public to cost in consequence of the business licensed. In some cases the incidental consequences are much the most important, and, indeed, are what are principally had in view when the fee is decided upon. The regulation of the business of huckster, for instance, could seldom be troublesome or expensive, but that of the manufacture and sale of intoxicating drinks could not be measured by anything like the same standard. The business is one that affects the public interest in many ways, and leads to many disorders. It has a powerful tendency to increase pauperism and crime. It renders a large force of peace officers essential, and it adds to the expenses of the courts, and of nearly all branches of civil administration. It cannot be questioned, therefore, if it is to be licensed by the public authorities, that it is legitimate and proper to take into the account all the probable consequences, or that the payment to be exacted should be sufficient to cover all the incidental expenses to which the public are likely to be put by means of the business being carried on. And all reasonable intendments must favor the fairness and justice of a fee thus fixed; it will not be held excessive unless it is manifestly something more than a fee or regulation.¹

¹See *Johnson v. Philadelphia*, 60 Pa. St., 445; *Ash v. People*, 11 Mich., 347; *Burlington v. Ins. Co.*, 31 Ia., 102; *People v. Van Baalen*, 40 Mich., 258; *People v. Russell*, 49 Mich., 617. In *Burch v. Savannah*, 42 Ga., 596, 598, the following remarks are made by *McKay, J.*: "The license fee for retailing liquors is in no proper sense a tax. Its object is not to raise revenue. It has for many years been thought that this business was one dangerous to the public peace and public morals, and it has been the uniform practice of the country to subject it to regulation, require license from some public functionary before it is engaged in, and to punish as a crime the pursuit of it without a license. The license is part of the public regulations of the country, and the fee is intended rather to prevent the indiscriminate opening of such establishments than to raise the revenue by taxation." And see *Thomasson v. State*, 15 Ind., 449; *Commonwealth v. Byrne*, 20 Gratt., 165; *Straub v. Gordon*, 27 Ark., 625; *Falmouth v. Watson*, 5 Bush, 660. An ob-

What may be licensed. Upon this subject it would not be safe to venture upon laying down any rule whatever, as one of limitation. Where revenue is the purpose, enough has been said in other parts of the present work to show that there is practically no limitation whatever. When the license is for regulation merely, the limitation is one of discretion and policy, and the question presented is, whether the business or occupation is one rendering special regulation important for any purpose of protection to the public, or to guard individuals against frauds and impositions. Employments the most necessary and commendable may sometimes need regulations for one or the other of these purposes, and so may the most dearly prized and most essential of fundamental rights or privileges. On this point no illustration could be more appropriate than that of the marriage relation. Marriage, between persons of suitable age and discretion, and under proper circumstances, should be esteemed a natural right; but what are suitable age and discretion, and what are the circumstances which should allow or forbid it? There are some cases in which it is as manifestly unfit and pernicious as in others it is proper and suitable; and obviously legislation is essential. In most countries the relation has always been subjected to regulations more or less stringent, among which has been the requirement of a license. Such a license has commonly for its purpose to prevent marriages between persons disqualified by immaturity or mental infirmity, or against the will of those standing in such relation to the parties as to render it proper and reasonable that they should be consulted.

Public amusements may also be forbidden with entire pro-

jection to a license fee exacted of saloon-keepers, etc., that it is unequal and invidious, because the rest of the community are not required to pay similar fees, has no force. *Durach's Appeal*, 62 Pa. St., 491. Neither has an objection that those taxed are not assessed according to the business done. *Youngblood v. Sexton*, 32 Mich., 406.

To determine whether, by the terms "license and regulate" in a municipal charter, it was intended to authorize licenses for the purpose of raising revenue, the whole charter and the general legislation of the state upon the subject must be considered. *Ex parte Frank*, 52 Cal., 606; *San Jose v. Railway Co.*, 53 Cal., 476. A license fee of \$40 on hackmen, not being for expense, etc., of regulation, must be deemed a tax. *Jackson v. Newman*, 59 Miss., 385.

priety except when licensed, inasmuch as everything of that nature has some tendency to disorder and to increased necessity for police supervision.¹ Perhaps those private amusements in which chance is one of the elements of interest, and which for that reason may beget a desire for gaming, and thus lead to disorders, might also be subjected to regulations of a like nature. The whole subject must be one which presents questions of legislative policy, rather than of strict law.²

Lotteries, where permitted, are usually licensed, and sometimes the state which grants the permission and receives a fee therefor permits its municipalities to exact a license fee also. This it has an undoubted right to do, unless the privilege was obtained from the state on the payment of a bonus, and under legislation which, in terms or by fair construction, would preclude any municipal regulations or exactions.³ Games of chance or hazard of every description, when made lawful at all, are usually made so under licensed regulations.⁴ And though a tax is sometimes levied for revenue upon the keepers of dogs, it is more usual to require the keeping to be licensed; the principal object being to have some person responsible for every animal of the kind that is protected by the law.⁵

¹See *Sears v. West*, 1 Murphy, 291; *The Germania v. State*, 7 Md., 1; *Orton v. Brown*, 35 Miss., 426; *Mabry v. Tarver*, 1 Humph., 94; *Hodges v. Nashville*, 2 Humph., 61; *Robertson v. Heneger*, 5 Sneed, 257.

²In *Stevens v. State*, 2 Ark., 291, it was held that the keeper of a billiard table could not be required to pay a fee as for a privilege. But this was put on the wholly untenable ground that it was unequal, because he was taxed on the table as property; and it was overruled by *Washington v. State*, 18 Ark., 572. And see *Straub v. Gordon*, 27 Ark., 625. The fee for the license of a place of amusement may well be graduated by the population of the town. *State v. O'Hara*, 36 La. An., 93.

³*Wendover v. Lexington*, 15 B. Monr., 258. Where one holds a license from the state or county, he cannot, without legislation expressly permitting it, be compelled to take out a license in a city as a condition of doing business within the city limits. *Robinson v. Franklin*, 1 Humph., 156; *Hannibal v. Guyott*, 18 Mo., 515. But where the state law permits it, or where at the time of granting the county or state license a valid city ordinance required a city license, it may be exacted. See *Napier v. Hodges*, 31 Tex., 287; *Independence v. Noland*, 21 Mo., 394.

⁴See *Washington v. State*, 13 Ark., 752; *Lewellen v. Lockharts*, 21 Grat., 570; *Tanner v. Albion*, 5 Hill, 121; *State v. Hay*, 29 Me., 457; *State v. Freeman*, 38 N. H., 426; *Commonwealth v. Colton*, 8 Gray, 488.

⁵See *Carter v. Dow*, 16 Wis., 298; *Tenney v. Lenz*, 16 Wis., 567; *Blair v.*

Of the occupations upon which license fees are usually imposed, the most conspicuous has already been mentioned; that, namely, of the manufacture and vending of spirituous and malt liquors.¹ Few persons dispute the necessity for the regulation by law of this business; when the legislation has gone to the extent of the entire prohibition, the judiciary has not deemed itself competent to interfere.²

Illustrations of other occupations which are commonly supposed to require special regulations are those of hackmen, draymen, hawkers, auctioneers, etc.³ A license fee imposed upon "all transient persons keeping stores" in the town imposing it has been sustained as a police regulation, though called a tax

Forehand, 100 Mass., 136; *Morey v. Brown*, 42 N. H., 373; *Mitchell v. Williams*, 27 Ind., 62.

For a construction of the Indiana statute for the taxing of dogs, see *Shelby v. Randles*, 57 Ind., 390. A specific tax for the privilege of keeping dogs may be imposed, and it may be provided that, on failure to pay, the dog may be killed.

That a constitutional provision for the taxation of property by value will not preclude a *per capita* tax on dogs, see *Holst v. Roe*, 39 Ohio St., 340; *Van Horn v. People*, 46 Mich., 183; *Cole v. Hall*, 103 Ill., 30; *Woolf v. Chalker*, 31 Conn., 121; *Ex parte Cooper*, 3 Tex. Ap., 439, and the cases above cited. *Contra*, *Washington v. Meigs*, 1 MacAr., 53; *Mowery v. Salisbury*, 82 N. C., 175.

¹ In *Keller v. State*, 11 Md., 525, an act requiring manufacturers of beer to take out a license for retailing was objected to as compelling them to pay more than their fair proportion towards the expense of the government; but the court say, "the system of legislation to which this act belongs may be vindicated on the plainest grounds of public policy." As to the right in general, see *Perdue v. Ellis*, 18 Ga., 536; *Thomasson v. State*, 15 Ind., 449; *Aulanier v. Governor*, 1 Tex., 653; *Smith v. Adrian*, 1 Mich., 495; *Gardner v. People*, 20 Ill., 430; *License Cases*, 5 How., 504; *License Tax Cases*, 5 Wall., 472.

² It has been held in Illinois that the corporate authorities of towns, when empowered by their charters to suppress the sale of intoxicating liquors, might declare the unlicensed selling a nuisance. *Goddard v. Jacksonville*, 15 Ill., 588; *Byers v. Olney*, 16 Ill., 35; *Jacksonville v. Holland*, 19 Ill., 271; *Pekin v. Smelzel*, 21 Ill., 464; *Block v. Jacksonville*, 36 Ill., 301. In Texas a fee of \$250 required of retailers of liquors has been sustained as only a regulation of police, and not a tax. *Baker v. Panola County*, 30 Tex., 86.

³ *Cincinnati v. Bryson*, 15 Ohio, 625; *Nightingale's Case*, 11 Pick., 168; *White v. Kent*, 11 Ohio St., 550; *Adams v. Somerville*, 2 Head, 363; *State v. Crawford*, 2 Head, 460; *Buffalo v. Webster*, 10 Wend., 99; *Brooklyn v. Breslin*, 57 N. Y., 591.

in the legislation which permitted it.¹ The license of street railway cars has been supported under the police power;² and so has been the licensing of insurance.³ Inspection fees are to be referred to the same authority, and are not taxes.⁴

Issuing the license. This is usually done by some administrative officer or board under general regulations. It has been held in Georgia that one applying for a license is entitled to it of right if he complies with the statutory conditions.⁵ But this cannot be universally true. In some cases the purpose of the legislation is to limit the number, and then a discretion will be allowed to grant or refuse, just as is done in England in the case of applicants for license to sell liquors. In others the regulations are often made exceedingly stringent. In addition to the payment of the tax a bond for good behavior is often re-

¹ *Wilmington v. Roby*, 8 Ired., 250. See *Wilmington v. Patterson*, 8 Jones, Law, 182. A statute forbidding sales by sample in the city of Louisville without a license was sustained against an objection on constitutional grounds in *Commonwealth v. Smith*, 6 Bush, 808; *Mork v. Commonwealth*, 6 Bush, 397.

² *Frankford, etc., R. R. Co. v. Philadelphia*, 58 Pa. St., 119; *Johnson v. Philadelphia*, 60 Pa. St., 445; *State v. Herod*, 29 Ia., 123. Railroad companies may be required to light such part of their track as is within a city or village, and on failure the cost may be made a lien on their real estate. *Cincinnati, etc., R. Co. v. Sullivan*, 32 Ohio St., 152.

³ *Fire Department v. Helfenstein*, 16 Wis., 136. An ordinance provided for a license fee of \$100 to be paid by every person or company doing an insurance business in the city. Held that although more than the cost of issuing the license the amount was collectible. *Leavenworth v. Booth*, 15 Kan., 627. Where the law imposes a special tax on foreign insurance companies, and a tax on all insurance companies, the two taxes may be collected from the former class. *Leavenworth v. Booth*, *supra*.

⁴ *Charleston v. Rogers*, 2 McCord, 495; *O'Maley v. Freeport*, 36 Pa. St., 24. It was decided in *East St. Louis v. Wider*, 46 Ill., 351, that a license fee required of merchants could not be discharged by a tender of evidences of indebtedness of the police commissioners, though that indebtedness was made receivable for taxes. A license tax on a business in a city for the benefit of the county in which it is, if regarded as a police regulation, may be upheld though not uniform throughout the district, since the price of the license may be graduated by the populousness of the community or by the profitability of the business licensed. *Ex parte Marshall*, 64 Ala., 266. A city may be empowered to exact a license from every meat-packing establishment in it or within a mile of its limits. *Chicago Packing, etc., Co. v. Chicago*, 88 Ill., 221.

⁵ *State v. Justices*, 15 Ga., 408; *Hill v. Decatur*, 22 Ga., 203.

quired, and sometimes a satisfactory showing of good moral character.¹

Recalling licenses. Under some statutes licenses are permitted to be recalled or revoked for the misbehavior of those who hold them. This in some cases is a very salutary power. They are subject also, like all other statutory privileges, to be terminated by changes in the laws; as a retailer's license, for instance, is terminated by a law totally prohibiting sales.²

Collection of license fees. What has already been said regarding the collection of taxes will preclude the necessity for any extended remarks regarding the collection of these fees. As has been remarked, the payment is usually required in advance. If they are not paid, and the privilege is nevertheless exercised, the statute or ordinance imposing the fee will determine what the consequence shall be, and what proceedings shall be taken. It has been decided that a municipal corporation empowered to grant licenses and to impose a fee therefor may lawfully make the failure to take out a license and pay

¹ In *Whitten v. Covington*, 43 Ga., 421, a requirement that the applicant for a license to sell liquor should produce the recommendation of four of his nearest neighbors was sustained; a requirement not always possible to be complied with.

The order of a county court to its clerk to issue license to retail spirituous liquors to an applicant does not, of itself, authorize the applicant to retail, but only authorizes the issuance of the license to do so after the applicant has complied with all the prerequisites of the law. *Brown v. State*, 27 Tex., 885.

² On this subject, see *Calder v. Kurby*, 5 Gray, 597; *Brimmer v. Boston*, 102 Mass., 19; *Commonwealth v. Brennan*, 103 Mass., 70; *Baker v. Boston*, 12 Pick., 184; *Brick Presb. Church v. New York*, 5 Cow., 538; *Vanderbilt v. Adams*, 7 Cow., 585; *People v. Morris*, 18 Wend., 325; *Board of Excise v. Barrie*, 34 N. Y., 657; *State v. Holmes*, 88 N. H., 225; *Hirn v. State*, 1 Ohio St., 15; *Freleigh v. State*, 8 Mo., 606; *State v. Sterling*, 8 Mo., 697; *Gatzweller v. People*, 14 Ill., 142; *Phalen v. Virginia*, 8 How., 163; *Butler v. Pennsylvania*, 10 How., 402. Some courts have been inclined to hold that a license, unless for misconduct, cannot be revoked except on a return of the fee: see *Adams v. Hackett*, 27 N. H., 239, 294; *State v. Phalen*, 3 Harr., 441; *Boyd v. State*, 46 Ala., 329; and certainly repayment would generally be equitable.

When a city has power to suppress the sale of liquors, it may revoke a license for failure to observe an ordinance. *Schwuchow v. Chicago*, 68 Ill., 444.

the fee subject the offender to the penalty of fine and imprisonment.¹

Federal licenses. The licenses issued by the federal government for revenue purposes do not supersede state regulations, and consequently must be received subject to all such requirements of license fees as the state may have seen fit to impose.² The federal government does not issue licenses under the police power, but may do so in some cases under the power to regulate commerce, and in the exercise of other federal powers; but such cases seem to call for no special remark.

¹See *Cincinnati v. Buckingham*, 10 Ohio, 257; *White v. Kent*, 11 Ohio St., 550; *Vandine, Petitioner*, 6 Pick., 187; *Nightingale, Petitioner*, 11 Pick., 168; *Shelton v. Mobile*, 30 Ala., 540; *Chilvers v. People*, 11 Mich., 43; *Brooklyn v. Cleves, Lalor*, 231; *Buffalo v. Webster*, 10 Wend., 99. *Contra, Butler's Appeal*, 73 Pa. St., 448.

²*McGuire v. Commonwealth*, 3 Wall., 387; *Purvear v. Commonwealth*, 5 Wall., 72; *Commonwealth v. Thorniley*, 6 Allen, 445; *Commonwealth v. Holbrook*, 10 Allen, 200; *Commonwealth v. Keenan*, 11 Allen, 263; *Black v. Jeffersonville*, 36 Ill., 301; *State v. Carney*, 20 Ia., 82; *State v. Stutz*, 20 Ia., 488.

CHAPTER XX.

TAXATION BY SPECIAL ASSESSMENT.

A very important species of taxation is that which is laid in the form of special assessments. This is done upon a system the general principles of which have long been recognized and acted upon in England, though perhaps not to so great an extent, nor with such distinct recognition of the proper sphere for its application, as they now are in the American states.

It will be convenient to consider the general subject of special assessments under the following heads:

1. The principles which underlie them.
2. The cases in which it is customary to levy them.
3. The objections which are made to them in point of policy.
4. The objections which constitutional principles or provisions are sometimes thought to oppose.
5. The principles of apportionment.
6. The proceedings in levying and collecting them.

1. The principles underlying them. Special assessments are a peculiar species of taxation, standing apart from the general burdens imposed for state and municipal purposes, and governed by principles that do not apply universally. The general levy of taxes is understood to exact contributions in return for the general benefits of government, and it promises nothing to the persons taxed, beyond what may be anticipated from an administration of the laws for individual protection and the general public good. Special assessments, on the other hand, are made upon the assumption that a portion of the community is to be specially and peculiarly benefited, in the enhancement of the value of property peculiarly situated as regards a contemplated expenditure of public funds; and, in addition to the general levy, they demand that special contributions, in consideration of the special benefit, shall be made by the persons receiving it. The justice of demanding the special contribution is supposed to be evident in the fact that the persons who are to make it, while they are

made to bear the cost of a public work, are at the same time to suffer no pecuniary loss thereby; their property being increased in value by the expenditure to an amount at least equal to the sum they are required to pay.¹ This is the idea that underlies all these levies. The distinction between them and ordinary taxation has thus been pointed out in a recent case: "A local assessment can only be levied on land; it cannot, as a tax can, be made a personal liability of the tax payer; it is an assessment on the thing supposed to be benefited. A tax is levied on the whole state or a known political subdivision, as a county or a town. A local assessment is levied on property situated in a district created for the express purpose of the levy, and possessing no other function, or even existence, than to be the thing on which the levy is made. A tax is a continuing burden and must be collected at stated short intervals for all time, and without it government cannot exist; a local assessment is exceptional both as to time and locality,—it is brought into being for a particular occasion, and to accomplish a particular purpose, and dies with the passing of the occasion and the accomplishment of the purpose. A tax is levied, collected and administered by a public agency, elected by and responsible to the community upon which it is imposed; a local assessment is made by an authority *ab extra*. Yet it is like a tax in that it is imposed under an authority derived from the legislature, and is an enforced contribution to the public welfare, and its payment may be enforced by the summary method allowed for the collection of taxes. It is like a tax in that it must be levied for a public purpose, and must be apportioned by some reasonable rule among those upon whose property it is levied. It is unlike a tax in that the proceeds of the assessment must be expended in an improvement from which a benefit clearly exceptive and plainly perceived must inure to the property upon which it is imposed."² Not all these differences are necessarily existent in every case, but in the main the characterization is accurate as it is forcible.

It will sometimes happen in the case of special assessments,

¹Brooks v. Baltimore, 48 Md., 265.

²George, Ch. J., in Macon v. Patty, 57 Miss., 378, 386. And see Matter of Market St., 49 Cal., 548, per Wallace, J.; State v. Elizabeth, 37 N. J., 380; Dalrymple v. Milwaukee, 53 Wis., 178.

as it does occasionally with all other taxation, that the expenditure will fail to realize the expectation on which the levy is made; and it may thus appear that a special assessment has been laid when justice would have required the levy of a general tax;¹ but the liability of a principle to erroneous or defective application cannot demonstrate the unsoundness of the principle itself; and that which supports special assessments is believed to be firmly based in reason and justice.²

¹ See *Lohrum v. Eyermann*, 5 Mo. Ap., 481; *Rogers v. St. Paul*, 22 Minn., 494.

² *Kirby v. Shaw*, 19 Pa. St., 258. "The principle upon which rests that numerous class of statutes which charge lots of ground with the expense of grading and paving the streets in front of them is, that the value of the lots is enhanced by the public expenditure." *Strong, J.*, in *Schenley v. Commonwealth*, 36 Pa. St., 29, 57. The principle is that, "when certain persons are so placed as to have a common interest amongst themselves, but in common with the rest of the community, laws may be justly made providing that, under suitable and equitable regulations, those common interests shall be so managed that those who enjoy the benefits shall equally bear the burden." *Shaw, Ch. J.*, in *Wright v. Boston*, 9 Cush., 233, 241—a drain case. "All these municipal taxes for improvement of streets rest for their final reason upon the enhancement of private properties." *Woodward, J.*, in *McGonigle v. Allegheny City*, 44 Pa. St., 118, 121. And see, per *Coulter, J.*, in *Pray v. Northern Liberties*, 31 Pa. St., 69. The principle is "that the territory subjected thereto would be benefited by the work and charge in question." *Grover, J.*, in *Litchfield v. Vernon*, 41 N. Y., 123, 133. "That principle of local taxation which is undisputed, which assesses on the property benefited, or its owner, a tax in proportion to the superadded value of the property caused by the local improvement, of which this property has a peculiar advantage beyond that of others not in like circumstances." *Agnew, J.*, in the case of *Washington Avenue*, 69 Pa. St., 352, 360. See, also, *Lockwood v. St. Louis*, 24 Mo., 20; *Matter of Opening of Streets*, 20 La. An., 497; *Allen v. Drew*, 44 Vt., 174, 187. "To pay for the opening of a street in the ratio to the benefit or advantage derived from it is no burthen." *Green, Ch. J.*, in *Patterson v. Society, etc.*, 24 N. J., 400, quoting with approval, *Matter of Mayor, etc.*, 11 Johns., 80. It is said by *Beck, J.*, in *Morrison v. Hershire*, 32 Ia., 271, 276, that "the power of the city to perform the work does not depend upon the benefits to be derived by property owners. [Citing *Warren v. Henly*, 31 Ia., 31.] The work is done for the benefit of the public; the assessment for its payment is levied upon the abutting lots, not because of any special benefit their owners derive from the improvement, but because the public good demands it, and the law authorizes special taxation for such objects." In contrast with this may be cited *Lodi Water Co. v. Costar*, 18 N. J. Eq., 519, cited with approval in *Matter of Drainage of Lands*, 35 N. J., 497, in which it was decided that where the cost of drainage is assessed upon lands without reference to the fact whether they are benefited to that extent or not, this constitutes an appropriation of private property

Special authority requisite. Assessments being a peculiar species of taxation, there must be special authority of law for imposing them. The ordinary grant to a municipal corporation of power to levy taxes for municipal purposes will not justify any other than the ordinary taxes. This would follow from the general rule which requires a strict construction of all such grants; but the principle has peculiar force when applied to powers in themselves exceptional.¹ And it is always held that such a power, when plainly granted, is to be construed with strictness,² and as strictly pursued by the authorities who are to levy the tax.³

2. Cases for assessments. No decision has ever undertaken to enumerate the cases in which special assessments are admis-

to public uses. The same principle underlies the decisions in *Matter of Albany Street*, 11 Wend., 149, and *Louisville v. Rolling Mill Co.*, 3 Bush, 416. And see *Van Tassel v. Jersey City*, 87 N. J., 128. In Illinois, to assess without reference to actual benefits is held to be unconstitutional. *St. John v. East St. Louis*, 50 Ill., 92. And see *Lee v. Ruggles*, 62 Ill., 427; *Ill. Cent. R. R. Co. v. Bloomington*, 76 Ill., 447. In *Palmer v. Stumph*, 29 Ind., 329, an assessment is spoken of as being the adjustment of the shares of a contribution to be made by several towards a common object, according to the benefit received. Taxes, it is said, are impositions for purposes of general revenue; assessments are special and local impositions upon property in the immediate vicinity of an improvement, laid with reference to the special benefit which such property derives from the expenditure. In *Hale v. Kenosha*, 29 Wis., 599, an assessment, as distinguished from other kinds of taxation, is defined in similar language. And see *Bridgeport v. N. Y. & N. H. R. R. Co.*, 36 Conn., 255; *Alexander v. Baltimore*, 5 Gill, 383. It is said, in *Hagar v. Reclamation District*, 111 U. S., 701, that in laying special assessments, "If no direct and invidious discrimination in favor of certain persons to the prejudice of others be made, it is not a valid objection to the mode pursued, that, to some extent, inequalities may arise."

A law for an assessment for paving and grading a street, and imposing one-third the cost on the adjacent property, is not to be regarded as a law laying a tax, and is not forbidden by the requirement that taxation shall be by value. *Hayden v. Atlanta*, 70 Ga., 817.

¹ See *Sharp v. Speir*, 4 Hill, 76; *First Presbyterian Church v. Fort Wayne*, 36 Ind., 338; *Appeal of Powers*, 29 Mich., 504; *Hitchcock v. Galveston*, 96 U. S., 341.

² *Reed v. Toledo*, 18 Ohio, 161; *Allentown v. Henry*, 73 Pa. St., 404. It is as competent to provide for laying an assessment for a work already done in good faith as for one to be done in the future. *Ricketts v. Hyde Park*, 85 Ill., 110.

³ *Smith v. Davis*, 30 Cal., 536; *Taylor v. Downer*, 31 Cal., 480.

sible. The reserve in this regard is wise, as it is obviously impossible to anticipate all the cases in which it might be equitable and proper to levy them; and it is consequently better and safer that special cases, as they present themselves, be judged upon their special circumstances. The following public purposes have been held to justify special burdens in return for special benefits:

Court-house and other Public Buildings. The general rule would require that these be constructed by the political community that is to own and make use of them. It has, nevertheless, been held in several cases that a municipality may be permitted to contribute specially, in addition to its share in the general burden, in consideration of the benefits it may receive from having a state or county building located within it.¹ And while, in the adjudicated cases, the expense has generally, if not always, been divided between the state or county and municipality specially taxed, the principle would seem to admit of the whole burden being assumed by the locality peculiarly benefited, if the advantages to be reasonably anticipated were sufficient to warrant it.

It is proper to remark of these cases that they are referred to here only because of the principle that supports them, and not because, in other respects, they differ from the customary taxation. Such an exceptional burden is not laid in the form of a special assessment, but, on the contrary, the municipality which contributes specially to the erection of a public building for the state or county will do so by voting and raising for the purpose a sum as part of the general taxes for the year. In principle it seems to be special, but in the method of levy and collection it takes its place with the ordinary taxes, and is mingled with them on the same roll.

Streets and Highways. The custom of the country, adopted from England, is to have the ordinary highways, though made for and belonging to the state at large, made, improved and kept in repair by the districts in or through which they are made, except where, for special reasons, the legislature shall otherwise direct. But as these districts are usually the towns—

¹See *ante*, pp. 153-155.

or, where there are no towns, the counties — the expense of the public highways is usually provided for by the general town or county levy, except in the case of important thoroughfares, which are sometimes constructed by the state at large, and except also where contributions in labor are demanded for the purpose.¹ As these contributions are usually based on a valuation of property, and, if not made, an equivalent in money is collected, the general result, when they are called for, is the same as it would have been had the expense been estimated and an assessment to meet it been made as a part of the general town or county charges.

As to village or city streets, a different practice has prevailed. No doubt it is entirely competent to put them upon the footing of common highways, and require them to be constructed and kept in repair by a general levy on the city or village;² and such must be the course in the absence of any legislation permitting the municipal corporation to levy street taxes on some different basis.³ But the opening or improvement of a city or village street almost invariably brings to the property in its immediate vicinity an enhancement of value, in which the people of the municipality at large can participate but slightly. It is not surprising that the parties who are to receive the benefit of this enhanced value are usually the ones who are active in pressing upon the public authorities the importance of these improvements; and while in this there is nothing censurable, and nothing that can justify their being singled out for invidious discrimination, yet their relation to the improvement, which induces this action, may very justly be considered when the burden comes to be imposed. That they should pay the cost, or at least some exceptional portion of the cost, in return for special benefits secured, is a belief

¹ See *Miller v. Gorman*, 38 Pa. St., 309. A tax assessed as labor cannot be carried upon the roll as a money tax without giving notice to perform the work. *Biss v. New Haven*, 42 Wis., 605. A statute imposing a labor tax on persons "residing" in a district will not embrace laborers engaged there for a few months only. On *Yuen Hai Co. v. Ross*, 8 Sawy., 384; S. C., 14 Fed. Rep., 838.

² See *People v. Whyler*, 41 Cal., 351, 354, per *Rhoads*, Ch. J.; *Sinton v. Ashbury*, 41 Cal., 525.

³ *Sharp v. Speir*, 4 Hill, 76.

that has found very general expression in the legislation on this subject.

Special assessments are therefore made for the cost of land required to be taken in opening streets,¹ and when this is done, it is not uncommon to provide that one commission or jury shall estimate the value of the lands taken and the incidental damages, if any, and assess these, together with the costs of

¹ *Matter of Twenty-sixth Street*, 12 Wend., 203; *Matter of DeGraw Street*, 18 Wend., 568. In these cases, a basis for an assessment under peculiar circumstances was laid down. *Dorgan v. Boston*, 12 Allen, 223; *Nichols v. Bridgeport*, 23 Conn., 189, and many others are cases of this description. In *Sutton's Heirs v. Louisville*, 5 Dana, 28, it was held not competent to open a street through the grounds of non-assenting parties, offset benefits against the value of land, and render judgment against the owners for the preponderance of benefits. The case, it will be seen, did not take the form of taxation, but of a judicial inquisition. For the general principle, see *Matter of Pittsburgh District*, 2 W. & S., 320; *McMasters v. Commonwealth*, 3 Watts, 292; *Pittsburgh v. Scott*, 1 Pa. St., 309; *Alexander v. Baltimore*, 5 Gill, 383; *Powers' Appeal*, 29 Mich., 504. In the case last named the whole subject is fully and carefully considered by *Campbell, J.*, who points out that, in such cases, where in the same proceeding land is taken for the public use and the cost of the improvement assessed upon adjacent land, the principles which underlie the law of eminent domain must be carefully observed, as well as those which apply to taxation. Where the benefits to the land remaining are equal to the value of the land taken, the owner has no ground for claiming damages: *Trinity College v. Hartford*, 32 Conn., 452; and where they exceed the damages, he may be taxed for the excess. *Nichols v. Bridgeport*, 23 Conn., 189; *Holton v. Milwaukee*, 31 Wis., 27. As to the effect of a constitutional provision in Ohio which entitles the owners of land taken to full compensation without deduction of benefits, see *Cleveland v. Wick*, 18 Ohio St., 303. "It was decided in *McMasters v. Commonwealth*, 3 Watts, 292, that in the opening of streets in a town or city, the damage occasioned to some of the lots might be apportioned and assessed upon others in the neighborhood improved in value thereby. It is there assumed as a well settled principle, employing the words of Chancellor *Walworth* in *Livingston v. New York*, 8 Wend., 85, that when any particular county, district or neighborhood is exclusively benefited by a public improvement, the inhabitants of that district may be taxed for the whole expense of the improvement, and in proportion to the benefit received by each. The conclusion seemed logically to follow; for if a county, district or town can be assessed for a public improvement, on the ground that they are particularly benefited, there can be no constitutional reason to exempt an individual from assessment on the same principle. It becomes a mere question of expediency, of which the legislature are the competent and exclusive judges, and not of right." *Sharswood, J.*, in *Hammett v. Philadelphia*, 65 Pa. St., 148.

the proceeding, upon the lands peculiarly benefited.¹ They are also made for the cost of grading streets,² for paving, planking or otherwise improving streets,³ as well as for altering, widening and extending them.⁴ The power to assess the expense of repaving or replanking a street on the adjacent proprietors, who were subjected to the expense of the first construction, has been denied by the supreme court of Pennsylvania;⁵ but the

¹ See for the general principle the important case of *Litchfield v. Vernon*, 41 N. Y., 123. Also *Goodrich v. Turnpike Co.*, 26 Ind., 119; *Hammett v. Philadelphia*, 65 Pa. St., 146, and *Livingston v. New York*, 8 Wend., 85, there quoted. It has been held competent, where land owners dedicate a street through their property, to order it graded and made fit for travel at their expense. *State v. Dean*, 23 N. J., 335; *Holmes v. Jersey City*, 12 N. J. Eq., 299.

Power to macadamize a street would not include the sidewalk. *Himmelman v. Satterlee*, 50 Cal., 68; *Dyer v. Chase*, 52 Cal., 440.

² *Wray v. Pittsburgh*, 46 Pa. St., 365. It is competent to change the grade and assess the expense against adjoining owners. *La Fayette v. Fowler*, 34 Ind., 140. In Nebraska it has been held that the damages occasioned by a change in the grade of a street, and which have been paid by the city, cannot be levied by special assessment on abutting property. *Goodrich v. Omaha*, 10 Neb., 88. A municipality cannot add to the amount of a sewer assessment part of the cost of a connecting sewer previously built for which no assessment was laid at the time. *Brown v. Fitchburg*, 128 Mass., 282.

³ *People v. Brooklyn*, 4 N. Y., 419; *Williams v. Detroit*, 2 Mich., 560; *Indianapolis v. Mansur*, 15 Ind., 112; *La Fayette v. Fowler*, 34 Ind., 140; *Cleveland v. Wick*, 18 Ohio St., 303; *Chambers v. Satterlee*, 40 Cal., 497; *People v. Austin*, 47 Cal., 353; *State v. Christopher*, 12 Wis., 627; *In re Dugro*, 50 N. Y., 513; *Morrison v. Hershire*, 32 Ia., 271; *Gozzler v. Georgetown*, 9 Wheat., 598; *Willard v. Presbury*, 14 Wall., 676; *Macon v. Patty*, 57 Miss., 378. The authority to assess the expense of paving includes all that is necessary, usual or fit in paving, including curbing. *Schenley v. Commonwealth*, 36 Pa. St., 29; *Petition of Burmeister*, 76 N. Y., 174. It includes the laying of a cross-walk. *Matter of Burke*, 62 N. Y., 224.

⁴ *Jones v. Boston*, 104 Mass., 461; *Hancock Street Extension*, 18 Pa. St., 26.

⁵ *Hammett v. Philadelphia*, 65 Pa. St., 146. In this case, *Sharswood*, J. (p. 155), says: "The original paving of a street brings the property bounding upon it into the market as building lots. Before that, it is a road, not a street. It is therefore a local improvement, with benefits almost exclusively peculiar to the adjoining properties. Such a case is clearly within the principle of assessing the cost on the lots lying upon it. Perhaps no fairer rule can be adopted than the proportion of feet front, although there must be some inequalities if the lots differ in situation and depth. Appraising their market values, and fixing the proportion according to these, is a plan open to favoritism or corruption, and other objections. No system of taxation which the wit of man ever devised has been found perfectly equal. But when a street is once opened and paved, thus assimilated with the rest of the city and made a part of it, all the particular benefits to the locality,

authorities in general sustain the right;¹ and it has been well remarked in Louisiana that: "if the first paving of a street is a special benefit to the front proprietor, justifying the imposition upon him of a portion of the expense, while the city pays for the residue as having been incurred for a matter of general utility, so the removal of a dilapidated or insufficient pavement, and the making of a new and sufficient one in its stead, is a matter of special benefit to the front proprietor, as well as of general utility. The equity is the same in both cases. . . It seems to me that the power to pave the streets is a permanent continuing power, to be exercised when the public good may require it, and that the power to levy a contribution on the property benefited by the paving in front of it is equally durable and continuing."² The cost of curb-stones is usually provided for in the same method. And it may be said that, in general, for any improvement whatsoever that tends to make the street more suitable and convenient for the use of the general public,³ an assessment may be laid.

derived from the improvements, have been received and enjoyed. Repairing streets is as much a part of the ordinary duties of the municipality, for the general good, as cleaning, watching and lighting. It would lead to monstrous injustice and inequality should such general expenses be provided for by local assessments." The able dissenting opinion of *Read, J.*, contains an interesting review of Pennsylvania legislation on the subject of special assessments, as well as of the adjudications in that and other states. Paving the footway and curbing had been done by a property owner on requirement of authorities; four years afterwards the roadway was narrowed and footway widened and owner required to put up new and costly curb. He refused. The street was then in good condition. *Held*, he could not be compelled. *Wistar v. Philadelphia*, 80 Pa. St., 505.

¹ *Willard v. Presbury*, 14 Wall., 676; *McCormack v. Patchin*, 53 Mo., 83; *Gurnee v. Chicago*, 40 Ill., 165; *Williams v. Detroit*, 2 Mich., 560; *Municipality v. Dunn*, 10 La. An., 57; *Bradley v. McAtee*, 7 Bush, 667; *Broadway Baptist Church v. McAtee*, 8 Bush, 508; *Shreeley v. Detroit*, 45 Mich., 425; *Wilkins v. Detroit*, 46 Mich., 120. As to what is repaving, see *Petition of Garvey*, 77 N. Y., 523. It includes reflagging. *Matter of Phillips*, 60 N. Y., 16. See, generally, as to repaving, *In re Astor*, 53 N. Y., 617; *In re Burke*, 62 N. Y., 224; *Petition of Brady*, 85 N. Y., 268; *In re Smith*, 99 N. Y., 424.

² *Stidell*, Ch. J., in *Municipality v. Dunn*, 10 La. An., 57. The fact that a street railway company has agreed to keep a portion of a street in repair is not available to an abutting lot owner as an objection to an assessment for repair. *People v. Brooklyn*, 65 N. Y., 349.

³ It is held in *Dean v. Carron*, 26 N. J., 228, that it is not competent to defeat an assessment for improving a street by showing irregularities in laying it out.

What is said above will apply to highways by water as well as highways by land, in all cases to which like reasons are applicable.¹

Sidewalks. While sidewalks may be ordered constructed under the police power, as is shown on a preceding page,² they may also be constructed by means of special levies; and this is sometimes done, the expense being apportioned by frontage or by some standard of benefits. The rules applied in the case of levies for other street improvements are applicable to these, and the proceedings in assessing and collecting the levies for them do not require separate consideration.³

Parks. City and town parks are sometimes purchased, improved and embellished under special legislative authority by means of general levies on the municipalities that are to own and have the benefit of them.⁴ But sometimes special taxing districts composed of several municipalities, or of parts of several, are created for the purpose, and a corporation is chartered with power to lay and collect taxes. But for the purposes of a city park there cannot be created outside the city a district upon which the cost of the park shall be imposed, though it is situated within such district.⁵ Where by the constitution only municipal bodies are authorized to levy taxes, if a park district is created embracing several towns, all of which accept the act creating it, the towns may afterwards be required to levy taxes in accordance with the act, to be expended within

¹ *Johnson v. Milwaukee*, 40 Wis., 315. This was a case of special assessment for dredging a river.

² *Ante*, p. 588.

³ See in addition to the cases cited on p. 589, *Flint v. Webb*, 25 Minn., 93; *Kemper v. King*, 11 Mo. Ap., 116; *Sloan v. Beebee*, 24 Kan., 343. The grant of a power to "regulate and improve" sidewalks has been held not to authorize an assessment for building them. *Fairfield v. Ratcliff*, 20 Ia., 396. As to the ownership of the materials in a sidewalk, see *Leonard v. Cincinnati*, 26 Ohio St., 447; *Rogers v. Randall*, 29 Mich., 41. In Texas a homestead may be sold for a sidewalk assessment. *Lufkin v. Galveston*, 58 Tex., 545. That the special assessment for a sidewalk is not necessarily limited to the benefits, see *White v. People*, 94 Ill., 604. See, further, *State v. Fuller*, 34 N. J., 227.

⁴ See *Matter of Central Park*, 50 N. Y., 493; *Matter of Flatbush Lands*, 60 N. Y., 398; *People v. Salomon*, 51 Ill., 37.

⁵ *State v. Leffingwell*, 54 Mo., 458.

the limits of the town levying them.¹ And the towns having once accepted the act, it may afterwards be amended without their assent.² It is competent to apportion park taxes by special benefits.³

Drains, Sewers, etc. The expense of constructing drains in order to relieve swamps, marshes and other low lands of their stagnant water is usually provided for by special assessments. The grounds on which this is done are not always very clearly shown in the statutes. Sometimes the ground indicated is that the drainage is important to the public health; and in such cases the right to levy assessments for the purpose cannot plausibly be disputed.⁴ The special benefits from the enhancement of values must accrue mainly to the owners of the lands drained, who ought, therefore, to bear the expense. But the authority to levy assessments for draining lands, upon no other consideration than such as pertain to the improvement of the land as property, must, it would seem, be confined within limited bounds. It has been said that "a tax cannot be levied upon any portion of the public for the construction of a drain in which the public are not concerned. Even the owner of the

¹See *People v. Breslin*, 80 Ill., 423; *Halsey v. People*, 84 Ill., 89; *Wright v. People*, 87 Ill., 582.

²*People v. Breslin*, 80 Ill., 423; *Dunham v. People*, 96 Ill., 331.

³*People v. Breslin*, 80 Ill., 423; *Dunham v. People*, 96 Ill., 331; *Foster v. Park Commissioners*, 133 Mass., 321. In *State v. Leffingwell*, 54 Mo., 458, it is said that the doctrine which justifies special taxation of adjoining property for local improvements has no application to parks.

⁴In *Reeves v. Treasurer of Wood Co.*, 8 Ohio St., 333, the subject is considered by *Brinkerhoof*, J., and the right to levy an assessment affirmed, though it does not distinctly appear that sanitary objects were had in view. In *Woodruff v. Fisher*, 17 Barb., 224, an assessment made ostensibly for the public health was maintained with some hesitation. Other cases are *Anderson v. Kerns Draining Co.*, 14 Ind., 199; *Sessions v. Crunklinton*, 20 Ohio St., 349; *Draining Co. Case*, 11 La. An., 838; *Hagar v. Supervisors of Yolo*, 47 Cal., 222; *O'Reiley v. Kankakee Valley Draining Co.*, 32 Ind., 160. The following were draining cases, in which for the most part only questions of the regularity of assessments were involved: *Jordan Association v. Wagoner*, 33 Ind., 50; *Thompson v. Draining Co.*, 33 Ind., 268; *Kinyon v. Duchene*, 21 Mich., 498; *Bench v. Otis*, 25 Mich., 29; *Atwood v. Zeluff*, 26 Mich., 118; *Etchinson Association v. Bresenback*, 39 Ind., 362; *Slusser v. Rawson*, 39 Ind., 506; *Nevins, etc., Draining Co. v. Alkire*, 36 Ind., 189; *People v. Jefferson County Court*, 56 Barb., 136; *People v. Haines*, 49 N. Y., 587.

land benefited cannot be taxed to improve it, unless public considerations are involved; but he must be left to improve it or not as he may choose."¹ But where any considerable tract of land, owned by different persons, is in a condition precluding cultivation, by reason of excessive moisture which drains would relieve, it may well be said that the public have such an interest in the improvement, and the consequent advancement of the general interest of the locality, as will justify the levy of assessments upon the owners for drainage purposes. Such a case would seem to stand upon the same solid ground with assessments for levee purposes, which have for their object to protect lands from falling into a like condition of uselessness.² But

¹*People v. Supervisors of Saginaw*, 26 Mich., 22, 29. That the taking of lands for drains is a taking under the eminent domain, see this case; also, *People v. Nearing*, 27 N. Y., 306. If, however, a man's premises are a nuisance by reason of their gathering and retaining water until it becomes stagnant and breeds miasma, he may be required to abate the nuisance at his own cost, and on his failure to do so, the cost may be assessed against him. It has been decided that a special assessment against plaintiff to pay cost of filling up his lot which was a nuisance will not be restrained on allegations that the city caused the nuisance by raising the grade of the street, it not being alleged that the lot was not benefited by the filling, and the plaintiff presumptively having been compensated for any damage from the grade. *Watkins v. Milwaukee*, 55 Wis., 835, citing *Smith v. Milwaukee*, 18 Wis., 63.

²The power to levy assessments for the mere purpose of improving large bodies of lands is assumed by Chancellor *Walworth*, in *French v. Kirkland*, 1 Paige, 117, and in *Philips v. Wickham*, 1 Paige, 590. The statutes in question seem to have conferred upon the proprietors of lands *quasi* corporate powers for the purpose. And see *Draining Co. Case*, 11 La. An., 338. The statute which came under consideration in *People v. Nearing*, 27 N. Y., 306, appears to have had no reference to the public health. The Massachusetts statute of 1847, for the construction of drains in towns, is considered in *Wright v. Boston*, 9 Cush., 233. It is said by *Shaw*, Ch. J., that while the public have some interest in the draining, on the grounds of health and general convenience, it is not mainly with these views that the statutes are framed, but with reference to the benefits to estates taxed. And see *Springfield v. Gay*, 12 Allen, 612; *Brewer v. Springfield*, 97 Mass., 152. The Pennsylvania statute of 1804, for draining a specified swamp, was held constitutional. See *Rutherford v. Maynes*, 97 Pa. St., 78.

In *Hager v. Supervisors of Yolo*, 47 Cal., 222, 233, *Crockett*, J., says: "It is said, however, that it is not within the constitutional power of the legislature to compel the petitioner to reclaim his lands at his own expense and against his consent. But we think the power of the legislature to compel local improvements, which, in its judgment, will promote the health of the people, and advance the public good, is unquestionable. In the exercise of this power it may abate nuisances, construct and repair highways, open

under the rule of strict construction of powers to tax, authority to drain lands for the public health, and to lay assessments therefor, will not support an assessment, the main cost of which is for filling in lands.¹

As regards sewers and culverts in cities and villages,² it is to be remarked that while they are often provided for by special

canals for irrigating arid districts, and perform many other similar acts for the public good, and all at the expense of those who are to be chiefly and more immediately benefited by the improvement." "But we need not rest our decision on the narrow ground that this is strictly a local improvement. On the contrary, the reclamation of the vast bodies of swamp and overflowed land in this state may justly be regarded as a public improvement of great magnitude, and of the utmost importance to the community. If left wholly to individual enterprise it would probably never be accomplished; and in inaugurating so great a work the legislature has pursued substantially the same system adopted in other states for the reclamation of similar lands, to wit: by dividing the territory to be reclaimed into districts, and assessing the cost of the improvement on the lands to be benefited. This plan has been adopted in the states of Louisiana, Mississippi and Arkansas, to prevent the annual overflow of the Mississippi by means of levees or embankments, constructed at the expense of the adjacent property. The 'Black Swamp' in Ohio has been wholly or partially reclaimed by the same method. A large body of land in Missouri is protected from inundation by similar means. In Massachusetts and Connecticut swamps and low lands are drained by means of assessments on the property benefited; and in New Jersey the salt marshes have been reclaimed in the same way. In this state, the city of Sacramento, including the ground on which the capitol stands, has been protected from inundation by means of levees, erected at the expense of the inhabitants, in the shape of a tax on the property within the district benefited. In none of these states, so far as we are aware, has the power of the legislature to cause such improvements to be made in this method ever been denied; nor do we see any tenable ground on which it can be questioned." See *Reclamation District v. Hagar*, 6 Sawy., 567; *Hagar v. Reclamation District*, 111 U. S., 731.

¹ *Petition of Van Buren*, 79 N. Y., 384.

In Michigan drain levies are made in special districts by township or county commissioners, and the cost is collected by the township treasurer. But the treasurer does not act for the town in this, and the township is not liable if the proceedings prove illegal. *Dawson v. Aurelius*, 49 Mich., 479.

² In England, the sewer assessments are laid with reference to benefits, but they are not necessarily based on sanitary considerations. See *Rooke's Case*, 5 Rep., 99, b; *Keighley's Case*, 10 Rep., 139, a; *Case of Isle of Ely*, 10 Rep., 142, b; *Dore v. Gray*, 2 T. R., 358; *Masters v. Scroggs*, 3 M. & S., 447; *Netherton v. Ward*, 3 B. & Ald., 21; *Stafford v. Hamston*, 2 B. & B., 691; *Rex v. Tower Hamlets*, 9 B. & C., 517; *Sondy v. Wilson*, 3 Ad. & E., 247; *St. Catharine Dock Co. v. Higgs*, 10 Q. B., 641; *Metropolitan Board of Works v. Vauxhall Bridge Co.*, 7 El. & Bl., 964; *Hammersmith Bridge Co.*

assessments, there is no uniformity of practice in this regard, and perhaps, considering the different offices which sewers perform, being sometimes matters of imperative public necessity, and at others conveniences for a few tenements only, there ought to be the diversity that now prevails. That the cost may be assessed upon the adjacent premises under proper legislation has been often held.¹ And in Connecticut it has been decided that this may be done under a general power to make and maintain highways and streets by special assessments; the sewers which carry off the surface water from the streets, and the filth that would otherwise accumulate, being regarded rather as improvements of the public highway than as independent works.²

In the case of sewers it is very common to provide that the cost shall in part be a general levy on the municipality, and in part be collected by special assessment. Perhaps more often than in the case of any other local improvement it is just that such a division of the burden should be made. The lands on the line of a sewer do not usually receive all the special benefits and therefore should not pay all the cost; and when the district is extended to embrace other lands, there is imminent danger of doing injustice by extending it too far. In a clear case of the assessment of special benefits for a sewer upon lands which could not possibly receive special advantages therefrom, the courts have felt bound in some cases to interfere and annul the levy. But a case of the kind ought to be so plain as to admit of no doubt.³

v. Overseers of Hammersmith, L. R., 6 Q. B., 230. A sewer rate cannot there be laid upon a whole town, but must be against particular estates. *Emmerson v. Saltmarshe*, 7 Ad. & El., 266.

¹ *Wright v. Boston*, 9 Cush., 233; *Philadelphia v. Tryon*, 35 Pa. St., 401; *Lipps v. Philadelphia*, 38 Pa. St., 503; *Commonwealth v. Woods*, 44 Pa. St., 113; *Stroud v. Philadelphia*, 61 Pa. St., 255; *Mauch Chunk v. Shortz*, 61 Pa. St., 399; *Wolf v. Philadelphia*, 105 Pa. St., 25; *People v. Brooklyn*, 23 Barb., 166; *Cone v. Hartford*, 28 Conn., 363; *St. Louis v. Ceters*, 36 Mo., 456. For rules for making the assessment, see *Clapp v. Hartford*, 35 Conn., 66. That notwithstanding the whole cost is assessed on adjoining property, the sewer may be made more capacious than present needs require, as a provision for future extensions, see *Hungerford v. Hartford*, 39 Conn., 279, 285.

² *Cone v. Hartford*, 28 Conn., 363.

³ An assessment of land a third of a mile distant, which the sewer would not drain or benefit, was set aside. The probability that the city in the

Levees. The construction of embankments to protect low lands, bordering upon rivers, from overflow, is a public object of the highest importance to the communities immediately concerned. No doubt general taxation is admissible for this purpose,¹ but the legislation which authorizes special assessments for the construction of embankments, and imposes the cost upon those who, without them, would be the principal sufferers, is probably in most cases wiser and better than would be any provision for general levies. The practice of making local assessments for this purpose has prevailed for many years in the states bordering on the lower Mississippi, and has been sustained against all the objections which have been made to such assessments for other purposes.² Special authority is, however, requisite for the purpose; a power to drain would not include the power to construct a levee as an independent work.³

Water Pipes in Streets. Of these it has been said that "the benefits are local, as the use of the water must necessarily be

future might project a sewer to connect with this and thus benefit the lands was held to be too remote. *State v. Elizabeth*, 37 N. J., 330, citing *State v. Newark*, 36 N. J., 188. For the same principle, see *Thomas v. Gain*, 35 Mich., 155; *Kennedy v. Troy*, 14 Hun, 308.

¹ Indeed, it has recently been indirectly resorted to by the general government; heavy appropriations, the money for which comes from taxation, being made to deepen the channel of the Mississippi, and keep its flow within bounds.

² *Williams v. Cammack*, 27 Miss., 209; *Alcorn v. Hamer*, 38 Miss., 652; *Daily v. Swope*, 47 Miss., 367; *Egyptian Levee Co. v. Hardin*, 27 Mo., 495. In *People v. Whyler*, 41 Cal., 351, a levy for such a purpose made upon part of a county on the same basis as the ordinary taxes was held to be a tax, not an assessment. But the basis of apportionment ought not to be very conclusive on this point. It is one peculiarity of assessments, that the measure of supposed benefits may be whatever appears to the legislature most just under the circumstances. See *Lockwood v. St. Louis*, 24 Mo., 20, where a levy made in the same way was sustained as being an assessment, and not in the ordinary sense a tax. The building of levees in Louisiana is a matter of more than local interest. But if it were not, the legislature has power to authorize local improvements, and discretion which courts cannot review to decide on the work and whether it shall be paid for by general tax or local assessment according to benefits. *State v. Maginnis*, 36 La. An., 558; *State v. Clinton*, 26 La. An., 561. See *Levee District v. Huber*, 57 Cal., 41.

³ *Udike v. Wright*, 81 Ill., 49. For a case of special assessment for a breakwater in a city, see *Teegarden v. Racine*, 56 Wis., 545.

mostly restricted to the benefit of the property on [the] lines, both for domestic purposes and the extinguishment of fires. The effect of supplying [the] streets with water is to enhance the value of the dwelling-houses thereon. The maintenance of the pipes and the supplying of water are necessarily a continuing expense," and for these reasons the assessment of the cost upon adjacent property is within the general principle of local assessments.¹

Lighting Streets with Gas. While lighting the streets is usually provided for by general tax, no reason is perceived why it may not be done by special assessments. Legislation for special assessments exists in several of the states.²

Fencing Townships. It has been held competent in North Carolina to provide by law for the construction of a fence around whole townships or even whole counties, with gates on the highways, and for levying the expense by special tax; and the power to do so has been considered properly referable to the power to lay special assessments. This provision is made in view of the special local circumstances.³

Other Special Cases. No doubt the legislature has power to provide for special assessments to meet the expenses of other improvements; and this power is sometimes spoken of as if it

¹ *Allentown v. Henry*, 73 Pa. St., 404, 406, per *Mercur*, J. And see *Northern Liberties v. Swain*, 13 Pa. St., 113; *Northern Liberties v. St. John's Church*, 13 Pa. St., 104. In *Allen v. Drew*, 44 Vt., 174, 187, *Redfield*, J., explains the principle of such assessments, and says: "It is not easy to see any distinction between an assessment for building a sewer or sidewalk and an aqueduct. They are each in degree a general benefit to the public, and a special benefit to the local property, both in the uses and in the enhanced value of the property. The proprietor may, indeed, leave his house tenantless, and his vacant lots unvisited, but the assessment is not for that reason void. Such assessments are justified on the ground that the subject of the tax receives an equivalent."

Water rates may be assessed against city lots, and when they are, it is competent to make them a lien prior to mortgages; at least as to all mortgages subsequently executed, and whether the water is taken before or after the giving of the mortgage. *Provident Inst. v. Jersey City*, 113 U. S., 506.

² The subject was somewhat discussed in *Jonas v. Cincinnati*, 18 Ohio, 318, and *Creighton v. Scott*, 14 Ohio St., 438.

³ *Cain v. Commissioners*, 86 N. C., 8; *Shuford v. Commissioners*, 86 N. C., 552.

was practically one that was unrestricted.¹ But other cases sanction no such broad doctrine, and justify us, as we think, in saying that, to warrant the levy of local assessments, there must not only exist in the case the ordinary elements of taxation, but the object must also be one productive of special local benefits, so as to make applicable the principles upon which special assessments have hitherto been upheld. A clear case of abuse of legislative authority, in imposing the burden of a public improvement on persons or property not specially benefited, would undoubtedly be treated as an excess of power and void.²

3. Objections in point of policy and justice. If the design of the present work embraced the discussion of legislative policy, it would be interesting to give, with some degree of fullness, the views which various judges have expressed regarding the justice of assessing the cost of public improvements upon property supposed to be specially benefited. Some judges have spoken of these assessments as eminently equitable and proper; others seem to have regarded the power to lay them as an extreme power, which generally operated oppressively, while still others have undertaken to indicate some line of division of expense, which should be drawn in such cases, between the public and the parties to be specially assessed; putting, for instance, one-half the expense on the former and one-half upon the latter. But, in truth, there is no universal rule of justice upon which such assessments can be made. Sometimes almost the whole benefit accrues to a few. Sometimes the benefit is distributed with something like regularity through the community. An apportionment of the cost that would be just in one case would be unfair and oppressive in another. For this very reason the power to determine when a special

¹ See particularly the remarks of *Grover, J.*, in *Litchfield v. Vernon*, 41 N. Y., 123, 134, and what is said in *State v. Elizabeth*, 37 N. J., 330.

² See *Washington Avenue*, 69 Pa. St., 352, approving *Hammett v. Philadelphia*, 65 Pa. St., 146. In *Allen v. Drew*, 44 Vt., 174, 188, *Redfield, J.*, says: "We have no doubt that a local assessment may so far transcend the limits of equality and reason that its exaction would cease to be a tax, or contribution to a common burden, and become extortion and confiscation. In that case it would be the duty of the court to protect the citizen from robbery under color of a better name." Remarks equally decided are made in *Louisville v. Rolling Mill Co.*, 8 Bush, 416, 423.

assessment shall be made, and on what basis it shall be apportioned, is wisely confided to the legislature, and could not, without the introduction of some new principle in representative government, be placed elsewhere. We dismiss this topic, therefore, with the single remark, that with the wisdom or unwisdom of special assessments, when ordered in cases in which they are admissible at all, the courts have no concern, unless there is plainly and manifestly such an abuse of power as takes the case beyond the just limits of legislative discretion.¹

4. Objections under constitutional principles and provisions. These have been made to special assessments on various grounds.

That they take property without due process of law. If these assessments are made in an exercise of the sovereign taxing power, what has already been said on the subject is equally applicable here.² The taxing power proceeds on its own methods, and the rules of the common law bend and conform to them. That these assessments are an exercise of the taxing

¹ Expressions on the subject by judges have been very numerous, but they have commonly been general remarks called out by special and somewhat exceptional cases. We refrain from collecting them for the reason expressed in the text; if the matter is of legislative cognizance, the courts and the profession as such have no concern with it. We may, nevertheless, copy what has been said in one case, because it probably expresses the general views which have prevailed in legislation. "Their intrinsic justice strikes every one. If an improvement is to be made, the benefit of which is local, it is but just that the property benefited should bear the burthen. While the few ought not to be taxed for the benefit of the whole, the whole ought [not] to be taxed for the few. A single township in a county ought not to bear the whole county expense; neither ought the whole county to be taxed for the benefit of a single township; and the same principle requires that taxation for a local object, beneficial only to a portion of a town or city, should be upon that part only. General taxation for a mere local purpose is unjust; it burdens those who are not benefited, and benefits those who are exempt from the burden." *Leonard, J.*, in *Lockwood v. St. Louis*, 24 Mo., 20, 23. On the other hand, *Church, Ch. J.*, in *Guest v. Brooklyn*, 69 N. Y., 506, 516, condemns the whole system as "a species of despotism that ought not to be perpetuated under a government which claims to protect property equally with life and liberty. Besides its manifest injustice, it deprives the citizen practically of the principal protection—aside from constitutional restraints—afforded in a free country against unjust taxation: the responsibility of the representative for his acts to his constituents."

² *Ante*, chapter III.

power has over and over again been affirmed, until the controversy must be regarded as closed.¹

That they take property, i. e., money, and appropriate it to the public use without compensation. This objection would seem to fall with the last. If special assessments are taxes, the compensation is conclusively presumed to be received by those who pay them. It is only on the assumption that they are laid in the exercise of the power of eminent domain that the objection could have any force whatever. But the distinction between the two cases is very clear. "Taxation exacts money or services from individuals as and for their respective shares of contribution to any public burden. Private property taken for any public use, by right of eminent domain, is taken, not as the owner's share of contribution to a public burden, but as so much beyond his share. Special compensation is therefore to be made in the latter case, because the government is a debtor for the property so taken; but not in the former, because the payment of taxes is a duty, and creates no obligation to repay otherwise than in the proper application of the tax. Taxation operates upon a community, or upon a class of persons in a community, and by some rule of apportionment. The exercise of the right of eminent domain operates upon an individual, and without reference to the amount or value exacted from any other individual or class of individuals."²

¹ See *Pennock v. Hoover*, 5 Rawle, 291; *Pennell's Appeal*, 2 Pa. St., 216; *Pray v. Northern Liberties*, 31 Pa. St., 69; *Gault's Appeal*, 33 Pa. St., 94; *Commonwealth v. Woods*, 44 Pa. St., 113; *People v. Brooklyn*, 4 N. Y., 419; *N. Y. Protestant Episcopal School*, 31 N. Y., 574; *Howell v. Buffalo*, 37 N. Y., 267; *Dorgan v. Boston*, 12 Allen, 223; *Baltimore v. Hughes*, 1 Gill & J., 480; *Baltimore v. Cemetery Co.*, 7 Md., 517; *Howard v. Independent Church*, 18 Md., 451; *Matter of Dorrance St.*, 4 R. I., 230; *Hoyt v. East Saginaw*, 19 Mich., 39; *Williams v. Cammack*, 27 Miss., 209; *Lexington v. McQuillan's Heirs*, 9 Dana, 513; *Bradley v. McAtee*, 7 Bush, 667; *Scoville v. Cleveland*, 1 Ohio St., 126; *Bridgeport v. N. Y. & N. H. R. R. Co.*, 36 Conn., 255; *King v. Portland*, 2 Or., 146.

² *Ruggles, J.*, in *People v. Brooklyn*, 4 N. Y., 419, 424. And see *Litchfield v. Vernon*, 41 N. Y., 123, 133, per *Grover, J.*; *People v. Lawrence*, 41 N. Y., 140, per *Mason, J.*; *Scoville v. Cleveland*, 1 Ohio St., 126, 135, per *Ranney, J.*; *Matter of Dorrance St.*, 4 R. I., 230, per *Ames, Ch. J.*; *Nichols v. Bridgeport*, 23 Conn., 189, 205, per *Hinman, J.*; *Washington Avenue*, 69 Pa. St., 352, 355, 361, per *Agnew, J.* The following cases are also in point: *Allen v. Drew*, 44 Vt., 174, 187; *Hill v. Higdon*, 5 Ohio St., 243; *Reeves v. Treasurer of Wood Co.*, 8 Ohio St., 333; *Malloy v. Marietta*, 11 Ohio St., 636;

Attention to the distinction here pointed out will make clear the fact that special assessments are not an exercise of the eminent domain. It is certain that when they are levied according to benefits received, they cannot be. The theory of the law is, that full compensation is then received in every instance.¹ It is not, it is true, a compensation made in money, but, as in every other case of taxation, the person taxed is to receive a benefit from the expenditure of the moneys collected. The benefit which one receives in the enhanced value of his property, from the public expenditure, is as real and as substantial as that which he receives in the protection afforded to his person and his estate. The difficulty, if any, in the case, must lie back of the nature of compensation, and must apply, rather, to the basis of assessment. If taxation were necessarily, under all circumstances, by values, it would be conceded that an apportionment by benefits must be inadmissible. But it has already been shown that value is only one of many standards of apportionment, and when others are admissible, it would

Peoria v. Kidder, 26 Ill., 351; *Garrett v. St. Louis*, 25 Mo., 505; *Uhrig v. St. Louis*, 44 Mo., 458; *Jones v. Boston*, 104 Mass., 461; *State v. Fuller*, 84 N. J., 227; *State v. Newark*, 35 N. J., 168, 171; *Sutton's Heirs v. Louisville*, 5 Dana, 28; *Lexington v. McQuillan's Heirs*, 9 Dana, 513; *Howell v. Bristol*, 8 Bush, 493; *Holton v. Milwaukee*, 31 Wis., 27; *Woodbridge v. Detroit*, 8 Mich., 278; *Baltimore v. Cemetery Co.*, 7 Md., 517; *Griffin v. Dogan*, 48 Miss., 11. That to tax one exempt from military service in order to procure volunteers, and then exempt others who are liable, is not a taking of private property for public use, see *State v. Demarest*, 32 N. J., 528.

There are nevertheless some cases in which it has been held that a special assessment on lands for a local improvement was an unlawful appropriation of property. One of these is *Louisville v. Rolling Mill Co.*, 3 Bush, 416, in which the defendants were assessed the expense of filling up the street in front of their property to an extent that greatly diminished its value, and required the erection of a high wall to protect their buildings.

The case was such that the property assessed received in no shape any compensation for the money exacted, and the objections in point of constitutional law are forcibly stated in the opinion. In *Zoeler v. Kellogg*, 4 Mo. App., 163, it was decided that if an assessment exceeds the value of the lot assessed it is unconstitutional. But these it will be seen are special and very peculiar cases. See, also, *State v. Elizabeth*, 37 N. J., 330. The whole cost of an improvement by drainage cannot be laid upon one lot when two are benefited. *Gilkerson v. Scott*, 76 Ill., 509.

¹See *Palmer v. Way*, 6 Col., 106; *State v. Jersey City*, 42 N. J., 97; *White v. People*, 94 Ill., 604; *Crawford v. People*, 82 Ill., 557; *Raymond v. Cleveland*, 42 Ohio St., 522.

seem to devolve upon those who deny the right of assessing by benefits, to point out the element of taxation, if any, which is absent when that basis is fixed upon. If apportionment is really made in view of actual benefits in the increased value of property, it is presumptively as fair and equal, and therefore as well supported by the advantages the tax payer receives from the government, as any other. It must consequently be equally admissible with any other. It cannot be said that the tax payer has been required to surrender for the public use something beyond his just proportion, when the demand has been made under a rule expressly framed to reach that very proportion and no more; a rule, too, that in its basis is so fair that it ought, perhaps, to be preferred to all others, if fairly and honestly applied.¹

That they violate express constitutional provisions securing uniformity in taxation. These objections have been made under a number of the state constitutions, and require examination separately.²

Alabama. In this state, under a constitutional provision that "all taxes levied on property in this state shall be assessed in exact proportion to the value of such property," it has been decided that assessments for the improvement of a street could only be laid according to value, and that a provision in the city charter, granted before the constitution was adopted, and which authorized such an assessment to be laid on the abutting property, was repealed by it.³

¹ The objections to the system and the answer to them are forcibly presented by *Hinman, J.*, in *Nichols v. Bridgeport*, 23 Conn., 189—a street case.

² There are provisions in the constitutions of the following states, requiring taxes levied on property to be in proportion to the value: Alabama, Arkansas, California, Florida, Georgia, Illinois, Indiana, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nevada, North Carolina, Oregon, South Carolina, Tennessee, Texas, Virginia and West Virginia. Minnesota and Illinois specially provide by their constitutions for the levy of assessments on the property benefited by or fronting on improvements.

³ *Mobile v. Dargan*, 45 Ala., 310; *Mobile v. Street Railway Co.*, 45 Ala., 322. *Contra*, *Hayden v. Atlanta*, 70 Ga., 817, and other cases cited further on.

Arkansas. A constitutional provision was that "all property shall be taxed according to its value, the manner of ascertaining which to be as the general assembly shall direct, making the same equal and uniform throughout the state. No one species of property shall be taxed higher than another species of property of equal value. The general assembly shall have power to tax merchants, bankers, peddlers and privileges in such manner as may be prescribed by law." This provision, it was held, applied to the state revenue, and not to taxes levied for local purposes,¹ and therefore that it did not preclude the assessment of a levee tax on the lands specially benefited.² But under a provision in a later constitution, that all property should be taxed by a uniform rule "according to its true value in money," it was held that paving taxes must be assessed according to the value of the lots assessed, and that it was not competent to apportion an assessment for paving according to frontage.³

California. There are provisions in the constitution that "all property in the state shall be taxed in proportion to its value," and that "taxation shall be equal and uniform throughout the state." The constitution also makes provision for conferring the power of taxation and assessment on "municipal corporations." An act of the legislature providing that the expense of a street improvement shall be assessed on property fronting on the street, in proportion to its frontage, has invariably been held not to be in violation of the provisions regarding valuation, equality and uniformity, but as being properly referable to the power of assessment, which had acquired a distinct meaning in other states before being introduced into the constitution of this state.⁴

¹ *Washington v. State*, 18 Ark., 752.

² *McGehee v. Mathis*, 21 Ark., 40. This case was reversed in the supreme court of the United States.

³ *Peay v. Little Rock*, 83 Ark., 81. Much reliance was placed in the case on *Weeks v. Milwaukee*, 10 Wis., 242; and *Chicago v. Larned*, 34 Ill., 203.

⁴ *Burnett v. Sacramento*, 12 Cal., 76; *Blanding v. Burr*, 18 Cal., 343; *Emery v. Gas Co.*, 28 Cal., 345; *Emery v. Bradford*, 29 Cal., 75; *Walsh v. Mathews*, 29 Cal., 123; *Taylor v. Palmer*, 31 Cal., 240; *Crosby v. Lyon*, 37 Cal., 242; *Chambers v. Satterlee*, 40 Cal., 497; *Reclamation District v. Hagar*, 6 Sawy., 569. The fact that an assessment is called a tax in the statute will not pre-

Colorado. The constitution provides that "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws which shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal." This, it is held, authorizes only one mode of levy for all burdens imposed under the taxing power, and that a special assessment upon lots fronting on a street for the cost of a sidewalk is unauthorized.¹

Florida. Under constitutional provisions for a "just valuation of all property," a "uniform and equal rate of taxation," and that all property taxed for municipal purposes "shall be taxed upon the principle established for state taxation," it is not incompetent to provide that the expense of altering, extending and opening streets shall be levied by special assessment on the lots benefited, not restricting the levy to the lots on the street, but extending it as far as the benefits extend. "A more just or fairer course could not have been adopted; and it would be strange indeed if the power were not in the legislature to prescribe it."²

Illinois. The former constitution of this state contained this section: "That the corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes; such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same." This, it was held, forbade an assessment of the cost of improving a street upon the real estate fronting thereon in proportion to frontage; the principle of equality and uniformity applying to local as well as general taxes, and such a special assessment being neither equal nor uniform within the

clude its being sustained as an assessment. *People v. Austin*, 47 Cal., 353. A street was improved and city bonds issued therefor, and to pay the same an annual levy was made on the property benefited. *Held* an assessment. *Ibid.* But a claim for compensation for work done under an abortive contract with the municipality cannot be satisfied by a special assessment. If a public claim at all, it presents a case for taxation. *Matter of Market St.*, 49 Cal., 546.

¹ *Palmer v. Way*, 6 Col., 106.

² *Egerton v. Green Cove Springs*, 19 Fla., 140.

meaning of the constitution. But the opinion was at the same time expressed that to assess to each lot the special benefit it would derive from the improvement, charging such benefit upon the lot, leaving the residue of the cost to be paid by equal and uniform taxation, would be constitutional.¹ But to make the improvement at the expense of lot owners, without regard to the *actual* benefit received, would not be equal and uniform, and consequently would be forbidden.² And so would be an assessment which exempted improvements from its operation.³ The present constitution provides that "the general assembly may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment or by special taxation of contiguous property or otherwise. For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same." Under this provision it is competent to impose the cost of constructing a sidewalk on the contiguous property, and there is no necessity for making it upon the basis of actual benefits, as in the case of what are more properly called special assessments.⁴ In the making and improving of streets by special assessments it is competent to charge county property with its proportion of the special benefit,⁵ and to charge the lots of non-residents with their proportion, but not to make the demand a personal liability against them.⁶

Indiana. One section of the constitution of this state declares that "the general assembly shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such rules and regulations as shall secure a just val-

¹ *Chicago v. Larned*, 84 Ill., 208. And see *Ottawa v. Spencer*, 40 Ill., 211; *Chicago v. Baer*, 41 Ill., 806; *Bedard v. Hall*, 44 Ill., 91; *Wright v. Chicago*, 46 Ill., 44.

² *St. John v. East St. Louis*, 50 Ill., 92. See *Lee v. Ruggles*, 62 Ill., 427.

³ *Primm v. Belleville*, 59 Ill., 142.

⁴ *White v. People*, 94 Ill., 604. See *Falch v. People*, 99 Ill., 137.

⁵ *McLean County v. Bloomington*, 106 Ill., 209, explaining *Craw v. Tolono*, 96 Ill., 255, and distinguishing it from *Taylor v. People*, 66 Ill., 322; *Scammon v. Chicago*, 42 Ill., 192, and *Higgins v. Chicago*, 18 Ill., 276.

⁶ *Craw v. Tolono*, 96 Ill., 255; *Virginia v. Hall*, 96 Ill., 278.

uation for taxation of all property, both real and personal, excepting such only for municipal, educational, literary, scientific, religious or charitable purposes as may be specially exempted by law." Another forbids the passing of local or special laws "for the assessment and collection of taxes for state, county, township or road purposes." These provisions do not preclude street and other local improvements being made, and the expense borne by means of an assessment upon property specially benefited.¹

Kansas. One provision of the constitution is, that "the legislature shall provide for a uniform and equal rate of assessment and taxation," and another that "provision shall be made by general laws for the organization of cities, towns and villages, and their power of taxation and assessment, etc., shall be so restricted as to prevent abuse of such power." These do not deprive the legislature of power to authorize local improvements of streets at the cost of the adjacent property.²

Louisiana. The provision of the constitution, that "taxation shall be equal and uniform throughout the state," does not preclude special assessments on property benefited by local improvements.³

Massachusetts. The constitution gives full power and authority to the general court, among other things, "to impose and levy proportional and reasonable assessments, rates and taxes upon all the inhabitants of, and persons resident and estates lying within, the said commonwealth." This is not violated by authorizing a town, in which the state agricultural college is located, to raise by tax and pay an exceptional por-

¹ *Goodrich v. Turnpike Co.*, 26 Ind., 119; *Bright v. McCullough*, 27 Ind., 223; *Palmer v. Stumph*, 29 Ind., 329. And see *La Fayette v. Jenners*, 10 Ind., 70; *Bank of the State v. New Albany*, 11 Ind., 139; *Anderson v. Draining Co.*, 14 Ind., 199; *Turpin v. Eagle Creek, etc., Co.*, 48 Ind., 45.

² *Hines v. Leavenworth*, 3 Kan., 186.

³ *Municipality v. Dunn*, 10 La. An., 57; *New Orleans v. Elliott*, 10 La. An., 59; *Yeatman v. Crandall*, 11 La. An., 220; *Draining Co. Case*, 11 La. An., 383; *Municipality v. Guillotte*, 14 La. An., 297; *Wallace v. Shelton*, 14 La. An., 498; *Bishop v. Marks*, 15 La. An., 147; *Matter of Opening of Streets*, 20 La. An., 497. To divide the expense of an improvement between the city and the property specially benefited is no violation of the rule of uniformity. *State v. New Orleans*, 15 La. An., 354.

tion of the expense.¹ Nor does it preclude local, street or drain assessments being laid on the property benefited, in proportion to the benefit which each parcel of property will receive, or may be supposed to receive, therefrom. Such a levy would be neither unreasonable nor unproportional.²

Michigan. The provisions that "the legislature shall provide a uniform rule of taxation, except on property paying specific taxes, and taxes shall be levied on such property as shall be prescribed by law," and that "all assessments hereafter authorized shall be on property at its cash value," only relate to the valuation, assessment and taxation of property for general purposes, and, consistent with them, local assessments may be laid for local improvements, either in proportion to benefits or in proportion to frontage.³

¹ *Merrick v. Amherst*, 12 Allen, 500.

² *Dorgan v. Boston*, 12 Allen, 223, 234. "In requiring that taxes should be proportional and reasonable, the framers of the constitution intended to erect a barrier against an arbitrary, unjust, unequal or oppressive exercise of the power. *Oliver v. Washington Mills*, 11 Allen, 268. If, for instance, the legislature should arbitrarily designate a certain class of persons on whom to impose a tax, either for general purposes or for a local object of a public nature, without any reference to any rule of proportion whatever, having no regard to the share of public charges which each ought to pay relatively to that borne by all others, or to any supposed peculiar benefit or profit which would accrue to those made subject to the tax which would not inure to others, so that in effect the burden would fall on those who had been selected only for the reason that they might be made subject to the tax, we cannot doubt that the imposition of it would be an unlawful exercise of power not warranted by the constitution, against the exercise of which a person aggrieved might sue for protection. But no such case is made by the present bill. This part of the plaintiff's case rests on the broad proposition that the legislature have no power to authorize the assessment of the cost of a work of a public nature, but the construction of which will be of special and peculiar benefit to adjacent property, on the abutting estates in proportion to their value. For the reasons already given, we are of the opinion that such a tax is neither unreasonable nor unproportional, and that it was competent for the legislature to impose it in the mode prescribed by the statute."

³ *Motz v. Detroit*, 18 Mich., 495; *Hoyt v. East Saginaw*, 19 Mich., 39. See *Lefevre v. Detroit*, 2 Mich., 586; *Williams v. Detroit*, 2 Mich., 560; *Woodbridge v. Detroit*, 8 Mich., 274; *Warren v. Grand Haven*, 30 Mich., 24. As to what are specific taxes, see *Walcott v. People*, 17 Mich., 68; *Kitson v. Ann Arbor*, 26 Mich., 325. A tax upon dealers in liquors, levied under a general law by which the proceeds are devoted to the use of the towns and cities

Minnesota. Under a provision that "all taxes to be raised in this state shall be as nearly equal as may be, and all property on which taxes are to be levied shall have a cash valuation, and be equalized and uniform throughout the state," a special assessment on lands in proportion to the benefits received from the construction of a public road was held inadmissible.¹

Mississippi. The constitution requires that "taxation shall be equal and uniform throughout the state. All property shall be taxed in proportion to its value, to be ascertained as directed by law." There is nothing in this which takes from the legislature the power to impose a tax on a special district for a local improvement, and municipal corporations may be authorized to assess the expense of a street improvement on the lots fronting on the street.² The provision has no application to taxes for local improvements, and it is, therefore, competent to lay a levee tax on lands by the acre instead of by valuation.³

Missouri. An assessment for street improvements on a basis of benefits does not contravene the provision of the constitution that "all property subject to taxation shall be taxed in proportion to its value."⁴ The same is true of assessments for levee purposes, which need not be made on the basis of valuation.⁵

Nebraska. Under a constitutional provision that the legislature shall provide for the organization of cities, and restrict

in which the business is carried on, is a local tax, and not a state specific tax, and the law imposing it is not, therefore, in conflict with the provision of the state constitution applying to state purposes the proceeds of state specific taxes. *Youngblood v. Sexton*, 32 Mich., 406.

¹ *Stinson v. Smith*, 8 Minn., 366. Subsequently the clause in the constitution was amended by the addition of the following: "Provided that the legislature may, by general law or special act, authorize municipal corporations to levy assessments for local improvements upon the property fronting upon such improvements, or upon the property to be benefited by such improvements, without regard to cash valuation, and in such manner as the legislature may prescribe."

² *Williams v. Cammack*, 27 Miss., 209. See *Smith v. Aberdeen*, 25 Miss., 458; *Alcorn v. Hamer*, 38 Miss., 652.

³ *Daily v. Swope*, 47 Miss., 367. See *Macon v. Patty*, 57 Miss., 378.

⁴ *Garrett v. St. Louis*, 25 Mo., 505; *Uhrig v. St. Louis*, 44 Mo., 458. See *Neenan v. Smith*, 50 Mo., 525.

⁵ *Egyptian Levee Co. v. Hardin*, 27 Mo., 495.

their power of taxation, assessment, etc., the legislature may confer upon a city the power to make street improvements by laying special assessments upon the abutting lots.¹

North Carolina. The constitution requires that taxes be imposed by a uniform rule upon moneys, credits and investments, and upon real and personal property, according to its true value, and also, that "such as are levied by any county, city, town or township shall also be uniform and *ad valorem* upon all property therein." These provisions are held to be referable to taxation for objects in which all have a common interest;² that they do not preclude the laying of special assessments by other standards than that of value; and that a law authorizing the board of county commissioners to assess upon two specified counties, or upon such townships therein as should request it by the application of a majority of the qualified voters, a special tax for the building of a fence around such counties or townships, with gates on the highways, and for keeping them in repair, was to be regarded as a law for the laying of special assessments, and was constitutional.³

Ohio. The provision of the constitution that "laws shall be passed taxing, by a uniform rule, . . . all real and personal property according to its true value in money," will not preclude the levy and collection of assessments on the basis of benefits in the cases in which they are usually laid.⁴

Oregon. The provision in the constitution, that "all taxation shall be equal and uniform," does not preclude an improvement of city streets by means of assessments levied on those to whose benefit the improvements specially inure.⁵

¹ *Hurford v. Omaha*, 4 Neb., 836.

² Citing *Young v. Henderson*, 76 N. C., 420.

³ *Cain v. Commissioners*, 86 N. C., 8; *Shuford v. Commissioners*, 86 N. C., 552.

⁴ *Hill v. Higdon*, 5 Ohio St., 248; *Marion v. Epler*, 5 Ohio St., 250; *Ernst v. Kunkle*, 5 Ohio St., 520; *Reeves v. Treasurer of Wood Co.*, 8 Ohio St., 833; *Nor. Ind. R. R. Co. v. Connelly*, 10 Ohio St., 159. See *Raymond v. Cleveland*, 42 Ohio St., 522; *Hastings v. Columbus*, 42 Ohio St., 585. This provision, however, applies as much to the local taxes, properly so called, as to the state taxes. *Zanesville v. Richards*, 5 Ohio St., 589.

⁵ *King v. Portland*, 2 Or., 146.

Rhode Island. A constitutional provision, that "the burdens of the state ought to be fairly distributed among its citizens," is not inconsistent with an act which provides for the laying out of a street, and the assessment by commissioners of one-half the expense on adjoining proprietors, in proportion to the benefits received; the assessments to any one not to exceed the benefits.¹

Wisconsin. The constitution requires that "the rule of taxation shall be uniform." Also, that "it shall be the duty of the legislature, and they are hereby empowered, to provide for the organization of cities and incorporated villages, and to restrict their power of taxation and assessment," etc. It has been doubted if special assessments on a basis of benefits could be upheld under the provision first quoted; but it has been decided that they may be, when properly authorized under the other.²

These are the cases in which the constitutional objections have been most distinctly presented; but many other cases occupy, with more or less fullness, the same ground. The fact very clearly appears that, while there is not such a concurrence of judicial opinion as would be desirable, the overwhelming weight of authority is in favor of the position that all such provisions for equality and uniformity in taxation, and for taxation by value, have no application to these special assessments. The reasons assigned vary in different cases, but they are nowhere set forth more clearly or strongly than in the leading case in New York. In that case, speaking of provisions made by the people in their constitutions, it is said: "They have not ordained that taxation shall be general, so as to embrace all persons or all taxable persons within the state, or within any district or ter-

¹ *Matter of Dorrance St.*, 4 R. I., 230. In the same case it is said that such an act is not invalid by reason of allowing the local authorities a discretion to levy the tax in the method adopted, or some other. And as to assessing by benefits, *Ames*, Ch. J., gives instances of assessments for payment for houses pulled down in populous towns to check the spread of conflagrations, and for the expense of watchmen in compact portions of cities.

² *Weeks v. Milwaukee*, 10 Wis., 242; *Lumsden v. Cross*, 10 Wis., 282; *Bond v. Kenosha*, 17 Wis., 284. Other cases than those here cited, without expressly so declaring, recognize the general doctrine that the provisions for uniform taxation by value are to be referred to general taxation, and that they do not exclude the laying of special assessments.

ritorial division of the state; nor that it shall or shall not be numerically equal, as in the case of a capitation tax; nor that it must be in the ratio of the value of each man's land, or of his goods, or of both combined; nor that a tax 'must be co-extensive with the district, or upon all the property in a district which has the character of and is known to the law as a local sovereignty.' Nor have they ordained or forbidden that a tax shall be apportioned according to the benefit which each tax payer is supposed to receive from the object on which the tax is expended. In all these particulars the power of taxation is unrestrained.

"The application of any one of these rules or principles of apportionment to all cases would be manifestly oppressive and unjust. Either may be rightfully and wisely applied to the particular exigency to which it is best adapted.

"Taxation is sometimes regulated by one of these principles, and sometimes by another; and very often it has been apportioned without reference to the locality or to the tax payer's ability to contribute, or to any proportion between the burden and the benefit. The excise laws, and taxes on carriages and watches, are among the many examples of this description of taxation. Some taxes affect classes of inhabitants only. All duties on imported goods are taxes on the class of consumers. The tax on one imported article falls on a large class of consumers, while the tax on another affects comparatively a few individuals. The duty on one article consumed by one class of inhabitants is twenty per cent. of its value, while on another, consumed by a different class, it is forty per cent. The duty on one foreign commodity is laid for the purposes of revenue mainly, without reference to the ability of its consumers to pay; as in the case of the duty on salt. The duty on another is laid for the purpose of encouraging domestic manufactures of the same article; thus compelling the consumer to pay a higher price to one man than he could otherwise have bought the article for from another. These discriminations may be impolitic, and in some cases unjust; but if the power of taxation upon importations had not been transferred by the people of this state to the federal government, there could have been no pretense for declaring them unconstitutional in state legislation.

"A property tax for the general purposes of the government

either of the state at large, or of a county, city or other district, is regarded as a just and equitable tax. The reason is obvious. It apportions the burden according to the benefit more nearly than any other inflexible rule of general taxation. A rich man derives more benefit from taxation, in the protection and improvement of his property, than a poor man, and ought therefore to pay more. But the amount of each man's benefit in general taxation cannot be ascertained and estimated with any degree of certainty, and for that reason a property tax is adopted instead of an estimate of benefits. In local taxation, however, for special purposes, the local benefits may, in many cases, be seen, traced and estimated to a reasonable certainty. At least this has been supposed and assumed to be true by the legislature, whose duty it is to prescribe the rules on which taxation is to be apportioned; and whose determination of this matter, being within the scope of its lawful power, is conclusive."¹

It is safe to assume, as the result of the cases, that the constitutional provisions refer solely to state taxation, or when they go further, to the general taxation for state, county and municipal purposes; and though assessments are laid under the taxing power, and are in a certain sense taxes, yet that they are a peculiar class of taxes, and not within the meaning of that term as it is usually employed in our constitutions and statutes.² They may therefore be laid on property specially bene-

¹ *Ruggles, J.*, in *People v. Brooklyn*, 4 N. Y., 419, 427.

² On this point see *Matter of Mayor, etc., of New York*, 11 Johns., 77; *Sharp v. Speir*, 4 Hill, 76; *Livingston v. New York*, 8 Wend., 85; *Matter of Furman St.*, 17 Wend., 649; *Nichols v. Bridgeport*, 23 Conn., 189; *Northern Liberties v. St. John's Church*, 18 Pa. St., 107; *Schenley v. Allegheny City*, 25 Pa. St., 128; *Wray v. Pittsburg*, 46 Pa. St., 365; *Hammett v. Philadelphia*, 66 Pa. St., 146; *Washington Avenue*, 69 Pa. St., 852; *Lexington v. McQuillan's Heirs*, 9 Dana, 513; *Barnes v. Atchison*, 2 Kan., 454; *St. Joseph v. O'Donoghue*, 31 Mo., 345; *St. Joseph v. Anthony*, 30 Mo., 587; *Municipality No. 2 v. White*, 9 La. An., 446; *Cummings v. Police Jury*, 9 La. An., 503; *Richardson v. Morgan*, 16 La. An., 429; *Matter of Opening of Streets*, 20 La. An., 497; *Maloy v. Marietta*, 11 Ohio St., 696; *Lima v. Cemetery Ass'n*, 42 Ohio St., 128; *Raymond v. Cleveland*, 42 Ohio St., 522; *State v. Dean*, 23 N. J., 335; *State v. Jersey City*, 24 N. J., 662; *Vasser v. George*, 47 Miss., 713; *Fairfield v. Ratcliffe*, 20 Ia., 396; *Jones v. Boston*, 104 Mass., 461; *Woodbridge v. Detroit*, 8 Mich., 274; *Alexander v. Baltimore*, 5 Gill, 383, 397; *Baltimore v. Cemetery Co.*, 7 Md., 517; *Hale v. Kenosha*, 29 Wis., 599; *Cain v. Commissioners*, 86 N. C., 8. An agreement to pay "all taxes and assess-

fited, notwithstanding such constitutional restrictions as have been mentioned.

5. **The methods of apportionment.** Sufficient, perhaps, has been said regarding the principles on which special assessments are levied.¹ The methods which are chosen for giving those principles effect may now receive brief attention.

Although complaint is often made that special assessment operates oppressively and unjustly, and it cannot be denied that in individual cases the complaint is perfectly just, yet on the whole it has a decided advantage over other taxation in the fact that its methods are so flexible, and so easily adapted to the special equity and justice of the several classes of cases. This is shown in the modes of apportionment which are selected under different circumstances.

1. The major part of the cost of a local work is sometimes collected by general tax, while a smaller portion is levied upon the estates specially benefited.

2. The major part is sometimes assessed on estates benefited,

ments," held to embrace street assessments. *Oswald v. Gilbert*, 11 Johns., 443; *Codman v. Johnson*, 104 Mass., 491. One who buys land subject to assessments which by his deed he assumes to pay may nevertheless contest them. *State v. Jersey City*, 35 N. J., 381.

¹In *Alexander v. Baltimore*, 5 Gill, 388, the general principle underlying these assessments is justly said to be the same with that on which highway taxes are laid. In *Bridgeport v. N. Y. & N. H. R. Co.*, 36 Conn., 255, 262, *Butler, J.*, in considering the question whether a certain act subjecting railroad property to a general tax, and exempting it from all other taxes, would exempt it from special assessments, makes the following remarks: "It is doubtless true that such an assessment of benefits is an exercise of the taxing power, and in a general sense a tax. It was so regarded by this court in *Nichols v. Bridgeport*, 23 Conn., 207, to which we have been referred. But it is never spoken of in the charters of cities and boroughs, or in the general law, or in popular intercourse, as a tax. And although this strictly in a general sense is a tax, it is one of a peculiar nature. It is a *local* assessment imposed occasionally as required upon a limited class of persons interested in a *local* improvement, and who are assumed to be benefited by the improvement to the extent of the assessment, and it is imposed and collected as an *equivalent* for that *benefit* and to pay for the improvement. It has consequently never been regarded as a tax, or termed such in legislative proceedings, in our public or private laws, or in popular intercourse. In all these it is known only and distinctively as 'an assessment for benefits,' and it cannot safely be assumed that the legislature had such assessments in contemplation when they passed the act of 1864."

while the general public is taxed a smaller portion in consideration of a smaller participation in the benefits.¹

3. The whole cost in other cases is levied on lands in the immediate vicinity of the work.

In a constitutional point of view either of these methods is admissible, and one may be sometimes just, and another at other times. In other cases it may be deemed reasonable to make the whole cost a general charge, and levy no special assessment whatever.² The question is legislative, and, like all legislative questions, may be decided erroneously; but it is reasonable to expect that, with such latitude of choice, the tax will be more just and equal than it would be were the legislature required to levy it by one inflexible and arbitrary rule.³

Assessment by Benefits. Even after it has been determined how the cost shall be borne, as between the public and the estates benefited, much liberty is allowed in fixing upon the basis of apportionment as between individuals. The two methods between which a choice is commonly made are:

1. An assessment made by assessors or commissioners, appointed for the purpose under legislative authority, and who are to view the estates, and levy the expense in proportion to

¹ See *People v. Sherman*, 83 Ill., 165. When commissioners are authorized to assess such part of the expense upon the city and such part locally as they shall deem just, they are not obliged to assess any upon the city unless they deem it just to do so. *People v. Syracuse*, 63 N. Y., 291, reversing 3 Hun, 433. The legislature is not bound to apportion a local improvement tax upon all the taxable property in the city: It may place the burden upon the owners of lands in proportion to special benefits received beyond the general advantage. The benefits may be estimated by the municipal authority in the first instance if an appeal to a jury is allowed to one aggrieved. If only half the benefit beyond the general advantage to all the real estate in the city is assessed to the property held by the council to be specially benefited, and the rule of apportionment is uniform within the district benefited, the assessment is proportional and reasonable within the constitutional rule. *Holt v. Somerville*, 127 Mass., 408. See *Hayden v. Atlanta*, 70 Ga., 817.

² As to the diverse methods, see *Wallace v. Shelton*, 14 La. An., 498.

³ "General taxation implies a distribution of the burden upon some general rule of *equality*. So a local assessment, or tax for a local benefit, should be distributed among and imposed upon all *equally*, standing in like relation." *Redfield, J.*, in *Allen v. Drew*, 44 Vt., 174, 186. The question always is, or should be, what is equal under the circumstances.

the benefits which in their opinion the estates respectively will receive from the work proposed.

2. An assessment by some definite standard fixed upon by the legislature itself, and which is applied to estates by a measurement of length, quantity or value.

An assessment by the first method would seem to be most equal and just, because it would be made on actual examination of the lands assessed. The legislature, in such cases, makes the rule, and the proper officers give effect to it in a manner corresponding to the ordinary assessment for a taxation by values. The right thus to assess by benefits has been often affirmed, and can no longer be regarded as a controverted question.¹

When benefits are assessed after this method, the district, within which the tax shall be laid, may be determined in either of two modes:

1. The legislative authority, either of the state, or, when properly authorized, of the municipality, may determine over

¹*McMasters v. Commonwealth*, 3 Watts, 292; *Fenelon's Petition*, 7 Pa. St., 173; *Hancock Street Extension*, 18 Pa. St., 26; *Schenley v. Commonwealth*, 36 Pa. St., 29; *Commonwealth v. Woods*, 44 Pa. St., 113; *Wray v. Pittsburg*, 46 Pa. St., 365; *Greensburg v. Young*, 53 Pa. St., 280; *Allentown v. Henry*, 73 Pa. St., 404; *Weber v. Reinhard*, 73 Pa. St., 373; *Livingston v. New York*, 8 Wend., 86; *Matter of Twenty-sixth Street*, 12 Wend., 203; *Owners of Ground v. Albany*, 15 Wend., 374; *Matter of Furman Street*, 17 Wend., 649; *Matter of De Graw Street*, 18 Wend., 568; *People v. Brooklyn*, 4 N. Y., 419; *Wright v. Boston*, 9 Cush., 233; *Dorgan v. Boston*, 12 Allen, 223; *Brewer v. Springfield*, 97 Mass., 153; *Jones v. Boston*, 104 Mass., 461; *Nichols v. Bridgeport*, 23 Conn., 189; *Cone v. Hartford*, 28 Conn., 363; *Reid v. Toledo*, 18 Ohio, 161; *Scoville v. Cleveland*, 1 Ohio St., 126; *Hill v. Higdon*, 5 Ohio St., 243; *Marion v. Epler*, 5 Ohio St., 250; *Alexander v. Baltimore*, 5 Gill, 383; *Moale v. Baltimore*, 5 Md., 314; *Baltimore v. Cemetery Company*, 7 Md., 517; *Howard v. The Church*, 18 Md., 457; *Bradley v. McAttee*, 7 Bush, 667; *Howell v. Bristol*, 8 Bush, 493; *State v. Newark*, 27 N. J., 155; *State v. Fuller*, 34 N. J., 227; *Holton v. Milwaukee*, 31 Wis., 27; *Hoyt v. East Saginaw*, 19 Mich., 39; *Steckert v. East Saginaw*, 22 Mich., 104; *Brevoort v. Detroit*, 24 Mich., 822; *Morrison v. Hershire*, 32 Ia., 271; *Chicago v. Larned*, 34 Ill., 203; *Ottawa v. Spencer*, 40 Ill., 211; *Chicago v. Baer*, 41 Ill., 306; *Matter of Dorrance Street*, 4 R. I., 230; *Garrett v. St. Louis*, 25 Mo., 505; *St. Joseph v. O'Donoghue*, 31 Mo., 345; *St. Louis v. Clemens*, 36 Mo., 467; *St. Louis v. Armstrong*, 38 Mo., 29; *Uhrig v. St. Louis*, 44 Mo., 458; *Burnett v. Sacramento*, 12 Cal., 76; *Emery v. Gas Company*, 28 Cal., 345; *La Fayette v. Fowler*, 34 Ind., 140. In *State v. Charleston*, 12 Rich., 702, the right to assess by benefits is denied. The point receives but little consideration, and the decisions to the contrary are not referred to.

what territory the benefits are so far diffused as to render it proper to make all lands contribute to the cost; or,

2. The assessors or commissioners who, under the law, are to make the assessment, may have the whole matter submitted to their judgment, to assess such lands as in their opinion are specially benefited, and as ought therefore to contribute to the cost of the work.

When the first method is adopted, the legislature exercises directly an undoubted and necessary power, which pertains to it in all matters of taxation; and which is inseparable from the power of apportionment. The whole subject of taxing districts belongs to the legislature; so much is unquestionable.¹ The authority may be exercised directly, or, in the case of local taxes, it may be left to local boards or bodies;² but in the latter case the determination will be by a body possessing for the purpose legislative power, and whose action must be as conclusive as if taken by the legislature itself. It has been repeatedly decided that the legislative act of assigning districts for special taxation on the basis of benefits cannot be attacked on the ground of error in judgment regarding the special benefits, and defeated by satisfying a court that no special and peculiar benefits are received. If the legislation has fixed the district, and laid the tax for the reason that, in the opinion of the legislative body, such district is peculiarly benefited, its action must in general be deemed conclusive.³ No doubt there

¹ *Sinton v. Ashbury*, 41 Cal., 525; and see *ante*, chapter VII.

² *Piper's Appeal*, 32 Cal., 530. When by law a special assessment is to be made on an estimate of benefits to be made on actual view by the commissioners, it is void if made absolutely on the cost of the work. *Johnson v. Milwaukee*, 40 Wis., 315.

"Property can only be assessed for public improvements on the principle of benefits received by the property from the construction of the work, and the assessment should never exceed the benefit conferred; and it is essential that it shall appear from the proceedings themselves that such was the principle on which the assessment was made." There must be some finding that the benefits will equal the amount levied, and the benefits must be imposed on the property proportionately. *Crawford v. People*, 82 Ill., 557.

³ *Baltimore v. Hughes*, 1 Gill & J., 480, 493, per *Buchanan*, Ch. J.; *Litchfield v. Vernon*, 41 N. Y., 123, 133, per *Grover*, J.; *People v. Lawrence*, 41 N. Y., 140; *St. Louis v. Oeters*, 36 Mo., 456; *Shaw v. Dennis*, 5 Gilm., 416; *Philadelphia v. Field*, 58 Pa. St., 320; *Macon v. Patty*, 57 Miss., 378; *Kelly v. Cleveland*, 34 Ohio St., 468; *Bigelow v. Chicago*, 90 Ill., 49. Compare *Wright v. Boston*, 9 Cush., 233.

If one denies that he is benefited by an improvement for which he is

may be exceptions; and one of these would be a case in which, under pretense of apportionment, a work of general benefit had been treated as a work of merely local consequence, and the cost imposed on some local community in disregard of the general rules which control legislation in matters of taxation.¹ Another is where, under pretense of apportionment, a basis has been fixed upon which cannot possibly, as regards the particular work to be constructed, be just; as where a statute assumed to confer upon a city the authority to levy sewer assessments upon any property supposed to be benefited in proportion to area, but not limiting the assessment to lots along or near the sewer, or to lots contiguous to each other, or even to such as received direct or peculiar benefits.² Had the assess-

charged, the burden is upon him to show it; every presumption supporting the legislative action. *Brown v. Denver*, 3 Col., 169; *Petition of Brady*, 85 N. Y., 268; *In re Bassford*, 50 N. Y., 509. As to the proper district for an assessment for improving an alley under the charter of Louisville, see *Schmelz v. Giles*, 12 Bush, 491. The city council of St. Paul has authority to decide conclusively upon the district for a local assessment, and whether the levy will exceed the benefits. *Rogers v. St. Paul*, 22 Minn., 494. Where provision is made that the tax shall be assessed on the land "fronting on the highway" to be improved, this means only that part of the highway which is to be improved. *Kendig v. Knight*, 80 Ia., 29.

¹*Baltimore v. Hughes*, 1 Gill & J., 480, 492, per *Buchanan*, Ch. J.; *Washington Avenue*, 69 Pa. St., 352. A jury empowered to assess for a street improvement cannot arbitrarily select a portion of the street for the purpose, except, perhaps, as they may limit it to abutters. *State v. St. Louis*, 1 Mo. Ap., 503. Where an assessment is to be laid "upon the lands" in a given levee district, the fact that some of the lands are to be benefited more than others will not warrant the entire omission from taxation of any land within the district. *Levee District v. Huber*, 57 Cal., 41. If the district is so made as utterly to destroy equality, the courts may and will interfere. *Preston v. Roberts*, 12 Bush, 570.

²*Thomas v. Gain*, 35 Mich., 155. Such an assessment, it was said, could under no circumstances be just "unless limited to lands directly and peculiarly benefited. But this act makes no provision by which parties assessed may of right drain into the sewer, so as to be enabled to reap the benefits they ought to derive from the expenditure. It makes no distinction between property actually occupied, or capable of being occupied, for city purposes, and that of an agricultural nature, of which there must be some within the city limits, upon which such a burden would fall with great severity and injustice. Nor does it confine the assessment to lands upon the streets in which the sewer is laid; and in the assessment before us lots on a parallel street are assessed. These lots, it is to be assumed, will be assessed again if a sewer is constructed in the street on which they front, and there is nothing

ment been restricted to the adjacent lots, there might, perhaps, have been no difficulty in sustaining it, as has been done in some cases.¹

in the act or in the nature of things to prevent a lot being assessed several times in different districts, as often as a sewer is constructed which, in the opinion of the common council, is productive of benefit to the neighborhood. This might not be unjust if each assessment was laid upon an estimate of actual benefits; but when it is levied by an arbitrary standard which requires the burden to be laid upon lands far from the sewer and only slightly benefited, equally with those fronting upon it and greatly benefited, it is manifest that it must not only work injustice, but that in some cases it may amount to actual confiscation. It is not, therefore, legally possible that such an apportionment of the cost of sewers can be just or equal, or in proportion to benefits." See, for a similar case, *Kennedy v. Troy*, 14 Hun, 308. And for a like principle, *Preston v. Roberts*, 13 Bush, 570.

¹ See *Grinnell v. Des Moines*, 57 Ia., 144; *Gillette v. Denver*, 21 Fed. Rep., 822.

An assessment according to frontage made by the water commissioners against property not using water but in front of which the pipes are laid is neither a local assessment nor a specific tax, and does not comply with any rule of uniformity, and is therefore void. *Jones v. Water Commissioners*, 34 Mich., 273. That it is competent to assess for sewers by special benefits is unquestionable. See *Wolf v. Philadelphia*, 105 Pa. St., 25. An assessment for a sewer by frontage was held in *Clapp v. Hartford*, 35 Conn., 66, too unreasonable to be sanctioned; while in *Hungerford v. Hartford*, 39 Conn., 279, one by special benefits was upheld.

A statute authorizing commissioners to assess the cost of a sewer on lands benefited thereby in such proportions as they should deem just and equitable was held invalid in *New Brunswick Rubber Co. v. Commissioners*, 38 N. J., 190, as failing to lay down any definite rule of apportionment. This was followed in *Barnes v. Dyer*, 56 Vt., 409, where a sidewalk assessment came in question. The common council was empowered by statute to assess upon the owners of abutting property so much of the expense as they should deem just and equitable. *Veazey, J.*, said: "The only question here is whether the phrase, 'as they shall deem just and equitable,' is sufficiently certain as a standard of assessment. If it could be properly construed as meaning only what was just and equitable in view of the benefit to the premises fronting on the improved sidewalk, it would possibly be sufficient. The exceptions do not state upon what view or theory the assessment in question was made. If said clause is fairly liable to a different construction from the one above stated, then it furnishes no certain legal standard of assessment. Did the court or common council determine the amount of this assessment in view of the benefit to the abutting land, or of its value, or of the personal convenience to the defendant, or of the ability of the defendant to pay, or of all of these combined? Who can say? Why might they not under this clause assess one man in one view and another in another view? Just and equitable in respect to what? The words import no special limitation." See, also, *Whiteford v. Probate Judge*, 53 Mich., 130.

The legislative authority in respect to assessment districts is sometimes exercised by making several districts for a single work. This indeed is often done in the case of street improvements; it being equally within the power of the legislature to prescribe one district over which the whole cost of the improvement shall be spread, or to make separate districts for the improvement along the several blocks.¹ It has even been held that the improvement of several streets may be treated as one work for the purposes of a special assessment, and the whole cost apportioned by uniform rule throughout one district,² and this may perhaps be equally competent with the general assessment throughout a city of the cost of such improvements.

Where the legislature prescribes no limits to the taxing district, but authorizes an assessment on such property as shall appear to be benefited, the report of the assessors or commissioners can alone determine what the district shall be. The

¹*Scoville v. Cleveland*, 1 Ohio St., 126; *Creighton v. Scott*, 14 Ohio St., 438; *Brevoort v. Detroit*, 24 Mich., 822; *Schenley v. Commonwealth*, 36 Pa. St., 29.

²See *ante*, p. 150. In *Arnold v. Cambridge*, 106 Mass., 352, the expense of constructing sidewalks on two streets was levied by one assessment, and apportioned among the lots abutting on the two streets. The only authority under which this could be done was the statute which empowered the mayor and aldermen, whenever they should deem it expedient to construct sidewalks "in any street," to assess the expense on the abutters in just proportions. By this the court thought "it was evidently intended by the legislature that the case of each street should be considered separately, and with a view to its own special circumstances;" and that, consequently, "the power to treat two sidewalks in two distinct streets as one for the purposes of assessment [was] not given by the statute." Compare *Hager v. Burlington*, 42 Ia., 661. In England it is held that separate lines of sewers ought not to be included in one district, when they are on a different level, and no one is of benefit to the district drained by the other. *Rex v. Tower Hamlets*, 9 B. & C., 517. For a very peculiar case in which the case of *Arnold v. Cambridge* was held not applicable, see *Cuming v. Grand Rapids*, 46 Mich., 150. An assessment for a sewer is not invalid because of the sewer being constructed along more than one street, if the improvement is a unity. *Grimmell v. Des Moines*, 57 Ia., 144; *Kendig v. Knight*, 60 Ia., 29. As to when two sewers may be provided for by one assessment see *Matter of Ingraham*, 64 N. Y., 310. It is not competent to assess for two separate and distinct public improvements as an entirety, and assess the cost together, unless the statute provides therefor or there are special reasons making it proper. *Mayall v. St. Paul*, 30 Minn., 294. For a proper case see *Stoddard v. Johnson*, 75 Ind., 20.

subject is referred to them as a matter depending on judgment, after actual inspection; but as they only pass upon the question of fact, the district is to be considered as prescribed by the legislature, when the principle is settled which is to determine it.¹ And when once prescribed under competent legislative authority, the levy must embrace all the property within the district to which the principle of the assessment is applicable. To omit any would be to defeat the rule of apportionment.²

Assessments by the Foot Front. In many instances where streets were to be opened or improved, sewers constructed, water pipes laid, or other improvements entered upon, the benefits of which might be expected to diffuse themselves along the line of the improvement in a degree bearing some proportion to the frontage, the legislature has deemed it right and proper to take the line of frontage as the most practicable and reasonable measure of probable benefits; and making that the standard, to apportion the benefits accordingly. Such a measure of apportionment seems at first blush to be perfectly arbitrary, and likely to operate in some cases with great injustice; but it cannot be denied that in the case of some improvements, frontage is a very reasonable measure of benefits; much more just than value could be; and perhaps approaching equality as nearly as any estimate of benefits made by the judgment of men. However this may be, the authorities are well united in the conclusion that frontage may lawfully be made the basis of apportionment.³

¹ As to districts depending on the estimates of commissioners, see *Appeal of Powers*, 29 Mich., 504; *Matter of Ward*, 52 N. Y., 395; *Raymond v. Cleveland*, 42 Ohio St., 522.

² *Hassan v. Rochester*, 67 N. Y., 528; *In re Prot. Epis. School*, 75 N. Y., 324. See *Matter of Churchill*, 82 N. Y., 288. If the assessment fails to embrace all the property of the district, the legislature cannot validate it. *People v. Lynch*, 51 Cal., 15; *Brady v. King*, 53 Cal., 44; *People v. McCune*, 57 Cal., 153. See *People v. Houston*, 54 Cal., 536.

³ *Pennock v. Hoover*, 5 Rawle, 291; *McGonigle v. Alleghany City*, 44 Pa. St., 118; *Magee v. Commonwealth*, 46 Pa. St., 308; *Spring Garden v. Wistar*, 18 Pa. St., 195; *Stroud v. Philadelphia*, 61 Pa. St., 255; *Covington v. Boyle*, 6 Bush, 204; *State v. Elizabeth*, 30 N. J., 365; *Same v. Same*, 31 N. J., 547; *State v. Fuller*, 34 N. J., 227; *Ernst v. Kunkle*, 5 Ohio St., 520; *Upington v. Oviatt*, 24 Ohio St., 232; *Wilder v. Cincinnati*, 26 Ohio St., 284; *Barnes v. Atchison*, 2 Kan., 455; *Parker v. Challiss*, 9 Kan., 155; *St. Joseph v. An-*

Occasional hardships must inevitably result from the adoption of such a basis, but the question is fairly a debatable one, whether they are likely to be more serious or more frequent than those which are to be anticipated from the selection of some other rule; and this question must be deemed settled by the statute.¹

thony, 20 Mo., 537; *Fowler v. St. Joseph*, 37 Mo., 228; *Neenan v. Smith*, 50 Mo., 525; *Chambers v. Satterlee*, 40 Cal., 497; *Whiting v. Quackenbush*, 54 Cal., 306; *Palmer v. Stumpf*, 29 Ind., 329; *Allen v. Drew*, 44 Vt., 174; *Williams v. Detroit*, 2 Mich., 560; *Motz v. Detroit*, 18 Mich., 495; *King v. Portland*, 2 Or., 146; *Cleveland v. Tripp*, 18 R. I., 50; *White v. People*, 94 Ill., 604; *Whiting v. Townsend*, 57 Cal., 515; *Sheley v. Detroit*, 45 Mich., 431.

A corner lot may be charged with the cost of improving the intersection of the two streets. *Wolf v. Keokuk*, 48 Ia., 129. See *Sands v. Richmond*, 31 Grat., 571.

¹ In *Terry v. Hartford*, 39 Conn., 286, the opening of the street for which a special assessment was made left a narrow strip of land on each side belonging to Terry; so narrow as to be incapable of use, except in connection with the adjacent lands. It was nevertheless assessed heavily for benefits. The case showed that both this and the adjacent land would be largely benefited if used together. The court say, "when we consider that here is land that would be benefited to an amount of more than \$3,600 by the laying out of this street, should the annexation be made, and the land adjoining would likewise be benefited to a large amount under the like circumstances, and that no benefit would be conferred on either tract so long as they remain the property of different proprietors, is it reasonable to suppose that there can be any serious obstacle to prevent the one owner from selling and the other from buying, when so great an advantage would result to both from such sale and purchase? A consideration of this character, no doubt, had its proper effect in the determination of the question, whether the land was benefited or not, and the extent of that benefit." See, also, *Same v. Same*, 39 Conn., 291.

The frontage rule, as applied to rural lands, is "unequal, unjust and unconstitutional; and in thus saying we but repeat what has been said over and over again in a long series of cases commencing with the *Washington Avenue Case*, 69 Pa. St., 352, and ending with *Craig v. City of Philadelphia*, 39 Pa. St., 268." *Gordon, J., Philadelphia v. Rule*, 93 Pa. St., 15. See *Seely v. Pittsburg*, 82 Pa. St., 360. Where an assessment by the foot front covers a whole lot, it will not be held objectionable because of the fact that a part of the lot, if assessed by itself, would be unjustly assessed. *Moale v. Baltimore*, 61 Md., 224. Where an assessment is to be by benefits, one by the lineal foot is not necessarily wrong. *State v. Passaic*, 37 N. J., 65. As to statutory correction of errors in an assessment by frontage, see *Griswold v. Pelton*, 34 Ohio St., 482. Where the legislature has invested a municipal body with power to provide by ordinance for assessing the cost of an improvement upon the property benefited, if such body adopts the rule of frontage as the rule of apportionment, the courts cannot, without statutory

The principle of these statutes is the same with that which supports assessments made through the intervention of assessors or commissioners. The benefits, actually or presumptively received, support the tax. Apportioning the cost by the frontage on the improvement is adopted by the legislature as constituting, in the judgment of its members, an apportionment in proportion to benefits as nearly as is reasonably practicable. This we understand to be substantially the view taken by the authorities.¹

In some instances a somewhat different method has been adopted for levying the cost of local works. Instead of establishing a taxing district, and apportioning the cost throughout it by some standard of benefit, actual or presumptive, the case of each individual lot fronting on the improvement has been taken by itself, and that lot has been assessed with the cost of the improvement along its front; or perhaps with one-half the cost, leaving the opposite lot to be assessed for the other half. If such a regulation constitutes the apportionment of a tax, it must be supported when properly ordered by or under the authority of the legislature. But it has been denied, on what seem the most conclusive grounds, that this is permissible. It is not legitimate taxation because it is lacking in one of its indispensable elements. It considers each lot by itself, com-

authority to do so, interfere with the determination, unless a clear case of abuse is made out. *Baltimore v. Johns Hopkins Hospital*, 56 Md., 1; overruling *Baltimore v. Scharf*, 54 Md., 499.

The fact that a town lot is used by a railroad for its purposes will not exempt it from a street assessment by the foot front. *Ludlow v. Trustees*, 78 Ky., 357.

The following cases are important: "Bounding or abutting" on a street will include the soil of a private road opening into the street. *Pound v. Plumstead Board of Works*, Law Rep., 7 Q. B., 183. "Adjoining" means touching or contiguous, as distinguished from lying near or adjacent. *Matter of Ward*, 52 N. Y., 395, citing *Rex v. Hodge*, 1 M. & M., 371; *Peverelly v. People*, 3 Park. C. R., 59; *Holmes v. Carley*, 81 N. Y., 289. "In front" of a lot construed to embrace, in case of a corner lot, not only the front commonly so called, but the line of the lot on the side street also. *Des Moines v. Dorr*, 81 Ia., 89; *Morrison v. Hershire*, 82 Ia., 271. A lot is not "fronting" on a street when it is separated from it by a narrow strip. *Philadelphia v. Eastwick*, 85 Pa. St., 75.

¹See *State v. Fuller*, 34 N. J., 227, 232, per *Belle, J.*; *Schenley v. Commonwealth*, 36 Pa. St., 29, 57, per *Strong, J.*; *Northern Indiana R. R. Co. v. Connelly*, 10 Ohio St., 159, 165, per *Peck, J.*

pling each to bear the burden of the improvement in front of it, without reference to any contribution to be made to the improvement by any other property, and it is consequently without any apportionment. From accidental circumstances, the major part of the cost of an important public work may be expended in front of a single lot; those circumstances not at all contributing to make the improvement more valuable to the lot thus specially burdened, perhaps even having the opposite consequence. But whatever might be the result in particular cases, the fatal vice in the system is that it provides for no taxing districts whatever. It is as arbitrary in principle, and would sometimes be as unequal in operation, as a regulation that the town from which a state officer chanced to be chosen should pay his salary, or that that locality in which the standing army, or any portion of it, should be stationed for the time being should be charged with its support. If one is legitimate taxation the other would be. In sidewalk cases a regulation of the kind has been held admissible, but it has been justified as a regulation of police, and is not supported on the taxing power exclusively. As has been well said, to compel individuals to contribute money or property to the use of the public, without reference to any common ratio, and without requiring the sum paid by one piece or kind of property, or by one person, to bear any relation whatever to that paid by another, is to lay a forced contribution, not a tax, within the sense of those terms as applied to the exercise of powers by any enlightened or responsible government.¹

¹ *Christiancy, J.*, in *Woodbridge v. Detroit*, 8 Mich., 274, 301. The case of *Lexington v. McQuillan's Heirs*, 9 Dana, 513, is a decision that the improvement of a street cannot be compelled on any such basis. To the same point is *Motz v. Detroit*, 18 Mich., 495. And see *St. Louis v. Clemens*, 49 Mo., 552; *Neenan v. Smith*, 50 Mo., 525, 531. The case of *Warren v. Henley*, 31 Ia., 38, is *contra*. *Weeks v. Milwaukee*, 10 Wis., 258, which also seems to be *contra*, appears to be based upon a practice in that state before the constitution was adopted. In the subsequent case of *State v. Portage*, 13 Wis., 562, it was held, under a charter which permitted the expense of an improvement on the abutting lots, in proportion to the front or size of such lots respectively, an ordinance directing that each lot should be charged with the cost of the improvement in front of it was void. "This," says *Paine, J.*, speaking of the provision of the charter, "it is obvious, is an entirely different principle of assessment from that which charges each lot with the entire expense of the improvement in front of it, and serves to

Although, as has been stated, an assessment by frontage is really based upon the idea that the estates taxed receive a benefit in proportion to frontage, yet when the legislature have made benefits the rule of assessment, and provided for assessors or commissioners to ascertain and apportion them, it is not arbitrarily to be assumed that the benefits to any particular lot are in fact in proportion to its front on the improvement. In such cases the assessors or commissioners have a duty to perform, on inspection and examination of the several estates; and a report by them that they have assessed the expense by the foot front, without saying that they find the benefits in that proportion, does not affirmatively show a performance of their duty.¹

Apportionment by the Acre, as a basis for an assessment, has frequently been adopted in levee cases. A statute in Mississippi may be taken as an illustration. It provided for a levee tax, prescribed the district of assessment, and directed the tax to be laid by the acre, according to an arbitrary standard of value fixed by the act, as follows: Unimproved lands in a part of the district, \$5 per acre; in the remainder of the district, \$3 per acre; improved lands in a part of the district, \$20 per acre, and in the remainder, \$30 per acre. The act was sustained,² as was also a similar statute in Missouri.³ Street

avoid much of the inequality and injustice of the latter system." As to the reasonableness and justice of an assessment by the foot front, compare the remarks of *Carpenter, J.*, in *Clapp v. Hartford*, 35 Conn., 66; *Read, J.*, in *Magee v. Commonwealth*, 46 Pa. St., 358; *Crozier, J.*, in *Hines v. Leavenworth*, 8 Kan., 186.

¹ *State v. Hudson*, 27 N. J., 214; *State v. Hudson*, 29 N. J., 104, 115; *State v. Bergen*, 29 N. J., 266; *Warren v. Grand Haven*, 30 Mich., 24.

² *Daily v. Swope*, 47 Miss., 367; *O'Reilly v. Holt*, 4 Woods, 645. See the previous cases of *Smith v. Aberdeen*, 25 Miss., 458; *Williams v. Cammack*, 27 Miss., 209; *Alcorn v. Hamer*, 38 Miss., 652.

³ *Egyptian Levee Co. v. Hardin*, 27 Mo., 495. See, also, the Louisiana and Arkansas cases. *Crowley v. Copley*, 2 La. An., 329; *Yeatman v. Crandall*, 11 La. An., 220; *Wallace v. Shelton*, 14 La. An., 498; *Bishop v. Marks*, 15 La. An., 147; *Richardson v. Morgan*, 16 La. An., 429; *McGehee v. Mathis*, 21 Ark., 40. In *Wallace v. Shelton*, *supra*, the levee tax was a specific tax by the acre. *Merrick, Ch. J.*, says: "The legislature has established, at different periods, different principles in regard to the assessments made for the levee district for these parishes, viz.: 1st. That it was right, equal and just to levy an *ad valorem* assessment upon the *lands* alone; that the

improvements in towns are sometimes made at the cost of abutting lots in proportion to their area, in the belief that this is an equally reasonable and just standard of apportionment with any other.¹

Assessment by Value of Lots. This has sometimes been ordered in levee cases, and also in the case of street improvements. In the latter case, the buildings erected upon the lands are sometimes excluded from the valuation, and very justly so, as the improvements, while increasing largely the market value

property receiving the advantage should bear the burden. 2d. That, in order to protect the *people* from inundation, it was just and equal that they should pay an *ad valorem* assessment upon all of their taxable property in the levee district. 3d. That it costs (as in the Draining Case) as much to protect one acre of land from inundation as it does another; that every acre of land in the district of land subject to overflow will be benefited to a much greater amount than the assessment, and that, therefore, it is just and equal that every acre should pay into the hands of the agents charged with protecting it the same sum as every other acre; and now, by a statute, since this litigation arose, and fourthly, that the second and third principles ought to be combined, and that *the land* ought to be subject to a specific tax, and all other property to an *ad valorem* tax. It is easy to perceive, by examination, that none of these theories can attain absolute equality, or bring about exact justice among the different individuals composing a community subject to assessment. The first and second theories operated harshly upon those persons who occupied high tracts of land, and had already protected themselves by sufficient levees at their own expense; and there may be cases of individual hardships under the third and fourth theories of legislation. But it is not pretended but that the plaintiff is benefited to the full amount of his assessment. The money he pays to the agents appointed to protect his property is restored to him in the increased value of his lands, and their security from overflow. The argument that he may not wish to sell or cultivate his lands, and that he may prefer that the soil be raised by the overflow each year, cannot be admitted. *Salus populi suprema, lex.* The obstinacy of a proprietor in one case, or the wishes of the capitalist who holds by a speculation in another, cannot be permitted to stand in the way of the safety of a whole community. Courts of justice cannot look to these wishes of parties, but must judge of their liability to assessment and taxation by reference to their property. The argument which would relieve them from the assessment in this case would relieve them from taxation in every other."

¹See *Clapp v. Hartford*, 35 Conn., 66; *Hines v. Leavenworth*, 8 Kan., 186; *Grimmell v. Des Moines*, 57 Ia., 144; *Gillette v. Denver*, 21 Fed. Rep., 922.

of land as such, do not usually increase perceptibly the value of the buildings erected upon it.¹

Property Subject to Assessment. It has been shown in another place, that while these local assessments are laid under a taxing power, they are not taxes in the ordinary understanding of that term, and that, consequently, the usual exemptions from taxation will not preclude the property exempted being subjected to them.² But this statement can only be applicable when the assessment is really made on the basis of special benefits which are supposed to be equivalent; for, if it is laid for a work of general utility, in the advantages of which the person assessed participates only as one of the general public, and not as receiving special benefits, it must be considered a general tax, and is improperly designated an assessment. Such has been the conclusion where an assessment was laid upon a railroad company which, by its charter, was exempt from taxation, for the expense of widening a street along which its track was laid; the assessment upon the company being of such portion of the expense as the commissioners deemed "equitable and just," and not being required to be made with any regard to the benefit the improvement might confer upon the company. Say the court: "If the assessment upon the railroad company may be sustained upon the ground of special benefits to the corporation from the increased facilities of travel afforded by widening the street, an assessment may be sustained upon the same ground against the owner of every express wagon or stage-coach that travels the street. The assessment in this case is a clear exercise of the taxing power. It is made for a public purpose, and confers no special benefits

¹See *Downer v. Boston*, 7 Cush., 277; *Brewer v. Springfield*, 97 Mass., 152; *Snow v. Fitchburg*, 136 Mass., 183; *Creighton v. Scott*, 14 Ohio St., 493. The levee tax sustained in *Williams v. Cammack*, 27 Miss., 209, was laid under an act which provided for a uniform tax of not exceeding ten cents per acre on all lands lying on or within ten miles of the river within a specified county, and of five cents per acre on lands lying ten miles or more from the river. The court say, the act rests upon the same basis with all other taxation. In some cases the assessments have been laid on the value of lots as assessed for ordinary taxes. See *People v. Whyler*, 41 Cal., 351; *Lockwood v. St. Louis*, 24 Mo., 20.

² *Ante*, pp. 207-8.

upon the property of the company."¹ These reasons take the levy out of the category of assessments properly so called, and to which all property specially benefited is liable to be subjected.

Personal property is not commonly thus assessed. The reason is manifest in the fact that special benefits generally accrue almost exclusively to lands. When, however, an exceptional assessment is levied upon a municipality for the special benefits its people receive from a public building or other work of the state or of some larger subdivision of the state, the benefits are usually quite as much to business as to real property, and the burden would not be equally distributed if the assessment were not laid on all property subject to ordinary taxation. This course has generally been adopted;² though in the case of

¹ *State v. Newark*, 27 N. J., 185, 191, per *Green*, Ch. J. In the same case, an assessment upon houses and lots owned by the company, on the basis of benefits, was supported. See *Chicago, etc., R. Co. v. South Park Commissioners*, 11 Ill. Ap., 562; and *South Park Commissioners v. Railroad Co.*, 107 Ill., 105. The assessment in *Nor. Ind. R. Co. v. Connelly*, 10 Ohio St., 159, was *by frontage* on the land appropriated by the railroad company for its track, and was sustained, the court holding that the question of actual benefit was not open for consideration. In *Bridgeport v. N. Y. & N. H. R. R. Co.*, 36 Conn., 255, it was denied that the easement of the railroad company in the land occupied for its track could be assessed for benefits for laying out a street along its side. In *New Haven v. Fair Haven, etc., R. R. Co.*, 38 Conn., 422, the rails, sleepers, ties and spikes of a street railway company, so laid into and attached to the soil of the street as to become part of the realty, were held properly assessable as real estate for paving the street. The same decision was previously made in *Appeal of North Beach, etc., R. R. Co.*, 32 Cal., 499, where an able opinion was delivered by *Sawyer, J.*, who reviews the case of *State v. Newark*, 27 N. J., 186, and points out the difference in the benefits likely to be received by a street railway when the street in which its track is laid is improved, and those which a railway between distant points might be supposed to derive from a like improvement along its track. The assessment in *Burlington, etc., R. R. Co. v. Spearman*, 12 Ia., 112, was on the depot grounds of the company, for a sidewalk, and seems to have been laid irrespective of the special use. Where by statute an assessment for a local work is authorized upon property abutting on a street, a railroad company's right of way across the street is not assessable. *Chicago, etc., R. Co. v. South Park Com'rs*, 11 Ill. Ap., 562; *South Park Com'rs v. Railroad Co.*, 107 Ill., 105.

² *Thomas v. Leland*, 24 Wend., 68; *Kirby v. Shaw*, 19 Pa. St., 258; *Merrick v. Amherst*, 12 Allen, 500; *Marks v. Purdue University*, 37 Ind., 155; *Gordon v. Cornes*, 47 N. Y., 608; *People v. Whyler*, 41 Cal., 351; *Gilman v. Sheboygan*, 2 Black, 510.

works commonly classed under the head of "internal improvements," a different course has been sometimes taken, and real estate alone been taxed.

It is no objection to an assessment for a local work that the property assessed is used for a purpose that will not be specially advanced by the improvement; as, for instance, that it is dedicated to the purposes of sepulture,¹ or is occupied by a building erected for the purposes of public worship,² or is devoted to school or charitable purposes,³ or constitutes the track of a railroad,⁴ or is put to any use to which the market value of the property is unimportant. There is nothing necessarily permanent in any present use; not sufficiently so, at least, to give it a controlling influence in determining principles of tax-

¹ *Baltimore v. Cemetery Co.*, 7 Md., 517. In this case the special objection made was that to subject the property to liability for paving would endanger its perpetuity as a cemetery; but the force of this, says the court, "whatever it may be, equally applies to all the engagements and liabilities of the corporation. The building of a wall of a church, or the improvement of the grounds, may superinduce debt and with it disastrous consequences. Although fully sympathizing with the laudable spirit which, with pious zeal and watchfulness, seeks to preserve the undisturbed repose of the dead, we nevertheless feel ourselves bound to declare that we see nothing in the legislation of the state, nor in the nature of the demand itself, to exempt the appellees from liability." See, to the same effect, *Buffalo City Cemetery v. Buffalo*, 46 N. Y., 506. In Kentucky a graveyard cannot be sold to enforce the lien of a special assessment. *Louisville v. Nevin*, 10 Bush, 549. Nor can it be in Ohio; but an assessment may nevertheless be enforced by such remedies as law or equity can give. *Lima v. Cemetery Association*, 42 Ohio St., 128.

² *Matter of Mayor, etc., of New York*, 11 Johns., 80; *Northern Liberties v. St. Johns Church*, 13 Pa. St., 104; *Second Universalist Society v. Providence*, 6 R. I., 235; *Le Fever v. Detroit*, 2 Mich., 586; *Broadway Baptist Church v. McAtee*, 8 Bush, 508; *Trustees of Church v. Ellis*, 38 Ind., 3.

³ *Cincinnati College v. State*, 19 Ohio, 110; *Lafayette v. Orphan Asylum*, 4 La. An., 1; *St. Louis Public Schools v. St. Louis*, 26 Mo., 468; *Sheehan v. Good Samaritan Hospital*, 50 Mo., 155.

⁴ *Northern Indiana R. R. Co. v. Connelly*, 10 Ohio St., 159; *New Haven v. Fair Haven, etc.*, R. R. Co., 38 Conn., 422; *Bridgeport v. N. Y. & H. R. R. Co.*, 36 Conn., 255; *Railroad Company v. Spearman*, 12 Ia., 112; *Chicago, etc.*, R. Co. v. *Chicago*, 90 Ill., 573; *Peru, etc.*, R. Co. v. *Hanna*, 68 Ind., 562; *Ludlow v. Trustees*, 78 Ky., 357. A street railway company has such an interest in a street where the track is laid as may be specially assessed for benefits for widening the street. *Appeal of North Beach, etc.*, R. R. Co., 32 Cal., 499; *Chicago v. Baer*, 41 Ill., 806. Compare this with *State v. Newark*, 27 N. J., 185.

ation. Even public property is often subjected to these special assessments; there being no more reason to excuse the public from paying for such benefits than there would be to excuse from payment when property is taken under the eminent domain.¹

6. Proceedings in levying and collecting assessments. First there must be competent legislative authority. The district of assessment must either be prescribed by the legislature or some method of determining it must be given, and the rule of apportionment must be laid down.

Where an improvement concerns a municipality, or some portion thereof to be determined on an investigation of facts, it is most usual for the legislature to confer upon the municipal authorities full authority in the premises; to delegate to them the power to determine whether the improvement shall be made, and, if so, through what subordinate agencies, but under such restraints as are deemed important for public and individual protection. Not uncommonly the determination of the rule of apportionment is left to the same authorities. This

¹See *Baltimore v. Cemetery Co.*, 7 Md., 517, 536, per *Le Grand*, Ch. J.; *St. Louis Public Schools v. St. Louis*, 26 Mo., 468; *McLean County v. Bloomington*, 106 Ill., 209; *Cook County v. Chicago*, 103 Ill., 646. The real estate belonging to the board of public schools of the city of St. Louis is liable to be assessed, under and by virtue of the ordinances of the city of St. Louis, for the construction of sewers, paving of sidewalks, opening of streets, etc. *St. Louis Public Schools v. City of St. Louis*, 26 Mo., 468. See *Sioux City v. School District*, 55 Ia., 150.

But exempting public property from the assessment does not render it illegal. *People v. Austin*, 47 Cal., 353. In *Hartford v. West Middle District*, 45 Conn., 462, a school district was held not liable to assessment for special benefits to its school-house from the laying out of a street. Say the court: "The assessment was undoubtedly made upon the idea that t'e intrinsic value of the property was increased; but if that were so, as a matter of fact, does it follow that it was increased in value as school district property, bought and used solely for school purposes, and did the district, or could it from the nature of things, derive any immediate, direct or special benefit from the laying out of the street? We are unable to see how the district, as a corporation, could be so benefited, or that their property was rendered any more valuable for the purpose for which they use it, and for which they must continue to use it, if not for all time, at least for a very long period. To render the assessment of benefits legal and valid, it must appear that the benefit is direct and immediate, and not contingent and remote.

is not only competent, but in general is deemed the proper course.

In many cases, however, a special district may be requisite, and this may embrace two or more municipalities or parts of two or more. For this or other reason any single municipality may be incompetent to deal with the case, and it may be necessary to create a special authority for the purpose. This is particularly the case with drains, with long highways and with levees; and when needful, a commissioner or board of commissioners will perhaps be provided for. It is not doubted that the legislature has authority to do this, when not hindered by any constitutional restriction.¹ The choice of commissioners is sometimes made by the legislature itself, sometimes referred to a court,² and sometimes, where that course is practicable,

¹The constitution of Illinois, 1870, provides that: "The general assembly may vest corporate authorities of cities, towns and villages with power to make local improvements by special assessments, or by special taxation of contiguous property, or otherwise. For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same." This is construed as a limitation upon the power of the legislature, and a restriction of the authority to lay local assessments to the municipal authorities named, and it is held that neither commissioners nor juries, nor the county court as such, can be given power to make local improvements—such, for example, as a levee—by special assessments or by special taxation of contiguous property. *Urdike v. Wright*, 81 Ill., 49. See, also, *Harward v. Drain Co.*, 51 Ill., 130; *Hessler v. Drainage Com'rs*, 53 Ill., 105; *Gage v. Graham*, 57 Ill., 144; *Board of Directors v. Houston*, 71 Ill., 318. If, however, a district is made to include several towns, the towns may establish it by accepting the legislation which provides for it. *Ante*, p. 615. A conclusion differing from that in Illinois was reached in Nebraska under a like constitutional provision. *State v. Dodge Co. Com'rs*, 8 Neb., 124. As to the meaning of "assessment" and "contiguous property" in the constitutional provision, see *Guild v. Chicago*, 82 Ill., 472.

In New Jersey the legislature may create for local improvement a corporation embracing parts of several townships; and this will be a political corporation if it is given power to grade and pave streets, construct sewers and make ordinances. *State v. Hackensack Imp. Co.*, 45 N. J., 113.

²In New York, where a commissioner for a local improvement is to be appointed by a court, and is to be a freeholder, the appointment is conclusive that he is a freeholder. *Dederer v. Voorhies*, 81 N. Y., 153. That should certainly be the rule as against a party having opportunity to be heard on the appointment, and who made no objection on that ground. *Clark v. Drain Commissioner*, 50 Mich., 618.

given to the people concerned. Other methods of choice, according to circumstances, are not inadmissible. The right of the tax payer to be heard at some proper stage of the proceedings is as clear in the case of this species of taxation as any other, and it is customary to provide for it.¹ The rule that the legislative authority cannot delegate its power is also as much imperative here as elsewhere,² and therefore the question, what rule of apportionment shall be applied, though it might be referred for decision to municipal authorities, cannot be left to merely administrative or ministerial officers. But the execution of the rule, and the determination of the district, when it is to depend upon facts, is commonly, not only with propriety, but of necessity, left to such officers.³

¹ For a case in which drain proceedings were held void, for a gross and very harmful disregard of the rights of tax payers in this regard, see *Whiteford v. Probate Judge*, 53 Mich., 130. Where the statute provides for a hearing before commissioners, they have no authority to restrict objections to such as shall be presented in writing. *Merritt v. Portchester*, 71 N. Y., 309, citing *State v. Jersey City*, 25 N. J., 309; *Hopkins v. Mason*, 42 How. Pr., 115.

² *Murray v. Tucker*, 10 Bush, 240.

³ If a city council has power to prescribe the mode in which a special tax shall be assessed, and has ordered the levy and assessment by resolution and directed the city auditor to fix the amount due from each owner according to his frontage, there is no delegation of the power to assess; the auditor's action is merely clerical. *Burlington v. Quick*, 47 Ia., 222. A city council may delegate to a board of public works full authority over the making of a contract for a public improvement. *Rogers v. St. Paul*, 22 Minn., 494.

A contract for a local improvement need not include the whole work embraced in the resolution providing for it; this is matter of discretion. *Emery v. San Francisco Gas Co.*, 31 Cal., 240. A resolution providing that a street shall be improved "where necessary" is nugatory. *Richardson v. Heydenfeldt*, 46 Cal., 68; *People v. Clark*, 47 Cal., 456.

The charter of Louisville, prior to 1872, provided that street improvements should be made "at the exclusive cost of the owners of lots in each fourth of a square;" *held*, that this could not be applied to a twenty-five acre tract not laid out into squares. *Caldwell v. Rupert*, 10 Bush, 179. See, for a different rule under an amended charter, *Craycraft v. Selvage*, 10 Bush, 696. For a case of a peculiar district, and the questions thereon, see *Schumacker v. Toberman*, 56 Cal., 508.

It is competent to provide that the district for a street improvement shall include the land within a certain distance of it, whether fronting on the street or not. *Ray v. Jeffersonville*, 90 Ind., 567. In assessing for drainage purposes in Illinois, it is not necessary that lands should be assessed in the smallest legal subdivisions, but disconnected lots should not be united. *Moore v. People*, 106 Ill., 376.

Municipal Action. Municipalities having no inherent power in these cases, it is necessary to the validity of their action that they keep closely to the authority conferred.¹ Their ordinances and resolutions must be adopted in due form of law,² and they must keep within them afterwards. They can bind the tax payers only in the mode prescribed, and can substitute no other.³ Their legislative action, if properly taken,

¹ *Caldwell v. Rupert*, 10 Bush, 179.

² *Chamberlain v. Cleveland*, 34 Ohio St., 551; *Matter of Met. Gas Light Co.*, 85 N. Y., 526; *Petition of De Pierris*, 82 N. Y., 243.

As to the sufficiency of particular action which came under review, see *Deady v. Townsend*, 57 Cal., 298; *Whiting v. Townsend*, 57 Cal., 515; *Loughridge v. Huntington*, 50 Ind., 263.

An improvement is not ordered when bids are merely advertised for, and therefore if the city power is taken away with a saving of cases in which improvements are already ordered, further proceedings cannot be taken in the case. *Wardens v. Burlington*, 39 Ia., 224.

Where the statute was that no vote should be taken in either board of the common council upon the passage of a resolution or ordinance contemplating a specific improvement or laying a tax or assessment until after three days' publication of notice, it was held that each board must give the notice for itself. *Petition of De Pierris*, 82 N. Y., 243, reversing 20 Hun, 305, citing *In re Little*, 60 N. Y., 843, and explaining *In re Conway*, 62 N. Y., 504.

An assessment is not void because the order for it in the city council did not have the several readings required by the rules of that body, since it may waive compliance with its own rules. *Holt v. Somerville*, 127 Mass., 408.

³ They cannot, for example, after ordering a certain improvement as an entirety, accept performance of a part and compel payment therefor, while they dispense with the remainder. *Henderson v. Lambert*, 14 Bush, 24. And see, for the general rule, *Sloan v. Beebe*, 24 Kan., 343; *Stockton v. Whitmore*, 50 Cal., 554.

An assessment is void when the work is not let to the lowest responsible bidder if the statute requires it. *Brady v. Bartlett*, 56 Cal., 350. See *Petition of Blodgett*, 91 N. Y., 117; *Matter of E. I. Savings Bank*, 75 N. Y., 383.

Where the statute requires notice inviting sealed proposals to be conspicuously posted in a certain public office for four days, this means that it should be kept posted for the full business hours of the four days. *Himmelmänn v. Cahn*, 49 Cal., 235; *Brooks v. Satterlee*, 49 Cal., 289. Where a board of supervisors is required to publish notice of awarding a contract, the board must order the publication. *Donnelly v. Tillman*, 47 Cal., 40; *Himmelmänn v. Satterlee*, 49 Cal., 387.

A city which has commenced proceedings and finds them irregular may retrace the steps and vacate the action. *Matter of Buffalo*, 78 N. Y., 362. As to what are substantial failures to comply with the law, see *Matter of Anderson*, 60 N. Y., 457; *Beniteau v. Detroit*, 41 Mich., 116. When the signing by printing is sufficient, see *Williams v. McDonald*, 58 Cal., 527.

is conclusive of the propriety of the proposed improvement, and of the benefits that will result, if it covers that subject,¹ but it will not conclude as to the preliminary conditions to any action at all; such, for example, as that there shall be in fact such a street as they undertake to provide for the improvement of,² or that the particular improvement shall be petitioned for or assented to by a majority or some other defined proportion of the parties concerned. This last provision is justly regarded as of very great importance, and a failure to observe it will be fatal at any stage in the proceedings.³ And any decision or certificate of the proper authorities, that the requisite application or consent had been made, would not be conclusive, but might be disproved.⁴ The intervention of a jury is not mat-

¹ *Ludlow v. Trustees*, 78 Ky., 357. For a like principle in drainage cases in Illinois, see *Moore v. People*, 106 Ill., 376.

² A city cannot proceed to lay a special assessment for a street or a sewer until it obtains an easement for the purpose. *Leavenworth v. Lang*, 6 Kan., 274; *Matter of Rhineland*, 68 N. Y., 105; *Lorenz v. Armstrong*, 8 Mo. Ap., 574. And there is no easement if the proceedings to obtain it were void as to any of the lot owners. *Brush v. Detroit*, 32 Mich., 43.

³ *Steuart v. Baltimore*, 7 Md., 500; *Henderson v. Baltimore*, 8 Md., 352; *Sharp v. Speir*, 4 Hill, 76; *Howard v. First Independent Church*, 18 Md., 451; *Howard v. Bristol*, 8 Bush, 493; *Case v. Johnson*, 91 Ind., 477; *Fass v. Seehawer*, 60 Wis., 525; *Dyer v. Miller*, 58 Cal., 585; *Mulligan v. Smith*, 59 Cal., 206. See *Whiteford v. Probate Judge*, 53 Mich., 130. One joint owner cannot bind his co-tenant by signing a petition. *Mulligan v. Smith*, 59 Cal., 206. See this last case for the evidence admissible to determine the question of majority. And for a peculiar case see *Dougherty v. Harrison*, 54 Cal., 428. Executors and administrators are not entitled to petition for an improvement as "owners." *Mulligan v. Smith*, 59 Cal., 206. The burden of showing that a majority of the frontage did not petition is on those objecting to the proceedings. *Dashiell v. Baltimore*, 45 Md., 675.

⁴ So held in *Sharp v. Speir*, 4 Hill, 76, where the village authorities had decided that the proper persons had petitioned for the improvement. The rule in New York is otherwise now by statute. *Matter of Kiernan*, 62 N. Y., 457. In *Henderson v. Baltimore*, 8 Md., 352, where the statute required the assent in writing of a majority of proprietors of land fronting on the street, before the paving of the street could be ordered, it was held that the assent must appear in fact to have been given; that the certificate of the commissioners that the requisite number of proprietors had assented was only a *prima facie* warrant of authority, and those who should act under it would do so at their peril. See, also, *People v. Batchellor*, 53 N. Y., 128, and cases referred to, *ante*, p. 254. Where the statute permitted the improvement of a street and an assessment of expense on the owners fronting thereon, on a petition therefor in writing, by the owners of the larger

ter of constitutional right in any stage of the proceedings in laying an assessment, except as in express terms it may be provided for,¹ as sometimes it is, and then it cannot be dispensed with.² If, observing all conditions precedent, the municipal authorities keep within their lawful authority, all intendments will favor their action.³

It is customary to provide for an assessment by the same act or resolution which provides for the work for which the assessment is to be made; but this is not indispensable unless made so by positive law; and an improvement may be made and the assessment for the expense provided for afterwards.⁴ It is com-

part of the ground between the points to be improved, provided that the council, by a vote of all the members elect, might order such improvement without such petition, *held*, that an ordinance not passed by the vote of all, in the absence of such a petition, was invalid. *Covington v. Casey*, 3 Bush, 698. Where the ordinance was required to be passed with "the unanimous consent of the mayor and councilmen in council," and it purported to be passed "by the mayor and board of councilmen," *held* that unanimous consent was to be understood, nothing to the contrary appearing of record. *Lexington v. Headley*, 5 Bush, 508. (The record showed an affirmative vote of all the aldermen, but was silent as to the mayor, though he signed the proceedings.) Compare *Hoyt v. East Saginaw*, 19 Mich., 39. On the point what is a sufficient ordering of the work, see *Wright v. Boston*, 9 Cush., 233; *State v. New Brunswick*, 30 N. J., 395.

¹ *Chapin v. Worcester*, 124 Mass., 464.

² *Campau v. Detroit*, 14 Mich., 276.

³ It is no defense to an assessment for a sewer in one street that land benefited by a sewer in another street is not assessed, when the two sewers, though built at the same time, are separate improvements. Nor is it a defense that lands are not assessed from which a private drain leads into the sewer, if the connection is only under revocable license. *Fairbanks v. Fitchburg*, 133 Mass., 42. Where an estate receives some degree of benefit from a sewer, and the assessment actually made is by the value of estates, the courts will not interfere. *Workman v. Worcester*, 118 Mass., 168.

Where a contractor has forfeited his bond and the work has been relet at an enhanced price, it has been held that it is the duty of the municipality to enforce the bond and apply the recovery before laying an assessment. *Eno v. New York*, 68 N. Y., 214. Where the contract price is to be paid only from an assessment fund, a suit against the city to determine the sum to be paid does not render it liable generally, but only as the contract provides. *Detroit v. Paving Co.*, 36 Mich., 335. Compare *United States v. Fort Scott*, 99 U. S., 153.

⁴ *Petition of Roberts*, 81 N. Y., 62. See *Hitchcock v. Springfield*, 121 Mass., 382. Where part of the owners contract on their own behalf to make a part of a desirable improvement, an assessment may be laid on the others for the balance. *Chicago v. Sherwood*, 104 Ill., 549. See *Beck v. Obst*, 12

petent also to provide for a second assessment if the first proves insufficient; but express statutory authority would be needed for this purpose.¹ Any notice to contractors required to be given by statute must be sufficiently full in its particulars to give the requisite information to enable them to bid intelligently, since otherwise the purpose of the statute in requiring it would be defeated.² Sometimes an option is given to the person assessed to make his portion of the improvement himself; but when this is done it is mere matter of favor, and the same strictness in notice might not be required as in establishing a claim against him.³

Proceedings in Assessment. These differ too much in different states, and even in the same state for different cases, to admit of any attempt to give them here in detail. We must therefore content ourselves with stating general principles. The most fundamental and imperative of these is that the statute authorizing an improvement must be strictly pursued; not, indeed, with absolute literalness, but in all important particulars. The observance of every one of the substantial requirements must be regarded as a condition precedent to any valid assessment;⁴ none of the steps prescribed can be regarded as

Bush, 268. Where an act prescribes that if a contractor fails to complete the work within the contract time the board shall relet the contract, the board has no power to grant the contractor an extension of time. *Beveridge v. Livingston*, 54 Cal., 54.

¹ *Hagar v. Supervisors*, 51 Cal., 474. As to what is a second assessment see *Harris v. Supervisors*, 49 Cal., 662. A city, after taking the preliminary steps for improving a street, cannot, at the time of hearing, decide to improve a part only and go on without any new notice and hearing to do so. *Stockton v. Whitmore*, 50 Cal., 554.

² See *Stockton v. Clark*, 53 Cal., 82; *Stockton v. Skinner*, 53 Cal., 85.

³ Notice by publication sufficient. *Fass v. Seehawer*, 60 Wis., 525. It is held that a notice to a lot owner to construct a sidewalk must comply with the statute strictly. *Simmons v. Gardner*, 6 R. I., 255.

⁴ *Nevins, etc., Draining Co. v. Alkire*, 36 Ind., 189; *In re Astor*, 50 N. Y., 363; *In re Cameron*, 50 N. Y., 502; *Sharp v. Speir*, 4 Hill, 76; *Covington v. Casey*, 3 Bush, 698; *Warren v. Grand Haven*, 30 Mich., 24; *Henderson v. Baltimore*, 8 Md., 352; *Jones v. Boston*, 104 Mass., 461; *State v. Jersey City*, 42 N. J., 575; *Robinson v. Logan*, 31 Ohio St., 466; *Grand Rapids v. Blakely*, 40 Mich., 367; *Himmelmann v. McCreery*, 51 Cal., 562; *Brady v. King*, 53 Cal., 44.

directory merely.¹ Where, therefore, the commissioners for such an improvement are required to take an oath faithfully and fully to discharge their duties, and they fail to take it or take a different one, their proceedings are illegal and void.² So if they are required to give notice of any particular step in the proceedings, a notice to the effect and for the time prescribed is indispensable.³

Estimating Benefits. It has been said that, in assessing benefits, the only safe and practicable course, and the one which will do equal justice to all parties, is to consider what will be the influence of the proposed improvement on the market value of the property; what the property is now fairly worth in the market, and what will be its value when the improvement is made.⁴ A test of this character should be applied by the legislature before establishing any arbitrary rule of assess-

¹ *Merritt v. Portchester*, 71 N. Y., 809; *Grace v. Board of Health*, 135 Mass., 490. A city, in a suit to enforce a special assessment, has the burden of showing performance of the conditions precedent. *Luffkin v. Galveston*, 56 Tex., 522.

² *Merritt v. Portchester*, 71 N. Y., 809.

³ *Grace v. Board of Health*, 135 Mass., 490; *Himmelmann v. Cahn*, 49 Cal., 285. If the statute prescribes how notice shall be given, city authorities cannot substitute one of another character. *Chambers v. Satterlee*, 40 Cal., 497.

Where an assessment is to be made by area, notice of the proceeding is not necessary, the apportionment being a mere mathematical calculation. *Gillette v. Denver*, 21 Fed. Rep., 822. Personal notice is not indispensable if the legislature prescribes some other. *Petition of De Peyster*, 80 N. Y., 565. Where a notice is to be given in a paper published in a city, it is immaterial if published in the city where it is actually printed. *Ricketts v. Hyde Park*, 85 Ill., 110.

Where an ordinance gives the owners of the majority of the frontage a right to determine the material to be used, they waive their right unless they give notice of their choice. *Moale v. Baltimore*, 61 Md., 224.

⁴ *Bronson, J.*, in *Matter of Furman St.*, 17 Wend., 668, cited with approval in *State v. Newark*, 35 N. J., 157, 167. It is held in Massachusetts that an assessment for the alteration of a street will date from the order for the alteration. *Jones v. Boston*, 104 Mass., 461, citing *Parks v. Boston*, 15 Pick., 198; *Meacham v. Fitchburg, etc.*, R. R. Co., 4 Cush., 291; *Whitman v. Boston, etc.*, R. R. Co., 7 Allen, 313. A suggestion that assessors have acted on an erroneous principle is not tenable, the matter being referred to their judgment. *Petition of Cruger*, 84 N. Y., 619, citing *Matter of Eager*, 46 N. Y., 100.

ment; such, for instance, as one which measures benefits by the length of frontage. There can be no justification for any proceeding which charges the land with an assessment greater than the benefits; it is a plain case of appropriating private property to public uses without compensation.¹ It is conceded that the legislative judgment, that a certain district is or will be so far specially benefited by an improvement as to justify a special assessment, is conclusive,² and that its determination as to what shall be the basis of the assessment is equally conclusive. To invoke the intervention of a court for relief against the results of its conclusion is to invoke the judicial authority to give its judgment controlling effect over that of the legislature, in a matter of the apportionment of a tax, which by concession on all sides is purely a matter of legislation. This is confessedly inadmissible in any case where the legislative action is not manifestly colorable and arbitrary.³ If either the rule prescribed for the apportionment, or the assessment made under it, is so grossly and palpably unjust and op-

¹ *Tide Water Co. v. Costar*, 18 N. J. Eq., 518; *Canal Bank v. Albany*, 9 Wend., 244; *Matter of Canal St.*, 11 Wend., 155; *Matter of Drainage of Lands*, 35 N. J., 497; *Yeatman v. Crandall*, 11 La. An., 229; *New Orleans v. Drainage Co.*, 11 La. An., 338. It is no objection to an assessment of benefits, that it is made in proportion to value; that may be a proper basis if the commissioners think it just. *Piper's Appeal*, 32 Cal., 530. Whether the property within a representative district will be benefited is a legislative question. Its decision, whether made by the legislature or by some subordinate authority, is in general final, and cannot be contested by individual property owners. *Pearson v. Zable*, 78 Ky., 170. But when the assessment in any one case is limited to half the assessed value of the lands, the authorities cannot evade the limitation by laying two assessments for what in fact is but one improvement. *Matter of Walter*, 75 N. Y., 354.

² *State v. District Court*, 29 Minn., 62; *Chamberlain v. Cleveland*, 34 Ohio St., 551; *Petition of Cruger*, 84 N. Y., 619.

³ If a legislative act directs such sum to be levied as the cost of a work as shall be shown by the books and vouchers of officers, without further inquiry as to their correctness or as to benefits, the act is void. *People v. Houston*, 54 Cal., 536. For difference between cost and benefits in these cases see *Johnson v. Milwaukee*, 40 Wis., 315. Where an assessment is ordered for the cost of a work, it is to be presumed that in the legislative judgment the cost would not exceed the benefits. *Petition of Roberts*, 81 N. Y., 62. It is no defense to an assessment for a street improvement that a canal has been taken for the street without a new condemnation, or that the city has given a railway company the right to lay its track in the street. *Richards v. Cincinnati*, 31 Ohio St., 506.

pressive as to give demonstration that the proper authority had never determined the case on the principles of taxation, the wrong must always be open to correction. A man's property is not to be taken from him with impunity, and without redress, by simply calling the appropriation an assessment, when it is not such in its elements.¹

When the estimate of benefits is referred to assessors, by whatever name they may be called, the rule of conclusiveness here stated must apply to their action. The remedy of one who considers himself unfairly assessed is to apply for redress to the statutory tribunal, if one is provided with the power to review. In all collateral proceedings, the benefits assessed are conclusively presumed to be received, and the assessment is not open to revisal or review.²

¹ *State v. Elizabeth*, 87 N. J., 390; *Minn. Linseed Oil Co. v. Palmer*, 20 Minn., 468; *Thomas v. Gain*, 85 Mich., 155.

² *Baltimore v. Hughes*, 1 Gill & J., 480; *Nor. Indiana R. R. Co. v. Connelly*, 10 Ohio St., 159, 165; *Commonwealth v. Woods*, 44 Pa. St., 113; *Wray v. Pittsburg*, 46 Pa. St., 365, 369; *People v. Hagar*, 52 Cal., 171; *Pearson v. Zable*, 78 Ky., 170; *State v. Jersey City*, 42 N. J., 97; *Ricketts v. Spraker*, 77 Ind., 371. Counterclaims of parties for damages cannot be set off against the assessment. *Whitney v. Boston*, 106 Mass., 89. The English sewer cases allow great latitude to the commissioners in the assessment of benefits. They are largely collated in *Soady v. Wilson*, 3 Ad. & El., 248, and it is said by *Lord Denman*, Ch. J., "from *Keighley's Case*, 10 Rep., 142 b, to *Bex v. Commissioners of Sewers for the Tower Hamlets*, 9 B. & C., 517, the doctrine laid down in them all is uniform and undisputed, as applicable to the present question. It rests on the principle that every one whose property derives benefits from the works of the commissioners may be assessed to the rates they impose. The benefit is not required to be immediate, nor do the cases, or the commission itself, or the statutes, say anything of the nature or amount of the benefit. Possibly that benefit may be so extremely small that a jury would not have found the fact stated in the case. But on the other hand the benefit may be of high value; as if a house were inaccessible because surrounded by marshes, and the work of sewerage had made them hard and passable. . . . If the commissioners had jurisdiction, this court would not inquire whether they had correctly exercised their judgment, in an action of trespass for levying the rate. But as the jurisdiction results from the fact of benefit being derived, and the case expressly states that some benefit was derived, we think ourselves bound by the finding to say that the defendant had authority to levy the rate, and is consequently entitled to our judgment." It is nevertheless held competent to show, in opposition to the assessment, that no benefit was received. This is on the ground that jurisdiction to make any assessment against a party depends on his premises being benefited, and the commissioners cannot determine the question

The broad latitude of legislative and administrative discretion in these cases undoubtedly opens the door to many abuses, and it may be a reason for carefully criticising the proceedings, in order to see that the law has been strictly observed; but it can constitute no reason for the judiciary taking upon itself the correction of legislative mistakes and errors of judgment. When a judicial review is given of the proceedings of assessors, an opportunity may be afforded for laying down the proper controlling principles; but in other cases it must be assumed that the assessors have had the proper rules in view for their own direction. It is clear that any assessment is wrong which charges lands with a sum beyond the special benefits received. If the cost of any improvement exceeds the local and peculiar benefits, the improvement should either not be made at all, or the excess should be assumed by the public, and become a part of the general levy. In making an assessment of actual benefits, it may undoubtedly be proper to take into consideration the fact of the property being devoted to a permanent use, which for the time being, at least, renders the market value of little or no moment. It has already been stated that this does not preclude the property being assessed for benefits. As has been justly remarked of some cases of this nature which have been considered by the courts, when lands were devoted to church or cemetery purposes,¹ "objections to the assessment

of jurisdiction in their own favor conclusively. *Masters v. Scroggs*, 3 M. & S., 447; *Stafford v. Hamston*, 2 B. & B., 691. See *Neave v. Weather*, 3 Q. B., 984. But in England, ratability once established, no question of the amount of benefit is permitted to be raised. *Regina v. Head*, 9 Jur., N. S., 871. The question whether property is benefited or not is one of detail, on which the federal Supreme Court will not pass. *Davidson v. New Orleans*, 96 U. S., 97. The burden of showing a local assessment to be excessive is upon those who contest it. *Bigelow v. Boston*, 120 Mass., 826. Every presumption is in favor of correctness. *Petition of Brady*, 85 N. Y., 268; *In re Bassford*, 50 N. Y., 509. As to the necessity for proximate equality, see *Preston v. Roberts*, 12 Bush, 570. If an assessment exceeds the value of the lot assessed, it is an unconstitutional appropriation of property. *Zoeller v. Kellogg*, 4 Mo. Ap., 163. Where commissioners for a local improvement were to pass upon the question whether the contract therefor was free from fraud, it was held that their determination was final. *Petition of Kendall*, 85 N. Y., 302, citing *Matter of Peugnet*, 67 N. Y., 441, and questioning *Matter of Burmeister*, 76 N. Y., 174.

¹*Matter of Mayor, etc.*, 11 Johns., 77; *Matter of Albany Street*, 11 Wend., 150.

proceed on the ground that the owner cannot apply the property to any new or different use. When the owner has the unrestrained power of alienation, and the property may be converted to any new use at his pleasure, it is difficult to see how, upon any principle, an exception can be made to the rule regarding only the market value. After the owner has escaped what would otherwise be a great burden, on the ground that he does not intend to use the property in a way which will make the improvement beneficial, he may change his mind, throw the property into the market, and realize advantages for which others have been made to pay."¹ And the remark is as applicable to those temporarily appropriated to church or other special purposes as to any others. The fact is only a circumstance to be considered by the assessors in making up their estimate.²

The fact that a railroad company, or a plankroad or turnpike company, has an easement in a public street of a permanent nature, and the right to occupy it for the corporate purposes, does not preclude the street being improved at the expense of adjoining property. It still remains a public street, and subject to the same right of control as before, except as the right is qualified by the easement granted to the private corporation.³

An assessment should be limited to the actual cost of the improvement;⁴ but this may properly include all incidentals, such as the cost of supporting walls to lots which have been cut into, cost of drains to protect the work, cost of advertising, engineering, superintendence, etc.⁵ But when all proper items

¹ *State v. Newark*, 35 N. J., 157, 167.

² *People v. Syracuse*, 63 N. Y., 291.

³ *Bagg v. Detroit*, 5 Mich., 333; *State v. Atlantic City*, 34 N. J., 99. And see *State v. New Brunswick*, 34 N. J., 395; *Richards v. Cincinnati*, 31 Ohio St., 506.

⁴ *Schenely v. Commonwealth*, 36 Pa. St., 9; *Chamberlain v. Cleveland*, 34 Ohio St., 551; *Hanscom v. Omaha*, 11 Neb., 37.

⁵ *Longworth v. Cincinnati*, 34 Ohio St., 101. If lateral support of a lot is removed in grading a street, the cost of a supporting wall cannot be charged upon the lot owner as a part of the improvement. *Armstrong v. St. Paul*, 30 Minn., 299. The costs of grading and of collecting are properly included in an assessment for paving in Maryland. *Dashiel v. Baltimore*, 45 Md., 615. See *Petition of Lowden*, 89 N. Y., 548; *Matter of Mut. Life Ins. Co.*, 89 N. Y., 530.

of cost are included, if the sum levied appreciably exceeds the amount, there is a plain excess of authority in laying it, and the levy must be treated as illegal.¹ But there is no reason in the nature of things why an assessment should not be made before the work is actually done, and before the cost shall be finally and conclusively determined. It is usually desirable that the collection of the assessment should proceed as the work progresses, that the contractor or workmen may be paid when it is completed. Indeed the charters of very many cities forbid that any payments shall be made by the corporation, for any street or other local work, except from a fund to be provided by a special assessment made for the purpose; and it is obvious that such works would only be constructed at very serious disadvantage, and at much greater expense, if no payment could be made as the work progressed. It has been said that, in assessing benefits under statutes permitting it, a city common council "is the agent and instrument of the land owners in respect to these improvements. The work is to be conducted and completed under its direction. It is to ascertain how much certain owners are to pay and others receive; to collect the money and see that it is applied to the purposes of the improvement. Its authority must be strictly pursued."² But it must also, in order to be enabled to perform its agency to advantage, be allowed to make the assessment, and even the collection if it shall be deemed proper, in advance. It has been repeatedly held that this is admissible.³ The assessment must of course be made upon an estimate which may be more or less incorrect, as all estimates for public works are likely to be, but the liability to error ought not to defeat a special any more than a general levy for future purposes. If it prove too large it is not fatal,⁴ though the excess properly belongs to the lot owners, who would be entitled to have it returned to them.

In assessing benefits the cost of the whole work distributed through the whole district is to be kept in view; the assessors

¹ *Minn. Linseed Oil Co. v. Palmer*, 20 Minn., 468.

² *Brown, J.*, in *Howell v. Buffalo*, 15 N. Y., 512, citing *McCullough v. Brooklyn*, 23 Wend., 458; *Lake v. Williamsburgh*, 4 Denio, 520; *Sharp v. Speir*, 4 Hill, 76.

³ *Manice v. New York*, 8 N. Y., 120; *Henderson v. Baltimore*, 8 Md., 352; *Scoville v. Cleveland*, 1 Ohio St., 129.

⁴ *Scoville v. Cleveland*, 1 Ohio St., 126.

cannot restrict themselves in the case of any particular lot to the cost of the improvement in front of it.¹ But at the same time they must carefully keep within the district; this is as imperative as it is in ordinary taxation.²

As in the case of ordinary taxes, assessments are made either against the land as such, or against the separate interests which individuals have in the land, according as the statute shall prescribe. In either case there should be a sufficient description of the land for the purpose of identification,³ and in the latter case it is imperative that the separate interests be taken notice of in the assessment.⁴ If the assessment is to be

¹ *Ex parte Mayor of Albany*, 23 Wend., 277. See *State v. Portage*, 12 Wis., 567. Items of cost improperly included may be deducted in proceedings to set the assessment aside, and the balance sustained. *Matter of Met. Gas Light Co.*, 85 N. Y., 526; *In re Merriam*, 84 N. Y., 596. When, in making a street improvement, squares formed by the intersection of other streets are crossed and improved, the city may, if the object in improving the squares is the improvement of the street, assess the whole expense upon the same property on which the other expenses of the improvements are assessed. *Creighton v. Scott*, 14 Ohio St., 438. See *Motz v. Detroit*, 18 Mich., 495.

² *Matter of Livingston Street*, 18 Wend., 556; *Turpin v. Eagle Creek, etc., Gravel Road Co.*, 48 Ind., 45. A statute provided for viewers to decide upon the expediency of a proposed street extension, and to "ascertain and determine what lots in the vicinity of said extension will probably be benefited by the opening of the said street, and divide and apportion, on equitable principles, the amount that each shall separately contribute to defray the damage incurred," etc. *Held*, that the term "vicinity" is not a matter of eyesight only, but for the judgment also. *Rogers, J.*, in *Extension of Hancock St.*, 18 Pa. St., 26, 32.

³ *Sharp v. Johnson*, 4 Hill, 92. For descriptions which consisted of diagrams of the property, which were held insufficient in an assessment, see *Himmelman v. Cahn*, 49 Cal., 282; *San Francisco v. Quackenbush*, 53 Cal., 52; *Himmelman v. Bateman*, 50 Cal., 11. See, also, *Norton v. Courtney*, 53 Cal., 691; *Whiting v. Quackenbush*, 54 Cal., 306; *Williams v. McDonald*, 58 Cal., 527; *Brady v. Page*, 59 Cal., 52.

⁴ *Matter of De Graw Street*, 18 Wend., 568. An assessment to "owners and occupants" for benefits is not the same thing as an assessment on the lands. *Sharp v. Speir*, 4 Hill, 76. Where the assessment is to be of the benefits "beyond that general advantage which all real property in the city may receive therefrom," and the adjudication is that the estates have been benefited certain amounts, this is presumed to have been made as the ordinance contemplates. *Jones v. Boston*, 104 Mass., 461. Where, by the statute, the assessment is authorized upon "the enhanced value of the land," the improvement upon the land must be excluded from consideration. *People v. Austin*, 47 Cal., 353. An assessment is void if not made by the stand-

made by a board of several persons, they must act as a board jointly.¹

In some cases statutes provide for an appeal from the assessment to some superior administrative authority or to a court. In other cases confirmation of the assessment is provided for and must take place before it has legal force. Whatever notice is required of the assessment, or of other proceedings which are to render it effectual, must be given with the same strictness as in the earlier proceedings.² What questions shall be open on the appeal, and in what manner they shall be disposed of, must be determined on an inspection of the statute.³ Purely technical objections to the proceedings will be disregarded everywhere;⁴ and if the appellate tribunal is given authority to correct substantial errors, it may do so whenever practicable consistent with a just protection to the rights of parties.⁵

ard fixed by law. *State v. District Court*, 29 Minn., 62. It is not necessarily void because of exceeding the valuation of the lot for annual taxation; there being no showing how near it comes to actual value, or that it exceeds the benefits. *Matter of Sackett, etc., Streets*, 74 N. Y., 95. As to how value is to be arrived at, see *Matter of St. Joseph's Asylum*, 69 N. Y., 353. As to when a park can be said to be "laid out," within the meaning of an improvement statute, see *Foster v. Park Commissioners*, 133 Mass., 321.

¹ *People v. Hagar*, 49 Cal., 229. See, as to the meaning of a requirement that the commissioners shall "jointly view and assess upon each and every acre," etc., *People v. Hagar*, 52 Cal., 171. It has been held that where no assessment district is created, an act providing for commissioners to assess benefits and damages, who shall be disinterested freeholders, is impracticable, since it cannot be known, when the commissioners are sworn, whether or not they are disinterested. *Montgomery Avenue Case*, 54 Cal., 579.

² A requirement of six days' notice held to be six days exclusive of Sunday. *Sewall v. St. Paul*, 20 Minn., 511. An immaterial departure from the statute in giving notice will not be fatal. *Petition of Lowden*, 89 N. Y., 548.

³ See *Eno v. New York*, 68 N. Y., 214; *Teegarden v. Racine*, 56 Wis., 545; *Alden v. Springfield*, 121 Mass., 27.

⁴ *Whiting v. Quackenbush*, 54 Cal., 306; *Dyer v. Parrott*, 60 Cal., 551; *San Francisco v. Certain Real Estate*, 50 Cal., 188. Objections to proceedings for condemning a street cannot defeat a subsequent paving assessment. *Dashiell v. Baltimore*, 45 Md., 615. An over estimate of the area of an estate will not be regarded if it is not over assessed. *Keith v. Boston*, 120 Mass., 108. In a suit for a paving assessment in Maryland it is immaterial that it is made in the name of a former owner. *Dashiel v. Baltimore*, 45 Md., 615.

⁵ A jury on an appeal by one lot owner from an assessment will not consider the relative benefits to other estates if they find the appellant's estate to be benefited and correctly assessed. *Keith v. Boston*, 120 Mass., 108; *Snow v. Fitchburg*, 136 Mass., 183. Where a lot owner has paid for improv-

Collection of Assessments. Collection may be provided for in any of the methods admissible in other cases, and what has been said on the subject of collection of general taxes is therefore applicable to the collection of special assessments whenever the proceedings are analogous.¹ It has become customary, however, to provide by law that in the case of city improvements the contractor shall look solely to an assessment upon the lots benefited for his compensation; the collection under some laws to be made by the municipality, and under others by the contractor himself. Such laws raise special questions, and decisions upon some of them are referred to in the margin.² They

ing part of an alley fronting his land, he may be relieved, under an authority for correcting an assessment, from the cost of improving the remainder. *Beck v. Obst*, 12 Bush, 268. See *Chicago v. Sherwood*, 104 Ill., 549.

Under a statute giving commissioners power after final order to make any change or addition necessary, the failure to place benefited lands upon the assessment roll for a road tax is a mere irregularity which will not avoid the tax, and may at any time be corrected by the commissioners. And the misconduct of the commissioners in selling lower than the statute authorizes, the bonds which the tax is to pay, will not affect its legality. *Ricketts v. Spraker*, 77 Ind., 371; *Stoddard v. Johnson*, 75 Ind., 20.

¹ If the collection of special assessments is enforced by imposing penalties, only such as are strictly within the range of the statute are admissible. *Ankeny v. Hennigsen*, 54 Ia., 29.

² *Illinois.* Under a contract to look only to the special assessment, the contractor has no other remedy, providing the city is in good faith, and with reasonable diligence, proceeding to make collections by means of such assessments. *Chicago v. People*, 48 Ill., 416. But if the city has no power to make such an assessment, and the improvement has been made without any express contract, the city is liable, upon an implied contract, to pay in the usual way, notwithstanding it was understood the contractor should rely on an assessment. *Maher v. Chicago*, 38 Ill., 266. See, also, *Chicago v. People*, 56 Ill., 327.

Louisiana. When the contractor for a public work loses his remedy against the land, by reason of the neglect of the authorities to give the proper notice to the owner, or of other fault on their part, an action may be maintained against the municipality for the contract price. *Boulogny v. Dornemon*, 2 Mart. (La.), N. S., 455; *Newcomb v. Police Jury*, 4 Rob. (La.), 233; *O'Brien v. Police Jury*, 2 La. An., 355; *Michel v. Police Jury*, 3 La. An., 123; *Same v. Same*, 9 La. An., 67. If the municipality contracts with a paver that lot proprietors shall pay a certain portion of the cost of the pavement, and they refuse or neglect to do so, the municipality is liable. *Cronan v. Municipality No. 1*, 5 La. An., 537. So, if by contract the municipality is to pay one-third the cost of a work and the lot owners two-thirds, but, by suit, it is determined that the lot owners can be charged one-third only, the municipality is liable for the two-thirds. *Fournier v. Municipality No. 1*, 5

show that where such is the law the city becomes liable to the contractor only in case its officers have, through bad faith or

La. An., 298. As to suits in the name of the corporation for the benefit of the contractor, see *New Orleans v. Wire*, 20 *La. An.*, 500.

Wisconsin. When the contractor is to be paid by certificates, showing the amount chargeable to each lot, which are to be collected as a tax, he cannot maintain an action against the city, but must depend on the collection of the certificates. *Whalen v. La Crosse*, 16 *Wis.*, 271; *Finney v. Oshkosh*, 18 *Wis.*, 209; *Fletcher v. Oshkosh*, 18 *Wis.*, 232. The failure of a contractor to complete his work in time cannot be taken advantage of by a lot owner to defeat a sale unless he can show he was injured thereby. *Fass v. Seehawer*, 60 *Wis.*, 575.

Kentucky. When the contractor has agreed to take and collect the assessments as his pay, he cannot hold the city liable, unless it may be in cases where the whole proceedings are void, or the city neglects its duty; as where it fails to observe the requirements of the charter necessary to make the lot owners liable. *Kearney v. Covington*, 1 *Met. (Ky.)*, 389. For a case of very peculiar contract, see *Louisville v. Henderson*, 5 *Bush*, 515. Under a charter providing that a city should not be liable to contractors for street improvements except when it may enforce payment from the property benefited, it is held that, inasmuch as the city has implied power to make such improvements, if it is without legal means to enforce payment therefor, it will be liable itself. *Louisville v. Nevin*, 10 *Bush*, 549. But the fact that the council, when having power to compel payment, has either by affirmative action or neglect rendered enforcement of payment from the property impossible, will not impose the liability upon the city. *Craycraft v. Selvage*, 10 *Bush*, 696.

Maryland. Where artesian wells were ordered on a petition, the order reciting: "The petitioners to be responsible for all expenses that may occur in sinking said artesian wells, if a failure should take place in the attempt to procure water," it was held, the contractors must look to the petitioners, and not to the city. *Ruppert v. Baltimore*, 23 *Md.*, 184.

Kansas. When, before ordering an improvement, it was necessary that a petition should be presented by a majority of the resident property owners to be affected thereby; and that there should be a stipulation in the contract that the contractor should look to the property owners benefited for his pay, and that the city would not be liable, a contract was let without such petition being presented, and not containing the above stipulation; it was held that the contractor, after failing to collect the amount from the property holders, could not make the city liable for the amount. *Leavenworth v. Rankin*, 2 *Kan.*, 357. But in *Kansas*, the city is primarily liable to a contractor for grading, and, unless it levies a valid tax and provides some means for enforcing it against the lot owners, it will remain liable. *Leavenworth v. Mills*, 6 *Kan.*, 238. A city of the second grade may issue bonds and pledge its faith and credit for their payment in order to pay contractors for improvements, though it might agree simply to lay a special assessment or tax, and leave the contractor to look to that. *Wyandotte v. Zeitz*, 21 *Kan.*, 649. By the terms of a paving contract, a city was to pay by levying

otherwise, so failed in their duty in respect to the assessment as to defeat or prejudice collection by him.

a special tax upon abutting property, and the contractors were to look only to the tax for their pay. In making the apportionment, the city engineer committed an error. As soon as discovered, it was corrected by a reapportionment. While the tax was being collected under the reapportionment, the contractors sued the city. *Held*, the action would not lie; they must look to the tax for their pay. *Casey v. Leavenworth*, 17 Kan., 189.

Indiana. Where the charter provides that the city shall be liable for the paving of so much of the street as is occupied by streets or alleys crossing the same, and that the contractor must look to the owners of the bordering lands for the remainder, *held*, that if the contractor failed to collect from these proprietors, he could not recover the amount from the city. *New Albany v. Sweeney*, 13 Ind., 245. See, also, *Johnson v. Indianapolis*, 16 Ind., 227.

California. See *Lucas v. San Francisco*, 7 Cal., 463, 474, for a doctrine corresponding to that in the case cited above from Indiana. The demand for the payment of a street assessment should be made on each lot for the amount due thereon. It is not enough to demand on two the aggregate amount due on them both. *Schirmer v. Hoyt*, 54 Cal., 280. The demand must be for the amount properly chargeable, and not for an amount which is not authorized by the resolution of intention. Failure to appeal to the board of supervisors does not bar the tax payer from defending a suit to recover the assessment. *Donnelly v. Howard*, 60 Cal., 291.

Massachusetts. When the contractor for a dike was to be paid from assessments, and after their payment the town was, by statute, liable, it was *held* there was no liability until such payment. *Hendrick v. West Springfield*, 107 Mass., 541.

Michigan. When, by law and by his contract, the contractor is to look only to a special fund raised by assessment for his compensation, he cannot hold the city liable in the absence of any negligence in levying or collecting the assessment. See *Goodrich v. Detroit*, 12 Mich., 279; *Second National Bank v. Lansing*, 25 Mich., 207. But the city is liable if it misappropriates the special fund. *Chaffee v. Granger*, 6 Mich., 51; *Lansing v. Van Gorder*, 24 Mich., 456.

New York. Where, by city charter, the contractor for a city work is to be paid from an assessment levied for the purpose, he cannot maintain a suit against the city before the assessment is collected, in the absence of default on the part of the officers to proceed therewith. *Hunt v. Utica*, 18 N. Y., 442. See *Beard v. Brooklyn*, 31 Barb., 142; *Swift v. Williamsburg*, 24 Barb., 427.

Minnesota. Where the contractor binds himself to look to the property owners for his pay, but fails to do so, the city is not liable even though it has taken ineffectual steps to make collections from the property owners. *Lovell v. St. Paul*, 10 Minn., 290.

Iowa. If a city agrees to collect the assessment and fails to do so, it is liable. *Morgan v. Dubuque*, 28 Ia., 575.

Ohio. If the contractor takes an assignment of the assessment in pay-

It is in general no defense to an assessment that the contract for the work has not been performed according to its terms.¹ If the proper authorities have passed upon the question and accepted the work as satisfactory, the acceptance must be conclusive; there cannot and ought not to be an appeal from them to court or jury. "No misconstruction or malconstruction of the work, arising from the incapacity, the honest mistake, or the fraud of the contractor, would invalidate the assessment, or relieve the parties assessed from the obligation to pay it. In this respect the property owners, assessed under the provisions of the law for the cost of a sewer, must stand upon the same footing with parties assessed for taxes for the public benefit. They take the hazard incident to all public improvements, of their being faulty or useless, through the incapacity or fraud of public servants."² But this doctrine must be con-

ment, he cannot look to the city to make up any deficiency in consequence of assessments exceeding the value of lots. *Creighton v. Toledo*, 18 Ohio St., 447. For a statutory change in this regard, see *Cincinnati v. Diekmeier*, 31 Ohio St., 242. And see, in general, *Hastings v. Columbus*, 42 Ohio St., 585.

¹*Fass v. Seehawer*, 60 Wis., 525. As to the right to make modifications while the work is in progress, see *Hastings v. Columbus*, 42 Ohio St., 585.

²*Green*, Chancellor, in *State v. Jersey City*, 29 N. J., 441, 449. See, also, *Ricketts v. Hyde Park*, 85 Ill., 110; *Murray v. Tucker*, 10 Bush, 240; *Henderson v. Lambert*, 14 Bush, 24; *Municipality v. Guillotte*, 14 La. An., 297; *Dougherty v. Miller*, 36 Cal., 83; *Taylor v. Palmer*, 31 Cal., 240; *Cochran v. Collins*, 29 Cal., 129; *Emery v. Bradford*, 29 Cal., 75. In the case last cited, *Sawyer, J.*, says: "In this case the contract is admitted by the pleadings to have been performed to the satisfaction of the superintendent. It was a duty devolved upon that officer to determine that question of fact, and he did determine it. There is no fraud charged—nothing but an error in judgment. The law afforded the defendant a remedy in the regular course of the proceeding itself, by which he might have had the error reviewed, and the defect, if any, remedied. He did not avail himself of the remedy, but declined to appeal, and now seeks to review the determination of the superintendent collaterally. We think, by this neglect to appeal, he has acquiesced in the approval of the work by the superintendent, and that his determination is conclusive. The principles applicable to the review of assessments of other taxes would apply here, and such would be the result in respect to ordinary taxes for state, county and municipal purposes. *Conlin v. Seaman*, 22 Cal., 549; *Peoria v. Kidder*, 26 Ill., 358; *Aldrich v. Cheshire R. R. Co.*, 1 Foster, 361; *Hughes v. Kline*, 30 Pa. St., 230, 231; *Sandford v. New York*, 33 Barb., 150; *Lowell v. Hadley*, 8 Met., 194; *Williams v. Holden*, 4 Wend., 227, 228; *Bouton v. Neilson*, 3 Johns., 475, 476; *Windsor v. Field*, 1 Conn., 284. It was decided in *Nolan v. Reese*, 32 Cal.,

fixed within its proper limits; it cannot be extended to cover a case in which the authorities, after contracting for one thing, have seen fit to accept something different in its place; for if this might be done, all statutory restraints upon the action of local authorities in these cases would be of no more force than they should see fit to allow them.¹ And no doubt if it were claimed that by fraud the cost of a work was purposely made excessive, the fact might be inquired into and redress obtained, either in a direct proceeding for the purpose, or on appeal if a competent appellate tribunal was provided.²

Collection by Sale of Lands. It is very proper in statutes for the levy of special assessments to declare that the sum assessed in respect to each lot or parcel of land shall be a lien upon it; and this declaration is generally made.³ It is also

484, that fraud in letting the contract was no defense to an assessment. It might doubtless be a reason for enjoining the execution of the contract, on a bill filed in due season."

¹ *Murray v. Tucker*, 10 Bush, 240; *Henderson v. Lambert*, 14 Bush, 24.

² *Matter of Orphan Home*, 92 N. Y., 116. See *Matter of Righter*, 92 N. Y., 111. By statute of 1872, in California, fraud is made a defense to an assessment. *Brady v. Bartlett*, 56 Cal., 350.

It is no defense to an assessment for improving a street that certain city officers were interested in the contract. *Schenley v. Commonwealth*, 36 Pa. St., 29. Errors in the legislation of the city give no ground for restraining the collection of an assessment. *Robinson v. Milwaukee*, 61 Wis., 485.

³ In *People v. Brooklyn*, 4 N. Y., 419, the assessment was made upon "the owners and occupants of all the lands benefited thereby, in proportion to the amount of such benefit." It was made a lien on the land, but was to be collected of the personal property of the owner, and if none, then of the land. As to lien, see, also, *Walsh v. Mathews*, 29 Cal., 123; *Emery v. Bradford*, 29 Cal., 75; *McMasters v. Commonwealth*, 8 Watts, 292; *Philadelphia v. Tryon*, 35 Pa. St., 401; *Schenley v. Commonwealth*, 36 Pa. St., 29. When the assessment is on land, irrespective of the value of buildings, the lien nevertheless affects the buildings. *Wright v. Boston*, 9 Cush., 233. When an assessment for widening a street is made a lien on the lot in the nature of a mortgage, with authority in the city to sell for its satisfaction, and a sale is made which is void, and money refunded, the lien remains, and the sale is no bar to further proceedings to collect. *New York v. Colgate*, 12 N. Y., 149. *Held*, in the same case, that a lien is not barred sooner than a mortgage would be.

The separate estate of a married woman is subject to the lien. *Leavenworth v. Stille*, 13 Kan., 539. As to when the lien attaches for a drainage assessment in Indiana, see *Scott v. State*, 89 Ind., 368. Where lands are sold for an assessment the purchaser has the burden of showing a regular sale, unless the statute provides otherwise. *Dederer v. Voorhies*, 81 N. Y., 153.

common to provide for a sale of the lands when necessary for the satisfaction of the assessment, sometimes with and sometimes without judicial proceedings for the purpose. Special provision for such sale is requisite, since the customary authority to sell lands for the satisfaction of taxes has no application to these proceedings.¹ When suit is provided for it is likely to be one of a peculiar character, and it may be either a suit *in rem* or a suit *in personam*, or a suit partaking of the nature of both. We have seen that under some statutes the assessment or list when completed is handed over to the contractor for the work, who proceeds to enforce the lien in his own favor.² But whether collection is to be made by the contractor or by the municipality, the statute must be the guide in respect to the proceedings.³

¹ Sharp v. Speir, 4 Hill, 76. To the same point are *McInery v. Reid*, 23 Ia., 410; *Merriam v. Moody's Executors*, 25 Ia., 163; *Paine v. Spratley*, 5 Kan., 525; *Leavenworth v. Laing*, 6 Kan., 274. In some of the states these assessments are by statute made collectible in the same manner as the ordinary taxes. See *Morrison v. Hershire*, 32 Ia., 271.

² See *Northern Indiana R. R. Co. v. Connelly*, 10 Ohio St., 159; *Taylor v. Palmer*, 31 Cal., 240; *Chambers v. Satterlee*, 40 Cal., 497. In Missouri, in a suit on a special tax bill for a street improvement, the bill is *prima facie* evidence that a public street exists where the improvement was made, but this may be disputed. *Seibert v. Allen*, 61 Mo., 482. As to when the bill is not to be defeated for want of strict compliance with the statute, see *Weber v. Schergens*, 59 Mo., 389. Inclusion through error in a special tax bill of a sum for which there was no contract will not invalidate it, and the contractor may collect what was due him. *Neenan v. Smith*, 60 Mo., 292. See this case for various questions of practice and proceeding.

As to collection of an assessment in Maryland, when the land has been sold while the work was in progress, see *Wolff v. Baltimore*, 49 Md., 446.

³ As to the necessity in California that the proceedings should follow the statute, see *Himmelman v. Townsend*, 49 Cal., 150; *Hancock v. Bowman*, 49 Cal., 413. If two lots owned by the same person are separately assessed, each lot is liable for its own assessment only, and a judgment to enforce the lien must distinguish between them. *Brady v. Kelly*, 52 Cal., 371. As to the necessity for publication in proceedings to enforce the lien, see *People v. Reay*, 52 Cal., 423. As to proceedings where several are joined as defendants and there is a discontinuance as to some, see *Clark v. Porter*, 53 Cal., 409; *Parker v. Altschul*, 60 Cal., 380; *Diggins v. Reay*, 54 Cal., 525; *Harney v. Appelgate*, 57 Cal., 205. Where the statute requires that the owners of a lot shall be sued, the complaint need not specify the individual interests. *Whiting v. Townsend*, 57 Cal., 515. As to opening defaults, see *Reclamation District v. Coghill*, 56 Cal., 607. As to proceedings where several tracts owned by the same person are assessed for the same improvement, see *People v.*

Personal Liability for Assessments. It is customary not only to make the assessment a lien on the land, but also to make it a personal charge against the owner. There is some difficulty in principle in doing this; a difficulty which in some states has been found insurmountable, the courts holding that in principle, at least, it is not permissible.¹

Hagar, 52 Cal., 171. As to proceedings where there are two separate assessments on the same lots, see *Dyer v. Barstow*, 50 Cal., 652. If two assessments are made for the same improvement by reason of the insufficiency of the first to cover the cost, both may be proceeded for in one suit. *District No. 110 v. Feck*, 60 Cal., 408.

In Ohio suit is authorized to recover special assessments, and when one is found irregular or defective, judgment may still be rendered for the amount properly chargeable. *Gest v. Cincinnati*, 26 Ohio St., 275; *Cincinnati v. Bickett*, 26 Ohio St., 49. It is error, in an action to recover an assessment on two parcels owned by the same person, to charge one lot with the assessment on both. *Corry v. Folz*, 29 Ohio St., 320. As to paying an assessment from funds in court, see *Gould v. Baltimore*, 59 Md., 378. As to enforcing an assessment against a county, see *McLean Co. v. Bloomington*, 106 Ill., 209.

¹See *Taylor v. Palmer*, 31 Cal., 240, 254; *Neenan v. Smith*, 50 Mo., 525; *Carlin v. Cavender*, 56 Mo., 286; *St. Louis v. Bressler*, 56 Mo., 350; *Louisiana v. Miller*, 66 Mo., 467; *Higgins v. Ausmuss*, 77 Mo., 351; *Macon v. Patty*, 57 Miss., 878. See *Craw v. Tolono*, 96 Ill., 253; *Virginia v. Hall*, 96 Ill., 278; *Wolf v. Philadelphia*, 105 Pa. St., 25.

"There is a broad distinction, and one of universal recognition, between the foundation upon which is based the right of general taxation for governmental purposes, and that which supports the right of local assessments. The authority to impose either is referred to the taxing power; but the object of one, as giving the authority, widely differs from that of the other. All taxation is supposed to be for the benefit of the person taxed. That for raising a general revenue is imposed primarily for his protection as a member of society, both in his person and his property in general, and hence the amount assessed is against him, to be charged upon his property, and may be collected of him personally. But, on the other hand, local taxes for local improvements are merely assessments upon the property benefited by such improvements, and to pay for the benefits which they are supposed to confer; the lots are increased in value, or better adapted to the uses of town lots, by the improvement. Upon no other ground will such partial taxation for a moment stand. Other property held by the owner is affected by this improvement precisely and only as is the property of all other members of the community, and there is no reason why it should be made to contribute, that does not equally apply to that of all others. The sole object, then, of a local tax being to benefit local property, it should be a charge upon that property only, and not a general one upon the owner. The latter, indeed, is not what is understood by local or special assessment, but the very term would confine it to the property in the locality; for, if the owner be personally liable, it is not only a local assessment, but also a general one

In the case of the ordinary taxes no sufficient reason exists why those on lands should not be made a personal charge against the owner, if he is a resident and has the usual opportunity to be heard. The taxes are not so much assessed in respect to the particular lands as the value of the particular lands is taken as the measure of the owner's duty to the state. He is not taxed in consideration of state protection to that particular item of property, but he is taxed for the general protection which the state affords to his life, his liberty, his family and social relations, his property, and the various privileges the law grants to him. If a tax measured by the property should, in its enforcement, take from him more than that property is worth, it would not follow that the state had taken beyond the equivalent rendered. Indeed, the contrary would be almost certainly the fact. It is different in the case of an assessment made upon the basis of benefits. Such an assessment regards nothing but the benefit that is to be conferred upon the particular estate. The levy is made on the supposition that that estate, having received the benefit of a public improvement, ought to relieve the public from the expense of making it. In such a case, if the owner can have his land taken from him for a supposed benefit to the land, which, if the land is sold for the tax, it is thus conclusively shown he has not received, and he then be held liable for a deficiency in the assessment, the injustice — not to say the tyranny — is manifest. But such a case is liable to occur if assessments are made a personal charge; and cases like it in principle, though less extreme in the injury they inflict, are certain to occur.

as against the owner. The reasonableness of this restriction will appear when we reflect that there is no call for a general execution until the property charged is exhausted. If that is all sold to pay the assessment, leaving a balance to be collected otherwise, we should have the legal anomaly — the monstrous injustice — of not only wholly absorbing the property supposed to be benefited and rendered more valuable by the improvement, but also of entailing upon the owner the loss of his other property. I greatly doubt whether the legislature has the power to authorize a general charge upon the owner of local property which may be assessed for its especial benefit, unless the owners of all taxable property within the municipality are equally charged. As to all property not to be so specially benefited, he stands on the same footing with others; he has precisely the same interests, and should be subject to no greater burdens." Per *Bliss, J.*, in *Neenan v. Smith*, 50 Mo., 525, 528.

The cases are not uncommon in which, on a sale of lands for the payment of a special assessment for a drain or a levee, the whole estate assessed is sold and lost to the owner. Such instances may occur in the case of other improvements. If the statute allows a sale to the highest bidder, the land may be lost to the owner, leaving a balance of the assessment still uncollected. The loss of his lands is incident to a proper exercise of the power of the government, and, though severe, can give him no ground for complaint. The assessors have perhaps erred in their judgment; but this may occur in any tax proceeding. The estate was lawfully charged with the supposed benefit, and the charge has been enforced. But where and what are the benefits to the individual for which he can be called upon to pay any deficiency after a sale of the estate? Unless the whole legal basis of these assessments has been misunderstood by the courts, it would seem that there are none whatever. But the practice of making these assessments a personal charge against resident owners has not been uncommon. The English statutes go so far as to make them a personal charge against "the present or any future owner of the property" assessed until paid.¹ In the United States, personal assessments of this nature have been enforced in a great number of cases.²

¹ *Vestry of Bermondsey v. Ramsey*, Law Rep., 6 C. P., 247; *Plumstead Board of Works v. Ingoldsby*, Law Rep., 8 Exch., 62; affirmed, id., 174.

² See *New York v. Colgate*, 12 N. Y., 141; *Gilbert v. Havermeyer*, 2 Sand., 508; *Manice v. New York*, 8 N. Y., 120; *People v. Nearing*, 27 N. Y., 308; *Sharp v. Johnson*, 4 Hill, 76; *Cumming v. Brooklyn*, 11 Paige, 596; *McCulloch v. Brooklyn*, 23 Wend., 458; *Gouverneur v. New York*, 2 Paige, 494; *Doughty v. Hope*, 3 Denio, 253; *Bennett v. Buffalo*, 17 N. Y., 383; *People v. Brooklyn*, 4 N. Y., 420; *Brewster v. Syracuse*, 19 N. Y., 118; *Bleecker v. Ballou*, 3 Wend., 263; *Litchfield v. McComber*, 42 Barb., 288; *Baltimore v. Howard*, 6 H. & J., 383; *Eschback v. Pitts*, 6 Md., 71; *Clemens v. Baltimore*, 16 Md., 208; *Dashiell v. Baltimore*, 45 Md., 615; *Patterson v. Society*, etc., 24 N. J., 385; *Nor. Lib. v. St. Johns Church*, 13 Pa. St., 104; *New Orleans v. Wire*, 20 La. An., 500; *Nichols v. Bridgeport*, 23 Conn., 190; *Lowell v. French*, 6 Cush., 223; *Hill v. Higdon*, 5 Ohio St., 243; *Ernst v. Kunkle*, 5 Ohio St., 529; *Creighton v. Scott*, 14 Ohio St., 439; *Reeves v. Treasurer of Wood Co.*, 8 Ohio St., 333; *Le Fever v. Detroit*, 2 Mich., 586; *Lovell v. St. Paul*, 10 Minn., 290; *Hazzard v. Heacock*, 39 Ind., 173; *Burlington v. Quick*, 47 Ia., 222.

Where a statute provides that a special assessment shall be a personal charge upon the owner and a lien on the lot, an ordinance laying the assessment is valid, which provides that it shall be paid by the property holders

How much of this may be due to the fact that the right to make a personal assessment was not contested can only be matter of conjecture; but at present it must be conceded that the weight of authority is in favor of the right.¹

in proportion to frontage, nothing being said about its being a charge on the property. *Kendig v. Knight*, 60 Ia., 29. *Assumpsit* may be maintained against the person assessed, even though there be other remedy. *Dashiel v. Baltimore*, 45 Md., 615. The assessment may be collected by distress on the land itself, but in the absence of statute allowing it, *assumpsit* will not lie except against the person who was owner when the work was done. *Wolff v. Baltimore*, 49 Md., 446.

An ordinance provided for collecting the cost of a street improvement from the owners of the property benefited. By statute, the city was authorized to assess the cost of such improvements upon the property benefited, and to collect such assessments as other city taxes are collected. It was objected that the ordinance did not strictly pursue the power granted, as it directed the assessment to be made on the person. *Held*, that the assessment was "a personal debt to the extent of the property charged with the tax. The tax was intended to be, and is, a lien on the property; and the owner, to that extent, is answerable for its payment, as for a personal debt of any other kind; but we do not wish to be understood that his liability for that tax would extend beyond the value of the property taxed for the improvement." *Moale v. Mayor, etc., of Baltimore*, 61 Md., 224.

¹ The rendering of a personal judgment against the owner, when the tax is at the same time a charge on the land, is not in violation of the right to due process of law. *Davidson v. New Orleans*, 96 U. S., 97.

CHAPTER XXI

LOCAL TAXATION UNDER LEGISLATIVE COMPULSION.

The general doctrine. In our discussions hitherto it has been assumed as a fundamental idea in republican government, that the people who are to pay the taxes must vote them, either directly or by their proper representatives. State taxes must be levied under laws passed by the legislature of the state, and local taxes under the votes of the people concerned, or their officers or agents duly authorized.

It has also been assumed that all local powers must have their origin in a grant by the state, which is the source and fountain of authority. The power to tax is no exception to this general rule. Every municipal corporation, and every political division of the state which demands taxes from the people, must be able to show due authority from the state to make the demand. The authority in some cases is conferred by the state constitution, but if not found there it must be given by legislative enactment. No person is compellable to pay taxes for imposing which the authorities are unable to show a legislative grant of power.¹

If local powers of taxation must come from the state, it might seem to follow as a corollary that the state could at pleasure withhold the grant and exercise the power itself. But in the general framework of our republican governments, nothing is more distinct and unquestionable than that they recognize the existence of local self-government, and contemplate its permanency. Some state constitutions do this in express terms, others by necessary implication; and probably in no one of the states has the legislature been intrusted with a power which would enable it to abolish the local governments.² It has usually a large authority in determining the extent of local

¹ Inhabitants of a village have no inherent right to have taxes assessed and collected by officers of their own choice, and a statute authorizing them to be laid and collected by town officers is not unconstitutional. *Jones v. Kolb*, 56 Wis., 263; *Ryerson v. Laketon*, 52 Mich., 509.

² *People v. Hurlbut*, 24 Mich., 44.

powers, and the framework of local government; but while it may shape the local institutions, it cannot abolish them, and, without substituting others, take all authority to itself.

Local power to tax. Of all the customary local powers, that of taxation is most effective and most valuable. To give local government without this would be little better than a mockery. If any state has the power to withhold it, the exercise of such a power would justly be regarded as tyranny. Indeed, local taxation is so inseparable an incident to republican institutions, that to abolish it would be nothing short of a revolution.

By local taxation here we do not mean that which is exercised for state purposes. So far as local officers or local boards are made use of for the levy and collection of state taxes, they cannot be left at liberty to exercise their own discretion in determining whether they will act or abstain from acting. If the state, instead of issuing a separate warrant for the collection of the state taxes, shall see fit to apportion the whole tax among the several townships, leaving the township authorities to collect their several proportions under the same warrants which are issued for the collection of local taxes, there is no reason why the collection of this proportion of the state tax should not be made compulsory. No local community has any inherent right to decide for itself whether it will or will not bear its share of the state burdens, and obviously the state could not afford to confer the right. To do so would leave the state in the same precarious condition that the federal union was found to occupy before the right to tax had been conferred upon it by the constitution; a government without the means of enforcing respect, securing obedience, performing its obligations or perpetuating its existence.¹

¹ De Tocqueville, who studied American institutions with so much care, and commented upon them with such wisdom, has the following remarks, which bear directly upon the subject now under discussion: "In the nations by which the sovereignty of the people is recognized, every individual has an equal share of power, and participates equally in the government of the state. Why, then, does he obey the government, and what are the natural limits of this obedience? Every individual is always supposed to be as well informed, as virtuous and as strong as any of his fellow-cit-

Compulsory local taxation. But aside from cases of state taxation proper, there are some to which the same principles apply. They are cases in which taxation is usually intrusted to the judgment and discretion of the people to be taxed, but where the interest is really general, and referring the cases to the local community is merely a politic provision for the appor-

izens. He obeys the government, not because he is inferior to those who conduct it, or because he is less capable than any other of governing himself, but because he acknowledges the utility of an association with his fellow men, and he knows that no such association can exist without a regulating force. He is a subject in all that concerns the duties of citizens to each other; he is free and responsible to God alone for all that concerns himself. Hence arises the maxim that every one is the best and sole judge of his own private interest, and that society has no right to control a man's actions unless they are prejudicial to the common weal, or unless the common weal demands his help. This doctrine is universally admitted in the United States. I shall hereafter examine the general influence which it exercises on the ordinary actions of life. I am now speaking of the municipal bodies. The township, taken as a whole and in relation to the central government, is only an individual like any other, to whom the theory I have just described is applicable. Municipal independence in the United States is, therefore, a natural consequence of this very principle of the sovereignty of the people. All the American republics recognize it more or less; but circumstances have peculiarly favored its growth in New England.

"In this part of the union political life had its origin in the townships, and it may almost be said that each of them originally formed an independent nation. When the kings of England afterwards asserted their supremacy they were content to assume the central power of the state. They left the townships where they were before, and, although they are now subject to the state, they were not at first, or were hardly so. They did not receive their powers from the central authority, but, on the contrary, they gave up a portion of their independence to the state. This is an important consideration, and one which the reader must constantly recollect. The townships are generally subordinate to the state only in those interests which I shall term *social*, as they are common to all the others. They are independent in all that concerns themselves alone; and amongst the inhabitants of New England I believe that not a man is to be found who would acknowledge that the state has any right to interfere in their town affairs.

"The towns of New England buy and sell, prosecute, or are indicted, augment or diminish their rates, and no administrative authority ever thinks of offering any opposition.

"There are certain social duties, however, which they are bound to fulfill. If the state is in need of money a town cannot withhold the supplies; if the state projects a road the township cannot refuse to let it cross the territory; if a police regulation is made by the state it must be enforced by the town; if a uniform system of public instruction is enacted every town is bound to establish the schools which the law ordains." Democracy, ch. v.

tionment of state burdens. Mention of one or two of these cases will sufficiently illustrate the principle.

One of the first and highest of all the duties devolving upon the state is to preserve the public peace. For this purpose, peace officers are chosen, judges selected, the militia organized, and the executive armed with very high powers to meet the contingencies of riot and disorder. In some cases, a state police force has been established as assistant to, and in some degree to supersede, the ordinary officers; but in general, the belief has prevailed that the public peace and good order were better preserved by apportioning the duty among the several municipal divisions, retaining only a state supervision over all. This apportionment is made by general laws, under which counties, towns, etc., choose their own peace officers, and levy the necessary taxes to meet the expense of a local administration of police laws; and by municipal charters which confer large police powers upon the bodies incorporated.

But if the local authorities were allowed unlimited discretion to levy or refuse to levy the necessary taxes for the support of the local police force, it might possibly happen, that, from neglect or refusal to do so, one part of the state might be left a prey to disorder and violence, to the general detriment of the state at large. Of course no state could safely, for a single day, tolerate such a condition of affairs. A city or township could no more be left at liberty to decline taxation for police purposes, when the police laws and police force, and the tax which supports them, are made local by the law, than if all were general. The police organization of the state is really general, however it may vary in different localities, and the obligation to support it is general, however it may be apportioned. To this effect are the decisions.¹ And within the reason of these decisions would fall all cases in which the municipal corporations or subdivisions of the state are called upon to tax their people for the erection and repair of court-houses and jails, by means of which the police laws are rendered effectual. Such calls must, of course, be responded to.²

¹ *People v. Draper*, 15 N. Y., 532; *Baltimore v. State*, 15 Md., 476; *People v. Mahaney*, 13 Mich., 481; *People v. Common Council of Detroit*, 28 Mich., 228, 236; *People v. Common Council of Chicago*, 51 Ill., 17.

² The state cannot compel a city to erect a court-house for the county, but it may authorize the city to do so, either with or without a vote of the

The power that prescribes police regulations and varies them to meet the needs of different localities has undoubted authority to apportion the moneys raised for general purposes, on its own view of the local needs. The legislature may, therefore, require a county to appropriate a part of its revenue to the special needs of the police board of a city within its limits; and an act for that purpose is liable to no constitutional objection.¹

Roads and Bridges. Elsewhere in this work, the public highways have been spoken of as subjects of general concern to the people of the whole state. In a certain sense they are of local concern, because the local organizations construct and support them, but they are constructed for the general benefit and use of all the people, and only turned over to the localities as a matter of apportionment. This being the case, any township, city or county that neglects its duty in this regard may be compelled by the interference of the state, and on state account, to perform it.² This doctrine applies to the common highways and streets;³ whether it can be extended to excep-

electors or of the tax payers favoring it. *Callam v. Saginaw*, 50 Mich., 7. It has been held that the state has power to compel a county to tax itself for the purpose of making good to the people of one town the losses sustained in consequence of the removal of the county seat therefrom. *Wilkinson v. Cheatham*, 49 Ga., 258.

¹ *State v. Police Commissioners*, 34 Mo., 546.

² That the legislature, in laying out a road through several towns, has authority to apportion between them the expense of construction, see *Norwich v. County Commissioners*, 13 Pick., 60; *Hingham and Quincy Company v. Norfolk County*, 6 Allen, 353; *Salem Turnpike, etc., Corporation v. Essex County*, 100 Mass., 283; *Commonwealth v. Newburyport*, 103 Mass., 129; *Waterville v. Kennebeck County*, 59 Me., 80; *Shaw v. Dennis*, 5 Gilm., 405; *Mahanoy v. Comry*, 103 Pa. St., 362. It has been held that the legislature may order a reapportionment when justice requires it. *Cambridge v. Lexington*, 17 Pick., 223; *Attorney-General v. Cambridge*, 16 Gray, 247.

³ The legislature may compel a municipality to levy a tax for the construction of a local road. *Wilcox v. Deer Lodge Co.*, 2 Mont., 574. It may provide for the improvement of city streets and the laying of assessments therefor through commissioners of state appointment, instead of leaving the choice to the municipal authorities. *Matter of Woolsey*, 95 N. Y., 135. A constitutional provision that city officers shall be elected by the people does not preclude the legislature from clothing officers appointed by it for carrying out a public improvement with authority to perform acts which have an especial relation to and connection with such improvement; *e. g.*, a street improvement by park commissioners. *Astor v. New York*, 62 N. Y., 567.

tional means of passage and transportation will be considered further on.

There is special need for the state possessing and sometimes exercising a compulsory authority in these cases, springing from the fact that expenditures necessary for making satisfactory thoroughfares are likely in some localities to be so great that it would not be just that the local public should bear the whole. In such cases it has been seen that it is customary to create overlying taxing districts to meet the expense;¹ and in the case of bridges, in particular, while the towns or even the road districts are required in general to make them, it is customary to compel the counties to assist wherever the expense is exceptionally heavy, and perhaps to take upon itself the whole cost of any considerable structure.²

Schools. Wherever a system of public instruction is established by law, to be administered by local boards, who levy taxes, build school-houses, and employ teachers for the purpose, it can hardly be questioned that the state, in establishing the system, reserves to itself the means of giving it complete effect and full efficiency in every township and district of the state, even though a majority of the people of such township or district, deficient in proper appreciation of its advantages, should refuse to take upon themselves the expense necessary to give them a participation in its benefits. Possibly judicial proceedings might be available in some such cases, where a state law for the levy of local taxes for educational purposes had been disobeyed; but the legislature would be at liberty to choose its own method for compelling the performance of the local duty.³ And here again the state has the

But in California it is held that the legislature cannot, under the state constitution, exercise directly the power of assessment for a local improvement in an incorporated city, regardless of the will of the local community. *People v. Lynch*, 51 Cal., 15; *Schumacker v. Toberman*, 56 Cal., 508.

¹ *Ante*, p. 153.

² See *Supervisors of Will Co. v. People*, 110 Ill., 511. Also *Springfield v. Power*, 25 Ill., 187; *Logan Co. v. Lincoln*, 81 Ill., 156, and *Halsey v. People*, 84 Ill., 89, for the general power of the legislature to apportion county-revenues between a city within the county and the other municipalities.

³ It is noticeable that in those states in which a general system of public instruction has longest prevailed, the municipalities have not been disposed

same power to apportion the moneys raised for the general purpose that it has to apportion moneys raised for police purposes or for roads.¹

Public Health. The subject of the public health is another in respect to which the legislature may exercise for the general good the power of local taxation. The state may have its state board of health, but it will provide for local boards of health also, and as their duties concern the community at large, their members are to be regarded as state rather than local officials.² They are usually given large powers of police to prevent the spread of contagious and infectious diseases, with incidental authority to levy taxes or collect fees in the nature of taxes to enable them to make the exercise of power effectual.³ How far they shall be subordinated in their functions to the municipal authorities, the legislature has full liberty to determine. But the state may more directly, without the intervention of such boards, levy taxes or special assessments, either in a municipal subdivision of the state, or in a special district created for the purpose, when the public health appears to require it; and this power is frequently exercised for the construction of drains and levees, as is shown in the preceding chapter.⁴

to find fault because they were required to maintain schools; but the complaint, when there has been any, has come from single individuals, who have complained that the local powers of taxation were exercised with unreasonable liberality for this purpose. The cases of *Cushing v. Newburyport*, 10 Met., 508; *Stuart v. Kalamazoo*, 30 Mich., 69, and *Horton v. School Commissioners*, 43 Ala., 598, may be referred to. The contest has been made on other grounds in other states. See *Kinney v. Zimpleman*, 36 Tex., 554; *Commissioners of Schools v. Allegany Co.*, 20 Md., 439.

¹ A law for the distribution of school taxes may be changed after the tax is levied, and the last law will control. *School District v. Webber*, 75 Mo., 558. A city which has collected privilege taxes is subject to the control of the state as to their disposition, and the state may transfer them from the general fund to the school fund. *State Board of Education v. Aberdeen*, 56 Miss., 518. On the general subject of state control of local revenues, see *Mount Pleasant v. Beckwith*, 100 U. S., 514; *Merriwether v. Garrett*, 102 U. S., 472; *Logan County v. Lincoln*, 81 Ill., 156.

² *Taylor v. Board of Health*, 31 Pa. St., 78.

³ *Taylor v. Board of Health*, 31 Pa. St., 78; *People v. Supervisors of Macomb*, 3 Mich., 475.

⁴ See *Hagar v. Reclamation District*, 111 U. S., 701.

Contract Obligations. Those cases in which the state interferes to compel a political corporation or body, which exists and exercises authority by its permission, to meet its contract obligations and pay its just debts, may be defended on two grounds: *First*, that it is the right and the duty of the state to see that the powers it confers are not abused, to the injury of those who have relied upon them. *Second*, that when a political corporation has contracted a debt or incurred an obligation, it has already taken the initiatory step in taxation, and has, in effect, given its consent that the subsequent steps, so far as they may be essential to the discharge of such debt or obligation, may be taken. No matter, therefore, what the purpose of any lawful municipal contract, the taxation to perform it must be regarded as taxation by consent of the people who made it. And while the general law usually makes provision for such cases, by means of suits at law and perhaps executions, circumstances sometimes render it entirely proper that more speedy remedies be provided; and of these the most speedy and effectual might possibly be a special tax upon the delinquent municipality, ordered by the state, and perhaps levied through state agencies.¹ Nor would the power of the state in this regard be confined to obligations of a strictly legal nature; for the difference between a legal and moral obligation is frequently no more than this: that the one has a remedy provided for its enforcement, and the other has not. No question, for example, can fairly be raised of the right of the state, after it has formed two municipal governments where one existed before, and apportioned the debts and property of the old organization between the two new ones, to require and compel the payment of any balance

¹ See *Dunnovan v. Green*, 57 Ill., 63, a case of the levy of a tax by the state upon the municipality to provide for municipal obligations. Also *Decker v. Hughes*, 68 Ill., 33. It is no defense to a tax to provide for a city debt, that when the debt was contracted the property taxed was not included within the city. *New Orleans v. Estate of Burthe*, 26 La. An., 497.

By statute the moneys collected in certain towns as county taxes were required to be appropriated to the payment of the railroad aid bonds of such towns. Held, that the moneys belonged to the towns for this purpose, and they might sue the county to recover them. *Bridges v. Supervisors of Sullivan*, 92 N. Y., 570.

Where a tax is laid for the benefit of a locality, and there is no complaint by or on behalf of the municipality or its authorities that it is not consulted, the persons taxed cannot object. *Youngblood v. Sexton*, 32 Mich., 406.

found equitably due.¹ Another case is where the state requires one of its corporations to reimburse to the officers expenses they have incurred in an honest though mistaken effort to perform their official duty,² or the money lost or stolen from them without their own fault.³

Mobs and Riots. Another similar case is where a municipal corporation is compelled, by means of taxation, to make compensation for losses sustained within its limits at the hands of mobs and rioters. It has been thought from very early times that that political division of the county which failed to exert its authority for the effectual suppression of disorder, by means whereof innocent parties suffered from lawlessness and violence within its boundaries, might justly be required to make good the losses, and that its diligence in maintaining the empire of the laws would be quickened by the requirement.⁴ Such legislation is, in effect, only a part of the state police system, under which the municipal divisions are severally looked to for the preservation of the public peace within their respective limits.⁵ And speaking generally, it may be affirmed that in any case in

¹ *Harrison v. Bridgeton*, 16 Mass., 16; *Layton v. New Orleans*, 12 La. An., 515; *People v. Alameda*, 26 Cal., 641; *People v. Power*, 25 Ill., 187. See *Vose v. Frankfort*, 64 Me., 229. The reduction of the limits of a municipal corporation, after a tax is levied, will not defeat the tax in the part cut off, where a general statute provides that it shall not affect rights accrued. *Sherman v. Benford*, 10 R. I., 559.

² See the extreme case of *Guilford v. Supervisors of Chenango*, 18 Barb., 615; S. C. in error, 13 N. Y., 143, questioned in *People v. Tappan*, 29 Wis., 664, 687. In *Sinton v. Ashbury*, 41 Cal., 525, 530, *Crockett, J.*, asserts in strong terms the power of the legislature to compel a municipal corporation "to pay a demand, when properly established, which in good conscience it ought to pay, even though there be no legal liability to pay it." And see *New Orleans v. Clark*, 95 U. S., 644.

³ *Board of Education v. McLandsborough*, 36 Ohio St., 227. This would seem to follow from the doctrine laid down in the cases cited in the last note. It would not be admissible under the constitution of Michigan. *People v. Supervisors of Onondaga*, 16 Mich., 254; *Bristol v. Johnson*, 34 Mich., 123.

⁴ *Darlington v. New York*, 31 N. Y., 164. This case was decided under a law passed before the mischief was done; but no reason is perceived why the equity of such a claim might not be recognized by legislation adopted afterwards.

⁵ See *In re Pennsylvania Hall*, 5 Pa. St., 204; *People v. Chicago*, 51 Ill., 17; *Wider v. East St. Louis*, 55 Ill., 133, 137; *Favia v. New Orleans*, 20 La. An., 410; S. C., 2 Withrow's Corp. Cas., 374.

which compulsory taxation is found necessary, in order to compel a municipal corporation or political division of the state to perform properly and justly any of its duties as an agency in state government, or to fulfill any obligation legally or equitably resting upon it in consequence of any corporate action, the state has ample power to direct and levy such compulsory taxation, and the people to be taxed have no absolute right to a voice in determining whether it shall be levied, except as they may be heard through their representatives in the legislature of the state.¹

Doubtful cases. Where a county is divided, and property and debts are to be apportioned, political considerations are involved, and the legislature must directly or indirectly pass upon them.² But when demands are asserted against municipal corporations, growing out of contracts, or upon such grounds as might give rights of action against individuals, it is at least questionable whether the legislature may pass upon the facts, adjudge the corporation liable, and proceed to enforce payment by taxation. Such action, as against a natural person, would be clearly judicial, and therefore beyond the legislative competency; and it could only be sustained in the case of municipal corporations on the doctrine that their powers and rights are wholly at the legislative disposal; a doctrine dangerous in government, and, as we think, unsound in constitutional law. The opinion has sometimes been expressed that these corporations were entitled to the constitutional benefits of an ordinary trial.³ But this is denied in other cases, and perhaps a hearing before some court or board of audit might be all the corporation could demand.⁴ But such a hearing, if

¹ It is competent, by special statute, to compel one county to levy a tax in order to refund to another county the fair proportion of the expenses which have been incurred by the latter in trials concerning the distribution of the proceeds of sales of property lying in both. *Lycoming v. Union*, 15 Pa. St., 166. If a city exercises to the utmost its power of taxation, and the amount raised is not more than enough to pay necessary current expenses, no part of this can be applied on city bonds. *Tucker v. Raleigh*, 75 N. C., 267.

² See *ante*, p. 162.

³ See *Sanborn v. Rice County*, 9 Minn., 273; *People v. Haws*, 37 Barb., 440; *Plimpton v. Somers*, 33 Vt., 283; *Gage v. Graham*, 57 Ill., 144; *State v. Tappan*, 29 Wis., 664.

⁴ *In re Pennsylvania Hall*, 5 Pa. St., 204; *Borough of Dunmore's Appeal*, 52 Pa. St., 374; *Layton v. New Orleans*, 12 La. An., 515. Compare Com-

local municipal government is a matter of substance, they must be entitled to. It is not believed that the liability of the corporation must be made to turn on legal questions purely. On the contrary, it is more consistent with the dignity and honor of government that all demands against the public shall be settled on broad grounds of equity, instead of being tested by technical rules; and auditing boards are generally, with the utmost propriety, empowered to govern their action by equitable considerations. This only is maintained: that the legislature is not a proper auditing board as between the municipalities and third persons, though it may undoubtedly prescribe the rule of liability for all cases.

Nature of municipal corporations. Before considering some other cases, it may be well to refer briefly to the general nature of municipal corporations. Primarily these are public and their powers governmental. They are created for convenience, expediency and economy in government, and, in their public capacity, are and must be at all times subject to the control of the state which has imparted to them life, and may at any time deprive them of it.¹ But they have or may have another side, in respect to which the control is in reason, at least, not so extensive. They may be endowed with peculiar powers and capacities for the benefit and convenience of their own citizens, and in the exercise of which they seem not to differ in any substantial degree from the private corporations which the state charters. They have thus their public or political character, in which they exercise a part of the sovereign power of the state for governmental purposes, and they have their private character, in which, for the benefit or convenience of their own citizens, they exercise powers not of a governmental nature, and in which the state at large has only an incidental concern, as it may have with the action of private corporations. It may not be possible to draw the exact line between the two, but provisions for local conveniences for the citizens, like water, light, public grounds for recreation, and the like, are manifestly matters which are not provided for by municipal corporations

monwealth v. Pittsburgh, 34 Pa. St., 496. In *Vasser v. George*, 47 Miss., 713, 720, *Simrall, J.*, claims very broad authority for the legislature in adjusting claims against municipalities.

¹ *Merriwether v. Garrett*, 103 U. S., 473.

in their political or governmental capacity, but in that *quasi* private capacity in which they act for the benefit of their corporators exclusively.¹ In their public, political capacity, they have no discretion but to act as the state which has created them shall, within constitutional limits, command, and the good government of the state requires that the power should at all times be ample to compel obedience, and that it should be capable of being promptly and efficiently exercised. In the capacity in which they act for the benefit of their corporators merely, there would seem to be no sufficient reason for a power in the state to make them move and act at its will, any more than in the case of any private corporation. With ample authority in the state to mould, measure and limit their powers at discretion, and to prevent any abuse thereof, their action within the prescribed limits, in matters of importance to themselves only, it would naturally be supposed, should be left to the judgment of their citizens and of their chosen officers.

And this has been the view on which the several state legislatures have in general acted. The largest liberty of action has been permitted to municipal bodies in matters of local concern, and very seldom has the disposition been evinced to interfere any further than was deemed necessary to prevent an oppressive exercise of local powers, and to confine them to proper local purposes. And in those cases in which municipal corporations have been allowed to vote taxes for purposes not strictly local, but on the grounds of special local benefit, the legislation has seldom gone beyond giving permission to vote them if the electors of the locality should choose to do so. Whenever the legislation has gone further than this, the courts have generally held that the legislative power of control has

¹This twofold nature of municipal corporations has often been commented upon and been made the ground of important decisions. See *Bailey v. New York*, 8 Hill, 581; *Milbau v. Sharp*, 15 Barb., 193, per *Edwards*, P. J.; *Lloyd v. New York*, 5 N. Y., 369, 375, per *Jones*, J.; *Storrs v. Utica*, 17 N. Y., 104; *People v. Batchellor*, 53 N. Y., 123, per *Grover*, J.; *Western Savings Fund Society v. Philadelphia*, 31 Pa. St., 175; *Touchard v. Touchard*, 5 Cal., 306; *Holland v. San Francisco*, 7 Cal., 361; *San Francisco Gas Co. v. San Francisco*, 9 Cal., 453; *Western College v. Cleveland*, 12 Ohio St., 375, 377, per *Gholson*, J.; *Jones v. New Haven*, 34 Conn., 1, 12; *Hewison v. New Haven*, 37 Conn., 475, 483; *Detroit v. Corey*, 9 Mich., 165; *People v. Hurlbut*, 24 Mich., 44; *People v. Common Council of Detroit*, 28 Mich., 228, 238; *Hasbrouck v. Milwaukee*, 13 Wis., 37; *Atkins v. Randolph*, 31 Vt., 226.

been exceeded. In a leading case in Vermont, the legislature provided for the appointment, by a county commissioner, of a town agent, who should be empowered to purchase liquors on the credit of the town, and sell the same for such purposes as were admissible under what was known as the prohibitory liquor law, accounting to the town for the proceeds. The act was held invalid; the court declaring that "courts that have gone farthest in sustaining laws of state legislatures, against the restrictive provisions of state constitutions, repudiate entirely the idea that a person, whether natural or artificial, can be compelled by legislative enactment to become a party to, or to be subjected to liability upon, a contract."¹ A like doctrine has been strongly asserted in Massachusetts, where in a case in which the legislature had taken steps looking to the establishment of a pecuniary demand against a municipal corporation, without its consent, the court declared — having the municipal corporation in view as the party to be charged — that "it is not in the power of the legislature to create a debt from one person to another, without the consent, express or implied, of the person to be charged," and that if the attempt were made, "it would not be within the power of any judicial court to enforce such an act."² A similar ruling was made in Maine in a similar case.³ In Wisconsin, the power of the legislature to force taxation upon the people for objects not within the customary grant of local powers for governmental purposes has been pointedly denied in cases in which the objects contemplated were presumptively of great local importance and value; one case, being that of an improvement of the city harbor,⁴

¹ *Atkins v. Randolph*, 31 Vt., 226, 236, per *Barrett*, J. In this case Chief Justice *Black* is quoted, who, in that opinion of his in *Sharpless v. Philadelphia*, 21 Pa. St., 147, 165, which asserts legislative supremacy in matters of taxation in very strong, if not extravagant, language, nevertheless interposes this caution: "I do not say, however, that a contract between two individuals, or two corporations, can be made by the legislature. That would not be legislation. Besides, it would be impossible, in the nature of things; for the essence of a contract is the agreement of the parties."

² *Hampshire v. Franklin*, 16 Mass., 76, 84, per *Parker*, Ch. J. And see *Richland v. Lawrence*, 12 Ill., 1, 8.

³ *Brunswick v. Litchfield*, 2 Greenl., 28, 32; *Bowdoinham v. Richmond*, 6 Greenl., 112.

⁴ *Hasbrouck v. Milwaukee*, 13 Wis., 37. In this case, *Dixon*, Ch. J., speaking of the power of the legislature to make a contract for a municipal cor-

and another that of a state normal school, to be located in the city, whose money, collected for local school purposes, the state directed should be appropriated to its erection.¹ In Michigan, the authority of the state to appoint agents who, without the consent of a city, might issue obligations binding upon it for the purchase and embellishment of a public park for its citizens, was denied on like grounds.² In Kansas, where county officers

poration against its will, says: "It is certainly unnecessary at this day to enter into an argument or to cite authorities to show that, under a constitutional government like ours, the legislature has no such power." This decision is defended in an able opinion by the same learned judge, in *Mills v. Charlton*, 29 Wis., 400. See, also, *Knapp v. Grant*, 27 Wis., 147; *State v. Tappan*, 29 Wis., 664.

¹*State v. Haben*, 22 Wis., 660, per *Dixon*, Ch. J. "Was it competent," it was inquired in this case, "for the legislature, without the assent of the city or its inhabitants, thus to divert the funds raised and in the hands of the treasurer for the purpose of erecting a suitable high school building, and to declare that they should be appropriated, not for that purpose, but for the purpose of purchasing a site for a state normal school in the city? We are clearly of the opinion that it was not. It is well settled as to all matters pertaining to vested rights of property, whether real or personal, and to the obligation of contracts, that municipal corporations are as much within the protection of the federal constitution as private individuals are. The legislature cannot divest a municipal corporation of its property without the consent of its inhabitants, nor impair the obligation of a contract entered into with or in behalf of such corporation."

²*People v. Common Council of Detroit*, 28 Mich., 228. And see *People v. Hurlbut*, 24 Mich., 44. In this last case, in answer to an objection that there was no express saving of municipal rights in the state constitution, the following remarks are made (p. 107): "Some things are too plain to be written. If this charter of state government which we call a constitution were all there was of constitutional command; if the usages, the customs, the maxims, that have sprung from the habits of life, modes of thought, methods of trying facts by the neighborhood, and mutual responsibility in neighborhood interests, the precepts which have come from the revolutions which overturned tyrannies, the sentiments of manly independence and self-control which impelled our ancestors to summon the local community to redress local evils, instead of relying upon king or legislature at a distance to do so; if a recognition of all these were to be stricken from the body of our constitutional law, a lifeless skeleton might remain, but the living spirit, that which gives it force and attraction, which makes it valuable and draws to it the affections of the people, that which distinguishes it from the numberless constitutions, so called, which in Europe have been set up and thrown down within the last hundred years, many of which, in their expression, have seemed equally fair and to possess equal promise with ours, and have only been wanting in the support and vitality which these alone

had issued to a creditor of the county the county bonds, bearing a rate of interest higher than was permitted by the law under which the debt was contracted, it was decided that the legislature had no power to validate the bonds; this being in effect the making of a new contract to which the county had not assented.¹ In Illinois, similar decisions have been based upon a narrower ground. The constitution of the state provides that "the corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes;" and this, it is held, by implication precludes the levy of local taxes, or the contracting of local debts, by agencies created by the legislature, and not being the corporate authorities of the locality to be taxed, or to be bound by the debts.² While, as has been said, the ground chosen in those cases is narrow, the decisions are nevertheless of very general application, for the terms in which authority over the municipal corporations is conferred by other constitutions, though not the same, will

can give; this living and breathing spirit, which supplies the interpretation of the words of the written charter, would be utterly lost and gone."

¹ *Shawnee County v. Carter*, 2 Kan., 115.

² *People v. Chicago*, 51 Ill., 17; *People v. Salomon*, 51 Ill., 37; *Harward v. Drainage Co.*, 51 Ill., 130; *Lovington v. Wider*, 53 Ill., 302; *People v. Canty*, 55 Ill., 33; *Wider v. East St. Louis*, 55 Ill., 133; *Sleight v. People*, 74 Ill., 47; *Hinze v. People*, 92 Ill., 406; *Cornell v. People*, 107 Ill., 372. Under the constitution of 1870 the legislature cannot impose a burden by local taxation for levees upon any locality without the consent of the citizens affected, and a law is invalid which provides that upon petition the county court shall determine the liability of a levee to be paid for by the proceeds of assessment of the property benefited. The fact that a land owner may contest the matter in court is immaterial, since it is the decision of the court and not the land owner's choice that controls. *Uplike v. Wright*, 81 Ill., 49.

By "corporate authorities" in the constitution is meant "those municipal officers who are either directly chosen by the people to be taxed or appointed in some other mode to which they have given their assent. Trustees of a school district not organized under the general laws for that purpose are not such officers. *People v. McAdams*, 83 Ill., 356. But several towns may for a common purpose be united into a single district and commissioners of the district may be invested with taxing powers for district purposes. To this extent they are corporate authorities. *People v. Salomon*, 51 Ill., 37; *Park Com'rs v. Telegraph Co.*, 103 Ill., 83. And see *ante*, p. 151-159.

A ministerial officer may be empowered by law to impose a tax of a limited amount for current municipal expenses when the proper authorities neglect to act. *Davis v. Brace*, 82 Ill., 542.

generally be found open to similar implications. A similar decision has been made in Tennessee.¹

In one or two states an inclination has been manifested to accept, in its broadest signification, the language in which an unrestricted authority in the legislature over the whole subject of taxation is usually spoken of when there is no occasion for pointing out the limitations. It has already been shown by the citation of a large number of cases that no such unrestricted power exists, and it may safely be asserted that it ought not to exist. It is not difficult to give the most reckless robbery for private purposes the forms of constitutional action, and it is as easy to call it a tax as it was in former periods to call those exactions which were enforced by prisons and physical suffering and the quartering of a ruthless soldiery upon the people by the gentle name of benevolences. Taxation is a fearful power, but, like other legislative powers in representative government, it has its checks and balances. It is certainly limited as to purposes, and, as has been generally believed, by local rights immemorially existing and universally recognized.

A recent case in Alabama is of importance as bearing upon this question just mentioned. An act of the legislature of that state constituted a board, consisting of the president of the court of county commissioners of revenue of Mobile county, the mayor of Mobile, the president of the bank of Mobile, the president of the Mobile chamber of commerce, and one citizen of the county of Mobile to be appointed by the governor, who, and their successors, were to be commissioners for the purpose of improving the river, harbor and bay of Mobile.

¹ *Pope v. Phifer*, 8 Heisk., 682, in which an able opinion is delivered by *Freeman, J.* See, also, *State v. Leffingwell*, 54 Mo., 458; *People v. Hastings*, 29 Cal., 449. The case in Heiskell involved the validity of an act of the legislature appointing a state board for the levy of county taxes in a few counties named. The court held the act invalid, as being inconsistent with the right of local taxation which by implication was considered retained and intended to be perpetuated by the constitution. And after commenting upon the maxim that taxation and representation go together, the court query concerning the board in question: "Can it be believed for a moment that the power was ever intended to be delegated by the people to the legislature to authorize such a body, so appointed and constituted, to perform the functions assigned to them in this act? We think no reasonable man can come to such a conclusion."

The county commissioners of revenue were directed to issue to said board bonds to the amount of one million dollars, binding upon the county, to be made payable as they should determine, and "to levy such tax as may be deemed proper to pay such bonds." The constitution provided that "No power to levy taxes shall be delegated to individuals or private corporations;" but the act was nevertheless sustained in an opinion that does little more than to allude to the very important question arising under the state constitution, and avoids the discussion of general principles.¹

A case which was more considered was decided a few years since in New York. An act of the legislature had named commissioners, authorized them to lay out and construct roads in two townships named, at a cost per mile not exceeding twenty thousand dollars, exclusive of bridges. The sum necessary to be raised to meet the expense was to be obtained by a sale of town bonds, to be issued by the town officers on the requisition of the commissioners, and by the latter sold. The roads, it will be seen, were local roads, to be constructed by state agents at the cost of the towns; neither the people of the town nor the local officers being consulted or allowed any authority whatever in the premises, or even the privilege of being heard. The work was exceptionally if not extravagantly expensive, and it is difficult to conceive of any justifiable ground for forcing upon an unwilling people an expense of this description, when no corresponding burdens were imposed on other localities. The court of appeals, however, felt constrained to uphold this legislation, basing the decision upon the ground of a general power in the legislature over the subject of tax-

¹ *President and Commissioners, etc., v. State*, 45 Ala., 399. The case in which the question arose was a proceeding in *mandamus* against the county commissioners of revenue to compel them to issue bonds under the act to the harbor improvement board. In answer to the objection that here was a case of delegation of the power to tax, which by the constitution was forbidden, *Safford, J.*, delivering the opinion of the court, says: "even if it be a delegation of the taxing power to individuals or private corporations, that portion of the act only need be vitiated." We should understand from this that the court did not regard the conferring upon this board the power of making the improvement, and of demanding and making use of bonds binding upon the county, for the purpose, as being equivalent to a delegation of the power to tax.

ation, which in this particular was not restricted by any express provision of the state constitution.¹

Conceding this to be sound doctrine, it must nevertheless be called hard doctrine. Such legislation stands wholly apart and distinct from all the ordinary provisions for the construction and support of highways. The customary regulations are made on some rule of apportionment, and this case had no rule but the special legislative determination.² And it may well have been regarded by the people concerned as specially objectionable, because depriving them of one of the privileges intended to be secured to them by the state constitution. That instrument had provided that local officers should be chosen by the voters of the locality,³ and it doubtless intended that they should be left to exercise the usual local powers. While this appointment of commissioners for roads in the two towns avoided a violation of the words of the constitution, the violation of its spirit, unless the roads were in importance something more than ordinary town highways, would seem to be undoubted. It is a well known principle, however, that a legislative violation of the spirit of the constitution does not ordinarily permit of judicial correction.

A case in Pennsylvania in which the legislature provided for the construction of an exceptionally expensive road at the cost of the people living on and near the same, without their consent, and not, as the court found, for the local but for the general benefit, must be regarded as opposed to the one in New York. The court held that, on the general principles governing taxation, the legislature had no such power.⁴ And this decision finds, as we think, strong support in a recent decision of the

¹ *People v. Flagg*, 46 N. Y., 401. This case was followed in *Jensen v. Supervisors*, 47 Wis., 298. The act there under consideration was for the laying out of a state road, and was in no manner exceptional.

² In *Goodrich v. Turnpike Co.*, 26 Ind., 119, an act "to allow county commissioners to organize turnpike companies," which permitted the cost of constructing the turnpike to be assessed upon the real estate within three-fourths of a mile of the proposed road, was sustained. This was an exceptional method, but not unknown to the law, and it was neither oppressive nor was the whole matter taken out of the hands of the local authorities.

³ Const. of N. Y., art. X, § 2.

⁴ *Matter of Washington Avenue*, 69 Pa. St., 352. See *Craig v. Philadelphia*, 89 Pa. St., 265; *Philadelphia v. Rule*, 93 Pa. St., 15; *Seely v. Pittsburgh*, 82 Pa. St., 360.

court of appeals of Kentucky; a court whose decisions in matters of taxation are always able and strong. The case there was one of a city assessment. It was denied that the legislature possessed the power to require a certain portion of one street in a city to be improved in a manner exceptionally expensive, at the cost of abutting owners and without their consent, when by the law as to all the other streets, the owners of the larger proportion of the frontage must petition for such an improvement before it could be ordered.¹ The case was one of an invidious assessment, as were those in Pennsylvania and New York. "A law," it is said by the court, "imposing taxation on the general public, the evident intent and legitimate results of which are to equalize the burden so far as practicable, will not be held as violative of the fundamental law, merely because that desirable end may not be attained. But when, as in this case, the most probable, if not the necessary, consequence of the law is to produce the most oppressive inequality, and to compel a small minority of tax payers to provide, at their sole expense, an improvement of general utility and public interest, the construction of which costs more than double as much as the character of such improvements in general use, and from which, when constructed, the general public derives almost as much advantage as themselves, it assumes the character of an attempted exercise of arbitrary power over the property of this minority; it becomes, in a constitutional sense, a taking and appropriation of their private property to the public use without compensation, and it cannot be sustained, so long as the safeguards placed around the citizen by our fundamental law are respected and upheld. No such power over the property of the citizen can be constitutionally exercised by any department of our state government; and whenever it is attempted, it is the imperative duty of the judiciary to interpose in behalf of those whose constitutional rights are being thereby prejudicially affected." Whatever may be thought of the relative soundness of these decisions in matters of law, those which deny the power to levy such invidious burdens are most likely to conduce to equality and fairness in matters of local taxation, and to just purposes and purity in legislation. It is difficult to conceive of a more corrupting power than that of

¹ *Howell v. Bristol*, 8 Bush, 498, per *Lindsay*, J.

voting taxes by those who are not to feel them, especially when the expenditure may be confided to those who have no interest personally or as corporators, and who will presumably be concerned only to the extent that they can make a personal profit of the taxes which others are to pay.

In another recent case in New York, it is decided that the legislature may require a village to levy a special tax to be expended in the construction of a state educational institution at that locality.¹ This decision is based upon the sovereign power of the state to tax and apportion the public burdens, a power which, unless it is subject to implied limitations, would enable the legislature of a state to require its capital town to construct the state house, another town to construct the state prison, and so on, to the entire relief of the state at large. It has been seen that a decision in Wisconsin is opposed to the one just cited, and that derives strong support in more recent cases in Illinois² and Michigan.³

The New York cases which have been mentioned find abundant justification in an earlier case in the same state, and could not well have been decided otherwise without rejecting that as an authority. The facts in that case were the following:

Certain citizens of Utica, in order to secure the connection of the Chenango canal with the Erie at their place, entered into a bond conditioned to pay to the state some \$38,000, the estimated increased expense in bringing the canal to that point, instead of to another which had been proposed. Having thereby secured the location, the legislature then interfered for their relief, and required the amount of the obligation to be assessed as a tax upon the real estate of the city of Utica. Was this a constitutional tax? The supreme court of the state held that it was. "The general purpose of raising the money by tax was to construct a canal, a public highway, which the legislature believed would be a benefit to the city of Utica as

¹ *Gordon v. Cornes*, 47 N. Y., 608.

² *Livingston County v. Weider*, 64 Ill., 427, is specially referred to. This case is commented on and explained in *Burr v. Carbondale*, 76 Ill., 455, in which it was held competent to *permit* a locality to vote special aid to a state building. See, also, *Hensley v. People*, 84 Ill., 544; *Livingston Co. v. Darlington*, 101 U. S., 407.

³ *Callam v. Saginaw*, 50 Mich., 7.

such, and, independently of the bond, the case is the ordinary one of local taxation to make or improve a highway."¹

How far the principle of this case can be carried beyond the exact state of facts upon which it was decided is a question of the highest interest. Would it, for instance, have been within the power of the legislature to compel the city of New York to bear the whole cost of the Erie canal? or to construct at its own cost the Erie railroad? Or might the whole cost of the Hoosac tunnel be thrown upon Boston? Or might Chicago or St. Louis be compelled to construct a system of railways through the state, on the ground that in the opinion of the legislature the railways would specially benefit the city which was made a terminus? If a power to require such expenditures can rest in the hands of any legislature, restrained only by a sense of the responsibility of its members to their constituents, there is always a possibility that the members may at some time discover that a majority of the constituencies would be pleased to see the power exercised.²

¹ *Thomas v. Leland*, 24 Wend., 65, 67, per *Cowen*, J. Under the principles of this decision it might, perhaps, be held that the legislature had the power to require the refunding by the municipalities of commutation moneys, or moneys paid to procure substitutes, where the effect was to relieve the municipality from a draft. The purpose of the payment, so far as it went to aid the government by money or men, was public; and yet as such payments are made by parties for their own advantage, a law levying taxation to refund them is judicially declared to resemble "an imperial rescript," rather than constitutional taxation. *Thompson*, J., in *Tyson v. School Directors*, 51 Pa. St., 9, 22. In *Perkins v. Milford*, 59 Me., 315, 318, *Appleton*, Ch. J., in denying the authority to authorize the refunding of commutation moneys by towns, says: "The money was voluntarily paid, and without expectation of repayment. It was a gift—so understood, so intended by all the parties subscribing. It was no advance or loan to the town with the expectation of repayment. Whether the gift was to the soldiers enlisting, or to the town, makes no difference. The naked question recurs, Can the town raise money to give to individuals? This is not a gift to any public purpose. It is a gift as a recompense for past generosity. If a town can give to A. it can give to B. If it can give little it can give much. If it can give, then every man holds his estate subject to the will of the majority, who can give away as much or little as they please. Taxation is for public purposes, and for those the right of the government to impose taxes is unlimited. Taxation is imposed by the state to meet its exigencies. But taxes to meet the plaintiff's claims would be taxes for a private purpose, for a gift to an individual."

² In *Freeland v. Hastings*, 10 Allen, 570, 580, *Bigelow*, Ch. J., speaking of the right of the state to apportion among the municipalities the expense of

Another recent case in New York seemed to interpose a check to the unlimited power of the legislature over the taxation of municipal corporations. The point of the decision was, that towns could not be compelled to give aid to railroad corporations by subscribing to their stock. The decision was an able one, and made by the court of last resort.¹ But this decision, so far as in the nature of things it would be possible, was shortly afterwards qualified, and, as it would seem, overruled by the assistant court, called the commission of appeals. The case decided by this court asserts a power in the legislature broader and more absolute than has ever been applied in this country, by any court of corresponding jurisdiction and dignity, whose decisions have fallen under our notice. The point of the decision was, that where the legislature had once empowered a commissioner, appointed for a town, but not by it or by any town officer or authority, to subscribe for the town to the stock of a railroad corporation, on the condition precedent of obtaining the assent of a majority of the resident tax payers, the legislature had full power afterwards to remove the condition and empower the commissioner to bind the town by a subscription without it. "As it is obvious," say the court, "that all the property of a town, as an artificial being, is public property, and must usually have proceeded from the exercise of the power of taxation, and as the private rights of individuals residing in the town can only be affected through the exercise of the power of taxation, it follows that the substantial power of the legislature, through the power of taxation, is broad enough to sustain the requirement to a town to aid in the construction of a railroad, in the construction of which, in the judgment of the legislature, it has a public interest. And if it may do this directly by the imposition of a tax,

highways, etc., says: "Perfect equality in the allotment of public burdens is unattainable. If they are distributed on just principles, applicable alike to all on whom they are imposed; if no undue discrimination is made among those on whom a charge or duty is laid; if no tax is assessed which is disproportionate, or 'without the assent of the people or their representatives,' substantial equality will be attained, and no legal or constitutional right or privilege will be violated or evaded." This seems to us an admirable statement of the principles governing the imposition by the state of burdens upon the municipalities.

¹ *People v. Batchellor*, 53 N. Y., 128, opinion by *Grover, J.*

and the direct and immediate employment of the money raised, it is not perceived how the issuing of bonds, with the only contingency of taxation to follow, can be beyond the legislative power, nor how the more remote possibility of becoming chargeable by reason of holding stock can alter the case."¹

As the commissioner who made the subscription was not a town officer, nor a town agent with the town's consent, it is manifest that he was able to accomplish what was said by the eminent Pennsylvania judge whose views have been quoted, to be "impossible in the nature of things"—a contract without the consent of the parties.²

It must, we should suppose, be conceded that the doctrine that the legislature may do anything to which it gives the form of taxation, and which is not expressly forbidden by the constitution, is necessarily corrupting in practice. It constitutes a standing invitation to corrupt classes of the state to flock to the state capital with schemes for enriching themselves at the expense of localities; and it would be remarkable if they were not often successful. Perhaps, if the state were owner of important public works, a more tempting attraction might thereby be presented, and the municipalities be left unmolested. But even this might prove otherwise, for the evils of vicious legislation are likely to increase and multiply in every direction when once it is admitted that they are subject to no legal restraints, and that the central authority may legislate on local matters which concern only the locality, and concerning which the members acting will know nothing except as interested parties may undertake to inform or misinform them.

All the property of a municipal corporation may be assumed to come from taxation. If any of it comes from gift or grant, it is not believed that the nature of its ownership is any different on that account, unless the gift or grant was charged with a trust. It is public property, but public for the purposes of the municipality, and not for the purposes of the state. If

¹ *Johnson, Com.*, in *Duanesburgh v. Jenkins*, 57 N. Y., 177, 187. The decision in the case reversed the decision in supreme court made by Judges *James, Bockes, Rosecrans* and *Potter*.

² *Black, Ch. J.*, in *Sharpless v. Philadelphia*, 21 Pa. St., 147, 165. See, also, what is said by *Mellen, Ch. J.*, in *Bowdoinham v. Richmond*, 6 Greenl., 112, 114.

any of it has been raised for special purposes, under state authority, the state may compel its proper application. The state must have a power of direction, also, in cases where municipal powers are so modified as to preclude the contemplated purpose being followed; but it is believed to be an unsound doctrine that the legislature of the state may, for that reason or any other, apply it to state uses, or even to local uses, against the consent of the people concerned. Mr. Justice *Story* early expressed the view that the legislature, changing, modifying, enlarging or restraining the local powers, must secure the property for the uses of those for whom, and at whose expense, it was originally purchased.¹ There can be little doubt that this is the view that has been generally acted upon, and that any other is, to say the least, less safe, either to the general interests of the state or of the municipalities. It is very true, as has often been said, the fact that a power is liable to abuse is no argument against its existence; it would only constitute a reason which should influence the people to expressly withhold the grant of power when framing their constitution. But when it is considered that the states in general have not been accustomed to exercise such a power, and that its existence is inconsistent with any substantial constitutional protection to local self-government—that feature of the American representative system which has usually been looked upon as the corner-stone of all—and must leave the municipalities at the mercy of legislative majorities, it may justly be questioned whether the recognition of the power is not an innovation. It is not to be forgotten that the power in question is “a power to destroy”—an expression which loses none of its force when

¹ *Terrett v. Taylor*, 9 Cranch, 43, 52. “It may also be admitted,” he says, in *Dartmouth College v. Woodward*, 4 Wheat., 518, 594, “that corporations for mere public government, such as towns, cities and counties, may, in many respects, be subject to legislative control. But it will hardly be contended that, even in respect to such corporations, the legislative power is so transcendent that it may, at its will, take away the private property of the corporation, or change the uses of its private funds acquired under the public faith. Can the legislature confiscate to its own use the private funds which a municipal corporation holds under its charter, without any default or consent of the corporators?” And, again, on p. 608, he says of the state: “It cannot recall its own endowments granted to any hospital, or college, or city, or town.” See, also, the discussion in *Merriwether v. Garrett*, 103 U. S., 472.

applied to municipal corporations,—and that it is capable of being exercised in legitimate modes to the destruction of private fortunes. And the subject seems to invite the remark, as bearing upon the question whether the early New York decision, which has been referred to, was not a departure from sound principle, that if the legislature of the state may vote the local taxes, or take the moneys which have been raised by taxation for local purposes, and appropriate them to other purposes in their discretion, on any assumption that, as they have now become public funds, they must be at the state's disposal, then the maxim that taxation and representation go together would seem to be merely a glittering generality, promising much, but assuring nothing.¹ For any reliance upon responsi-

¹ On this general subject, reference is made to the case of *Sleight v. People*, 74 Ill., 47. The facts were, that a railway was built through four townships—Oxford, Clover, Weller and Galva—of Henry county. Two of these townships—Weller and Galva—subscribed for capital stock and issued their bonds in payment of the subscription. The charter of the railroad company provided that “the taxes to be collected from said railroad company for county and township purposes, by the several counties and townships through which said railroad runs, shall be paid to and set apart by the county treasurer as a sinking fund to redeem the principal of the bonds issued by any township or townships in said county.” On behalf of the railroad company, the claim was made that the entire tax collected from the railroad company, for county and township purposes, in the several townships through which the railroad run, should be paid to and set apart by the treasurer of the county as a sinking fund, to be applied *pro rata*, in redeeming the principal of the bonds issued by the towns of Weller and Galva. *Schofield, J.*, considering this claim, says:

“The claim here made is for the taxes actually levied and collected for county and township purposes, from the railway company, in the towns of Oxford and Clover. If this amount shall be taken, there must necessarily be a deficiency to that extent in the county and township revenues, which will have to be supplied by additional taxation. The property liable to taxation in one municipality will thus be compelled to bear a burden of taxation imposed by the corporate authority of a different municipality, and this, too, without its consent, and in the absence of any presumptive corresponding benefits. The principle upon which alone this can be sustained is, that the legislature may, in its pleasure, impose debts upon counties and townships, and require their payment without regard to the wishes of the inhabitants and tax payers of such counties and townships; for it is evident that the practical result is precisely the same, whether it is said the taxes levied for county and township purposes on the property of the railway company in the towns of Oxford and Clover shall be set apart for the payment of the bonds issued by the towns of Weller and Galva, or that the

bility to constituents, as a check upon extravagant taxation and reckless misappropriation, becomes useless, and indeed worse than useless, because deceptive, if the constituency in general, instead of bearing the burden of evil legislation, may actually, in some cases, have the general burden diminished by the selection of particular communities for exceptional and invidious taxation. And any principle in representative government may well be considered obsolete when, as applied, it only removes the substantial responsibility and restraining power from the constituency concerned to a distant central authority.

county and these townships shall pay a sum equal to the amount out of their revenues for the same purpose. In either event, it is taking so much of the revenues of the county and of the towns of Oxford and Clover to pay the debts of the towns of Weller and Galva. But it has been repeatedly held by this court that the legislature is powerless to impose a debt upon a municipality against its consent; and those cases must be deemed conclusive on the questions involved here. *The People v. The Mayor, etc.*, 51 Ill., 17; *People v. Salomon*, 51 Ill., 87; *People v. Chicago*, 51 Ill., 58; *Madison Co. v. People*, 53 Ill., 456; *Hessler v. The Drainage Commissioners*, 53 Ill., 105; *Lovington v. Wider*, 53 Ill., 302."

See, further, *Elmwood v. Marcy*, 92 U. S., 289; *Allhands v. People*, 83 Ill., 284; *Board of Directors v. Houston*, 71 Ill., 318.

CHAPTER XXII.

THE REMEDIES OF THE STATE AGAINST COLLECTORS OF TAXES.

Remedies in general. It has been seen that the law sometimes provides very summary proceedings for the enforcement of the duty to pay taxes, and that the legislative competency to do so has been very fully sustained. With much greater reason may the law provide summary remedies against those who, having accepted official positions under the revenue laws, neglect or refuse to perform the duties which pertain to them, or endeavor to substitute a performance of their own for something of a different nature which the law has required. This is particularly true of tax collectors; they have only to collect money and pay it over to the proper custodian, and it is seldom that a question arises which can justify departure from the strict terms of their authority, or neglect in the prompt payment of what comes to their hands. And whatever hardships there may be in forcing summary payment by the person who is simply negligent in paying his dues, there can be none whatever in requiring speedy accounting and settlement by one who has, by his office, become custodian of the public funds; and he has the less reason to complain, since whatever are the evils which may be anticipated in the case of individual neglects, they are likely to be multiplied many fold, if one who has collected from numerous persons may then neglect or refuse to pay over his collections until it shall suit his convenience to do so.

The remedies which are at the service of the public authorities, and one or more of which are usually made use of, are the following:

Suit at the Common Law. The state, or any of its municipalities, for which moneys have actually been collected, may pursue its delinquent collector by suit at the common law, if under the circumstances that remedy shall be deemed adequate and suitable.¹ Where expedition is not important and the col-

¹ *Adams v. Farnsworth*, 15 Gray, 423; *Helvey v. Huntington Co.*, 6 Blackf., 317; *Wentworth v. Gove*, 45 N. H., 160; *Spencer v. Perry*, 18 Mich., 394.

If a county treasurer refuses to pay over moneys to a village entitled to

lector himself is unquestionably responsible, this may be all that is essential. Such a suit the collector can defend only on such grounds as would constitute a defense to a like suit as between other parties who stand in the relation of principal and agent. It would be a suit for money received by the collector for the use of the public; and he would not be permitted to rely on technical objections which might be made to the right of the public to the money.¹ If he receives the money to the use of the public, he should account for it; and it is immaterial that those who have paid it might successfully have resisted the collection from them. It has been elsewhere shown² that a collector *de facto*, or even an intruder, will not be permitted to resist the demand of the state upon him for taxes collected, by showing that he collected them without due authority. And it has been held that although a bond to perform the duties of an office would be void if there were, by law, no such office in existence, yet an irregular appointment of a person to an office which is established by law is valid as a contract to perform the duties of the office, and entitles the public to demand the fulfillment of the engagement.³ The principles here stated are applicable not merely to the case of a defect in the official authority, but to the case also in which defects, either technical or substantial, might have been urged to the tax the officer has enforced.⁴ The substantial fact is that he has received money for the state, and having done so, it is not his privilege to pause and question the right of the state to receive it; but he should pay it over, and leave those from whom it was received to present a claim to the state for the

it, a bill will not lie to enjoin a misappropriation, but suit should be brought at law, either against him or on his bond. *Hindman v. Aledo*, 6 Ill. Ap., 436.

¹ *Clifton v. Wynne*, 80 N. C., 145.

² *Ante*, p. 256. See, also, *Ford v. Clough*, 8 Me., 334; *Johnson v. Goodridge*, 15 Me., 29; *Orono v. Wedgewood*, 44 Me., 49; *Trescott v. Moan*, 50 Me., 347; *State v. Woodside*, 8 Ired., 104; *Lyndon v. Miller*, 36 Vt., 329.

³ *United States v. Maurice*, 2 Brock., 98.

⁴ *Williams v. Holden*, 4 Wend., 223; *Moore v. Allegheny City*, 18 Pa. St., 55; *People v. Cooper*, 10 Ill. Ap., 384; *Coons v. People*, 76 Ill., 383; *Lovington v. Trustees*, 99 Ill., 504; *Berrien Co. Treasurer v. Bunbury*, 45 Mich., 79. A *de facto* collector is liable to a town for money actually collected, but not for taxes which persons refused to pay because he was not lawfully an officer. *Lincoln v. Chapin*, 132 Mass., 470.

refunding, if they deny its right to retain it.¹ Even an unconstitutional tax, once collected, the officer has no right to retain, but he should account as in other cases.² The action in these cases is for the money had and received to the use of the public.³ For a mere neglect to perform the official duty to collect, an action on the case would be the appropriate remedy.⁴

It is not the right of the collector, in a suit against him for taxes collected, to set off a demand owing to himself by the municipality for which he acts, even though it be for unpaid salary.⁵

Collector's Bond. It is a customary precaution to require of any collector of public moneys that he shall give bond to secure a proper accounting. The form, or at least the requisites, of such a bond are commonly prescribed by statute, and statute remedies cannot be had upon it unless it is a good bond under the statute. But it is always lawful for one who has a duty to perform to a third person or the public, to give sureties for the performance thereof; and a bond by a public collector, which is not in the statutory form, may nevertheless be a good bond at the common law, upon which the usual common law remedies will be available.⁶ On this ground suits have been

¹ *Commonwealth v. Philadelphia*, 27 Pa. St., 497.

² In *Waters v. State*, 1 Gill, 302, and *Smyth v. Titcomb*, 31 Me., 272, it was decided not to be a good defense to a suit to recover taxes collected, that the tax itself was unconstitutional. In *O'Neal v. School Commissioners*, 27 Md., 227, there was a like ruling as to a tax claimed to have been unlawfully levied. In *State v. Baltimore & Ohio R. R. Co.*, 34 Md., 344, this doctrine was applied to a railroad company which, being required to pay to the state one-fifth of the fares on a certain branch, collected the fares, but declined to pay, alleging the unconstitutionality of the tax. See, also, *State v. Cunningham*, 8 Blackf., 339.

³ To charge the collector it is not necessary to show a conversion. If he has received funds and refuses to pay over on proper demand, or if the statute regulates the disposition to be made of them and he fails to make it, he is accountable. *Coons v. People*, 76 Ill., 383. The specific money collected belongs to the collector, and if he applies what is collected for one year upon a prior deficiency, the public authorities cannot compel a change of application. *Pratt's Appeal*, 41 Conn., 191.

⁴ *Charleston v. Stacy*, 10 Vt., 562.

⁵ *Waterbury v. Lawler*, 51 Conn., 171, explaining *Hartford v. Franey*, 47 Conn., 76.

⁶ *Claassen v. Shaw*, 5 Watts, 468; *Freeman v. Davis*, 7 Mass., 200; *Morse v. Hodsden*, 5 Mass., 314; *Burroughs v. Lowder*, 8 Mass., 373; *Sweetser v. Hay*,

sustained upon bonds which were given to one body or official board, when the statute required them to be given to another,¹ and also upon those which were so defective in any of their requisites as not to constitute a sufficient statutory bond.² If, however, the bond is given to an obligee different from that named in the statute, suit upon it should be brought in the name which appears in the obligation, though the suit will be for the use of the party entitled to the moneys collected.³ The important differences between a common law bond and a statutory obligation are, that upon the former common law remedies alone can be had; the statute will give no aid, either in respect to the right to institute suits or summary proceedings,

2 Gray, 49; *Horn v. Whittier*, 6 N. H., 88; *Treasurer v. Bates*, 2 Bailey, 362; *Goodrum v. Carroll*, 2 Humph., 490; *Governor v. Allen*, 8 Humph., 176; *Walker v. Chapman*, 22 Ala., 116.

The following points were decided in *Coons v. People*, 76 Ill., 383: Where one is collector of state and county taxes, and collects a special bounty tax, the fact that his bond describes him as collector of bounty tax, when no such separate office exists, will not avoid it. The bond required him to account for a special bounty tax of 1864, but the tax levied was for 1865. Held that the figures 1864 might be treated as surplusage. A special bond should be given by the collector for such a special tax, and it would be good as a common law bond whether required by law or not. And see *Berrien Co. Treasurer v. Bunbury*, 45 Mich., 79.

A township is under no common law liability to a county for a loss of county taxes through the defalcation of the township treasurer. *Hart v. Oceana Co.*, 44 Mich., 417. But the statute may impose the liability, and it may be enforced by *mandamus*. *Oceana Co. v. Hart*, 48 Mich., 319.

¹ *Van Hook v. Barnett*, 4 Dev., 268; *Justices of Christian v. Smith*, 2 J. J. Marsh., 472. And see *Supervisors of St. Joseph v. Coffinbury*, 1 Mich., 355; *People v. Johr*, 22 Mich., 461, 462; *Mallory v. Miller*, 2 Yerg., 113. The rulings in the federal courts are that a bond taken from a collector of taxes is good as a common law bond, though not required by law, or though not in statutory form when a bond is required. *Dixon v. U. S.*, 1 Brock., 177; *Postmaster-General v. Rice*, Gilpin, 554; *United States v. Howell*, 4 Wash. C. C., 620; *United States v. Tingey*, 5 Pet., 115.

² If, in addition to the condition stating the statutory duty, a bond contains a qualification which is beyond the statute terms and unreasonable, it may be regarded as a nullity and treated as surplusage. *Berrien Co. Treasurer v. Bunbury*, 45 Mich., 79.

³ *Stevens v. Hay*, 6 Cush., 229; *Governor v. Humphreys*, 7 Jones' L., 258; *Walker v. Chapman*, 22 Ala., 116. It may, perhaps, be otherwise when the name of the obligee is merely formal. See *Bay County v. Brock*, 44 Mich., 45; *Haynes v. Butler*, 30 Ark., 69; *Dudley v. Chilton Co.*, 66 Ala., 508.

or to the incidents to suits when they are brought.¹ Summary proceedings are therefore inadmissible on a mere common law obligation, because the common law never gave them. What has been said of the liability of the collector, to account for moneys received, is as applicable in a suit on any such bond, as in a suit for money had and received; if the terms of the bond cover the case, neither he nor his sureties can defend by showing that those who voluntarily have paid to him could not legally have been compelled to do so.²

But the liability upon the collector's bond must in all cases be governed by the condition; the sureties have undertaken for nothing more, and their obligation is to be strictly construed. It is important, therefore, in every case to see precisely what it is which the sureties undertake that their principal shall do. If they undertake that he shall "faithfully perform his duty, and pay over the moneys collected," they are liable for the moneys collected by him, whether with warrant or without, for his duty is to pay over all such moneys.³ The substantial inquiry will be, whether the officer "by virtue of his office has received money for the state. If he has, it is not his province to dispute the right of the state to receive it, unless the case shows that the tax payer has demanded it and he has refunded it" for lawful reason.⁴ On the other hand, if the sure-

¹ *Stevens v. Hay*, 6 Cush., 229; *Polk v. Plummer*, 2 Humph., 500; *Kinney v. Etheridge*, 3 Ired., 360; *Pickering v. Pearson*, 6 N. H., 559; *White v. Quarles*, 14 Mass., 451; *Calhoun v. Lunsford*, 4 Port. (Ala.), 345; *Lord v. Lancey*, 21 Me., 468; *Justices v. Smith*, 2 J. J. Marsh., 472; *Sweetzer v. Hay*, 2 Gray, 49.

² See cases cited on last page. Also *Kellar v. Savage*, 20 Me., 199; *Feigert v. State*, 31 Ohio St., 432; *Schuster v. Weissman*, 63 Mo., 552; *State v. Harney*, 57 Miss., 863; *Morris v. State*, 47 Tex., 583; *Swan v. State*, 48 Tex., 120; *Police Jury v. Brookshier*, 31 La. An., 736. Nor can he excuse himself from payment on the pretense that he fears claims against him by tax payers. *Gilbert v. Dougherty Co.*, 53 Ga., 191. Nor that he paid over the moneys collected to make up a deficiency on a tax of the previous year. *Wilkinson v. Bennett*, 56 Ga., 290.

³ *Johnson v. Goodridge*, 15 Me., 29; *State v. Woodside*, 8 Ired., 104. And see *Ford v. Clough*, 8 Greenl., 334; *Orono v. Wedgewood*, 44 Me., 49; *Trescott v. Moan*, 50 Me., 347; *Williamstown v. Willis*, 15 Gray, 427; *State v. Rushing*, 17 Fla., 226.

⁴ *Timberlake v. Brewer*, 59 Ala., 108. In California the collector is bound to pay over money collected, even though it was paid under protest and suit has been brought to recover it back. *San Francisco v. Ford*, 52 Cal., 193.

ties merely undertake for the collection of all rates for which the collector shall have "sufficient warrant under the hands of the assessors," a recovery cannot be had upon the bond for moneys which have not been collected by him by virtue of such warrant; the case not being brought by the facts within the terms of their obligation.¹

From what has already been said it will be understood that it is not the business of the collector to question the fairness or propriety of any tax which has been committed to him for collection. If the assessment is excessive, the party assessed must make the objection, and not the assessor. His duty is to collect the list committed to him, and he cannot excuse himself for any failure to exhaust his authority in collecting, on the pretense that the person taxed should not have been assessed at all, or should have been assessed otherwise than as he was.² Nor can he answer for a neglect of duty in attempting to collect by showing that the poverty of the person taxed would probably have made the attempt ineffectual; his duty is to exhaust his power under the warrant, and the legal evidence of the inability of the person taxed to pay the amount charged against him will then be furnished by his official return.³

But while the collector is not, in general, to be heard to question the validity of a tax which he has collected, he may always refuse to proceed in the collection of one for the enforcement of which his authority is insufficient. While he is bound to account for all sums voluntarily paid to him by persons taxed, he is under no obligation to commit trespass in the attempted

¹ *Foxcroft v. Nevens*, 4 Me., 72. An error not chargeable to himself, which deprives a collector of one mode of collecting which otherwise he would have had, will relieve him of the duty of collecting, and his failure to collect will therefore not be a breach of his bond. *Harpwell v. Orr*, 69 Me., 333.

² See *Williams v. Holden*, 4 Wend., 223; *Moore v. Allegheny City*, 18 Pa. St., 55; *Wilkinson v. Bennett*, 56 Ga., 290; *Walden v. Lee County*, 60 Ga., 296.

³ *Gorham v. Hall*, 57 Me., 58; *Colerain v. Bell*, 9 Met., 499; *Treasurers v. Hilliard*, 8 Rich., 412. The sureties undertake not only for the collector's honesty, but for his skill and diligence. If he has power to enforce payment by solvent parties and is entitled to credit for what he cannot collect from insolvents, he is chargeable with all uncollected taxes appearing when the settlement should be made, and for which he has not obtained credit. And the sureties are chargeable also. *State v. Lott*, 69 Ala., 147.

exercise of a void authority; and it is always a defense to him and his sureties, that the process committed to him would not have protected him in its execution.¹ Undoubtedly, also, the collector may decline to proceed in the collection of a tax illegally levied; as any person may refuse to recognize any illegal authority, or to obey an unconstitutional law. But he takes upon himself a great responsibility when he assumes to question the validity of a statute, or of the acts of his superiors. In any case he ought to be the last person to raise the question, and then only when necessary to his own protection. So long as the persons taxed voluntarily make payment of the tax, it is his duty to proceed with the collection.

It has been said on a preceding page,² that the collector should receive for the taxes money only, unless the statute permits him to receive something different. Money is always understood in the tax laws when nothing else is mentioned.³ Laws are sometimes passed making county or municipal obligations receivable for taxes or for some kinds of taxes, and when such laws exist, any obligations coming within their terms must be received, and a tender of them to the collector would discharge the lien of the tax.⁴ The same is true of state

¹ *Reynolds v. Lofton*, 18 Ga., 47; *Barlow v. The Ordinary*, 47 Ga., 639; *Cheshire v. Howland*, 13 Gray, 321; *Adams v. Farnsworth*, 15 Gray, 423; *Weimer v. Bunbury*, 30 Mich., 201; *State v. Rushing*, 17 Fla., 236.

² *Ante*, p. 452.

³ See *Johnson v. United States*, 5 Mason, 425; *United States v. Morgan*, 11 How., 154; *Miltenberger v. Cooke*, 18 Wall., 421; *Hartford v. Franey*, 47 Conn., 76; *Dickson v. Gamble*, 16 Fla., 687; *Jones v. Wright*, 34 Mich., 371; *Loftin v. Watson*, 32 Ark., 414; *West Baton Rouge v. Moores*, 27 La. An., 459.

A note given in payment of a special tax held void and not a satisfaction of the tax. *Doran v. Phillips*, 47 Mich., 228. See *Dickson v. Gamble*, 16 Fla., 687.

⁴ *Daniel v. Askew*, 36 Ark., 487. The collector cannot refuse to receive part payment because all is not tendered. *Coit v. Claw*, 28 Ark., 516.

A provision that state taxes may be paid in state warrants, county and township taxes in county and township warrants, respectively, does not bind the tax payer to make payment of each tax in the obligations mentioned, but he may pay in other funds. *English v. Oliver*, 28 Ark., 317. See *Wallis v. Smith*, 29 Ark., 354, for a discussion of Arkansas acts making state and county scrip receivable for taxes. County warrants issued since the adoption of the constitution of 1874 are not receivable in payment of a tax levied to pay indebtedness existing at the time of such adoption. *Loftin v. Watson*, 32 Ark., 414.

Where a county board levies a tax in currency which should have been

obligations which by their terms or by the law under which they are issued are receivable for taxes; the state in issuing them makes a contract with the creditors receiving them which it must abide by.¹ But the collector cannot exercise the option of the tax payer to pay in something besides money, in his own interest, and he cannot therefore make demands, which are by law made receivable for taxes, available to him in his settlement, unless he actually received them in payment.² The collector must also at his peril keep safely and account for whatever comes to his hands. It is no defense, when he is sued for a failure to account, that the moneys have been stolen from him, or otherwise lost, without fault or negligence on his part.³ This seems a very harsh rule, but it is, without question, a very necessary one.

When the time arrives for the collector to account and pay over his collections, no demand is necessary in order to fix upon him and his sureties a liability for failure to do so; but they may be sued at once, as soon as a default has occurred.⁴

levied in warrants, the collector must nevertheless collect in currency. *Graham v. Parham*, 32 Ark., 676. But it seems that even when he has collected in currency, if he pays county warrants to the treasurer his official liability is discharged, because the law makes the warrants a legal tender by the collector in payment of his indebtedness on account of the tax. *Asken v. Columbia Co.*, 32 Ark., 270. But see cases in second note following.

For a case of refusal to enjoin a collection in scrip where it appeared impossible to collect otherwise, see *Ranger v. New Orleans*, 2 Woods, 128. Compare *Auditor v. Treasurer*, 4 S. C., 311.

¹ *Antoni v. Greenhow*, 107 U. S., 769; *Baltimore, etc., R. Co. v. Allen*, 17 Fed. Rep., 171.

² *Commonwealth v. Rodes*, 5 T. B. Monr., 318. See *Frier v. State*, 11 Fla., 300; *Cheshire v. Howland*, 13 Gray, 321. The collector has no right to receive in payment of taxes the draft of his creditor upon himself. *Elliott v. Miller*, 8 Mich., 132.

³ *United States v. Prescott*, 3 How., 578; *United States v. Morgan*, 11 How., 154; *United States v. Dashiell*, 4 Wall., 182; *Morbeck v. State*, 28 Ind., 86; *Muzzy v. Shattuck*, 1 Denio, 233; *State v. Harper*, 6 Ohio St., 607. The rule held to be otherwise where public moneys in the hands of a public officer were seized by the rebel authorities by force. *United States v. Thomas*, 15 Wall., 337; *United States v. Huger*, 1 Hughes, 397. And in Iowa, where the terms of the bond are that the officer shall exercise "reasonable diligence and care," he is not liable if, notwithstanding due care, the money is stolen from him. *Rose v. Hatch*, 5 Ia., 149. Compare *State v. Lanier*, 31 La. An., 423.

⁴ *State v. McIntosh*, 9 Ired., 307; *State v. Woodside*, 9 Ired., 496. Where a treasurer by mistake pays to one district moneys belonging to another, the

The official bond of a collector is for the protection of the public, and not of individuals who may be injured by his trespasses or his neglect.¹ But under proper legislation a bond running to the state may cover the collection of municipal taxes, and be subject to suit by the municipal authorities.²

Liability of Sureties. The liability of a surety on an official bond corresponds to that which others take upon themselves when they assume responsibility for third persons. It may or may not be the same responsibility which rests upon the principal himself. The position of the officer is essentially different from that of his surety. The officer in accepting the official position accepts it charged with duties; and if he fails to perform them, he is legally responsible for the failure. But the surety assumes no responsibility except as he does so by the terms of an express contract, and the law charges him with nothing further. Any responsibility on his part must therefore be gathered from the very terms of the contract, and made out on strict construction.³ It follows, therefore, that if any alteration is made in the obligation after the surety has become a party to it, but without his consent, the alteration discharges him since it is no longer his contract.⁴ This would be the case even though the alteration tended to diminish the surety's responsibility, instead of to increase it; on the plain principle that contracts rest upon consent, and when there has been no consent there can be no contract.⁵

payment is no protection. *People v. Yeazel*, 84 Ill., 539. It is no excuse for a collector's failure to account for the collections of one year that he has paid them over to make up a balance of a previous year. *Wilkinson v. Bennett*, 56 Ga., 290. As to the liability of a collector to indictment for not accounting in Maine, see *State v. Walton*, 62 Me., 106. See, also, *People v. Bringard*, 39 Mich., 22.

¹ *Clark v. United States*, 60 Ga., 156; *State v. Harris*, 89 Ind., 363; *Brown v. Phipps*, 6 S. & M., 51. Public moneys cannot be garnished by a creditor of the collector. *Goldsmith v. Kemp*, 58 Ga., 106.

² *Haynes v. Buller*, 30 Ark., 69. See *Dudley v. Chilton Co.*, 66 Ala., 593.

³ *Miller v. Stewart*, 9 Wheat., 680, 702; *United States v. Boyd*, 15 Pet., 187; *Leggett v. Humphreys*, 21 How., 66; *Swanson v. Ball*, Hempst., 39; *Walsh v. Bailie*, 10 Johns., 180.

⁴ *Gass v. Stinson*, 2 Sumn., 453; *Smith v. United States*, 2 Wall., 219; *Dover v. Robinson*, 64 Me., 183.

⁵ "The alteration of the bond, after it was executed by the defendants, and without their consent, discharged them from all liability under it. It

The principle above stated applies to a case in which, by arrangement between the collector and the public authorities, based on legal consideration, some favor or privilege is granted him which in effect works a change in the contract though its terms are not altered. A pertinent illustration would be that of the authorities extending the time for the collector to account for moneys already collected, whereby, if the sureties remained chargeable, their responsibility would be continued in point of time and exposed to further risks. In the case of obligations in general, this cannot be done except with the consent of the sureties, and the principle applies with full force to the case of official bonds. But the rule would not apply to the official bonds of collectors of taxes, in any case where the law in force when the bond was given authorized the indulgence which has been granted, since the bond must be understood as being given with the law in view, and subject to anything that may lawfully be done under it. And even in the absence of any such law, if the legislature by special act or otherwise should give or permit to be given to a collector an extension of time to complete his collections, it would seem that the sureties would be in no position to object, since what is done is in the nature of a favor to them, to the extent that the collector is enabled to make further collections. Moreover the extension when granted does not bind the state; it is given without legal consideration, and may be repealed at any time.¹

does not now truly represent the obligation into which they entered. That obligation was that Jonathan Eldridge should act faithfully as collector of a tax of \$2,572.82, which had been already assessed; by the alteration of the bond, the obligation which it purported to impose on the defendants was, that the said Eldridge should act faithfully as collector of a tax of \$2,490.01, which was assessed after the bond was executed. This obligation they never consented to incur." *Metcalf, J.*, in *Doane v. Eldridge*, 16 Gray, 254.

¹ *State v. Carlton*, 1 Gill, 249; *Prairie v. Worth*, 78 N. C., 169; *Worth v. Cox*, 89 N. C., 44; *Bennett v. McWhorter*, 2 W. Va., 441; *Commonwealth v. Holmes*, 25 Grat., 771; *State v. Swinney*, 60 Miss., 39; *Smith v. Peoria*, 59 Ill., 412; *Nashville v. Knight*, 12 Lea, 700. Sureties are not discharged by the supervisors taking a new bond for which the law makes no provision, nor by their names being stricken off by the supervisors without authority. *State v. Mathews*, 57 Miss., 1. See *State v. Harney*, 57 Miss., 863, for a discussion of questions of duress in the giving of the bond, and of alteration. It is immaterial to the liability of the sureties that the bond was given after the time when by statute the principal's office might have been declared

But if the term of office is extended, the sureties are not responsible for the acts or defaults of the principal during the extended term.¹

Sureties cannot question the appointment of the collector under which their bond was given,² and if the principal was his own successor, and reported a sum of money on hand at the beginning of his second term, the sureties for that term are liable for it if it is not subsequently accounted for.³ In such a case the breach of the bond consists in the failure to account, and the breach occurs in the term when the accounting should take place.⁴ If the collector is lawfully superseded in his office, and turns over his uncollected rolls to his successor, the sums for which he and his sureties are then liable to account are not those shown by the rolls, but those which have been actually collected upon them — the transfer of the rolls relieving responsibility as to the remainder.⁵ A collector's admission of pay-

vacant. *Harris v. State*, 55 Miss., 50. As to what must be shown in a suit on the bond to charge the collector and his sureties, see *Houston Co. v. Dwyer*, 59 Tex., 118.

¹ *Brewer v. King's Sureties*, 68 Ala., 511. See *Brown v. Lattimore*, 17 Cal., 98. Where a collector fails to give a new bond when called upon as required by law, the sureties continue liable for subsequent defaults. *Tinsley v. Rusk Co.*, 42 Tex., 40.

² *Chapman v. Commonwealth*, 25 Grat., 721.

³ *Morley v. Metamora*, 78 Ill., 394. See *Hartford v. Franey*, 47 Conn., 76; *Bruce v. United States*, 17 How., 487; *Commissioners v. McCormick*, 4 Mont., 115.

As to the liability of sureties in different bonds where the collector was his own successor for several terms, and the sureties in the several bonds were not the same, and defaults existed in each term, see *United States v. Eckford*, 17 Pet., 251; S. C., 1 How., 250; *Detroit v. Weber*, 29 Mich., 24.

⁴ Where a sheriff as tax collector executes a new bond with sureties before there has been any default on the old bond, a subsequent default will be applied to the new bond. *State v. Wade*, 15 W. Va., 54. Sureties are liable for taxes collected during the collector's term upon assessment rolls received during a prior term. *United States v. Stone*, 106 U. S., 525.

⁵ *State v. Daspite*, 30 La. An., 1112; *West Baton Rouge v. Morris*, 27 La. An., 459; *Police Jury v. Brookshier*, 31 La. An., 736.

As to the rights of sureties in a general and a special bond of the collector as between themselves, see *Cherry v. Wilson*, 78 N. C., 164. Sureties are severally liable for the whole amount for which they have signed. *Police Jury v. Brookshier*, 31 La. An., 736.

As to the liability of one surety to another when the latter has been compelled to make good a principal's default, and the former has, by a division

ment is not conclusive upon his sureties, and therefore, if he gives receipt for taxes as paid which are not paid in fact, his sureties are not responsible as for actual payment;¹ nor are they accountable for a sum which he collects as a tax, but which in fact was never levied.² When a collector who has several taxes for collection pays over moneys and directs upon which tax they shall be applied, the direction is equivalent to an application, and the receiving officer cannot apply them otherwise without consent of the treasurer and his sureties.³

Where a collector's bond is in general terms, and conditioned for the faithful performance of his duties, or for the payment of all moneys collected by him, if by subsequent legislation new taxes are provided for, the collection of which is committed to the collector, his sureties are liable in respect to such taxes to the same extent as if they had been provided for before the bond was given. And this is so even though in providing for

of profits with the collector, received more than the amount delinquent, see *McLewie v. Furgerson*, 59 Ga., 644.

The payment by a collector to any but a person authorized to receive it does not rid him of liability, but if in good faith he so pays and the municipality gets the benefit of the money, it ought in equity to reimburse him. *School Directors v. Delahoussaye*, 30 La. An., 1097. See, for the same principle, *Clifton v. Wynne*, 80 N. C., 145; *Burns v. Bender*, 36 Mich., 195.

If the principal is put into bankruptcy the sureties cannot complain that he is not arrested or his goods seized before suing them. *Richmond v. Toothaker*, 69 Me., 451. They are liable though the principal is discharged in bankruptcy. *Richmond v. Brown*, 66 Me., 373.

¹*Hartford v. Franey*, 47 Conn., 76; *Reutchler v. Huckle*, 3 Ill. Ap., 144. A tax collector has no power to compromise a claim for taxes. *Trustees v. Guenther*, 19 Fed. Rep., 395.

²*Greenwell v. Commonwealth*, 78 Ky., 320. A collector's sureties are liable for license taxes which he should have collected, even though the licenses do not expire until after the time for his accounting. *Crawford v. Carson*, 35 Ark., 565. Where it is the duty of a treasurer to give a special bond upon the receipt of certain taxes, it is not the duty of the collector, before paying them over, to inquire whether such bond was given. *Woodall v. Oden*, 62 Ala., 125.

³*Readfield v. Shaver*, 50 Me., 37; *State v. Wade*, 15 W. Va., 524. While a bond conditioned for the collection of the taxes of 1872 and 1873 will not cover taxes of 1874 (*Prince v. McNeill*, 77 N. C., 398), yet one conditioned for collection of taxes during the officer's continuance in office will cover taxes laid in a year prior to his election if he actually collects them. *Commissioners v. Taylor*, 77 N. C., 404.

the further tax an additional bond was authorized to be taken, but which was not called for or executed.¹ But the law will not intend that new duties not yet existing, and not germane to the office, were within the contemplation of the sureties, or of their undertaking, when they entered into it; and therefore the bond of a sheriff, who is not the general collector of taxes, will not be held to cover his duties in respect to the collection of a special tax subsequently imposed upon him.² But the imposition of new duties upon the office will not affect the liability of the sureties in respect to such as were imposed upon it when their bond was given.³

The repeal of the law under which the bond was given does not affect the responsibility of the sureties, whose contract remains in full force as before.⁴

In many cases it is made the duty of some auditing board or other authority to examine the collector's accounts periodically, and come to a settlement with him for previous collections. Undoubtedly all such boards or authorities should perform their duty, and give the sureties such benefit as might accrue to them therefrom; but the legal view of provisions of law imposing such duties is, that they are made, not for the protection of sureties, but of the public. The sureties undertake for the conduct of the principal, and cannot require the state to protect them against his misconduct or neglect. If, therefore, they suffer from neglects which are not only his neglects, but also those of some other public officer or board, the loss must be borne by themselves. If periodical settlements would tend to

¹ *State v. Hathorn*, 36 Miss., 491. See *Stevenson v. Bay City*, 26 Mich., 44.

² *White v. East Saginaw*, 43 Mich., 567.

³ *Commonwealth v. Holmes*, 25 Grat., 771; *Smith v. Commonwealth*, 25 Grat., 780. If a collector fails to make collection of a tax by sale of a homestead when he might do so, he becomes liable, and a subsequent exemption of the homestead from sale will not relieve him. *Brooks v. State*, 54 Ga., 36. See *Davis v. State*, 60 Ga., 76.

⁴ *Tucker v. Stokes*, 3 S. & M., 124. See, for special cases of liability on a collector's bond, *State v. Hill*, 17 W. Va., 452; *Shaw v. State*, 43 Tex., 355; and for heavy damages on default—thirty per cent., *State v. Lowenthal*, 55 Miss., 589; and for presumption of legal performance of duty, *Supervisors v. Rees*, 84 Mich., 481. If the law makes no provision for compensation, the collector can retain nothing from his collections. *State v. Baldwin*, 14 S. C., 135.

their advantage, they will be expected to look after them in their own interest.¹

Summary remedies. So far, we have spoken of obligations and remedies, in providing for which no serious question of legislative power could well arise. But in the case of collectors of the public revenue, it has sometimes been thought important to compel them to place themselves under obligations and subject themselves to liabilities not demanded in other cases. Provisions of the following import are often met with:

1. That the statement of accounts by the state auditor or other public accountant shall, as between the state and its collector, be conclusive.

2. That, when the collector is in default, process in the nature of an execution may be issued against him by his superior officer, without any judicial finding, or any hearing, and this process shall be collected of the property of the collector and his sureties.

3. That, on application to some specified court, summary judgment may be taken against the collector on motion, without other process than short notice to show cause.

Upon this is to be remarked that the justification of such remedies must be found in the contract relations established between the state and the collector by the acceptance of office by the latter while such provisions are in force, and between the state and the obligors in the official bond by their giving the bond under the statute which provides this summary remedy. The bond, in such a case, is to be read as if the provisions of the statute were set forth at large in it, and had thereby received the express assent of the parties.² And this removes

¹ *United States v. Kirkpatrick*, 9 Wheat., 720; *United States v. Van Zandt*, 11 Wheat., 184; *United States v. Nicholl*, 12 Wheat., 505; *Dox v. Postmaster-General*, 1 Pet., 318; *Osborne v. United States*, 19 Wall., 577; *Ryan v. United States*, 19 Wall., 514; *Marlar v. State*, 62 Miss., 677; *State v. Atherton*, 40 Mo., 209; *Christian, Ex parte*, 23 Ark., 641; *Christian v. Ashley County*, 24 Ark., 142; *State v. Bates*, 36 Vt., 387, 398; *Detroit v. Weber*, 26 Mich., 284. If a collector is appointed who has, unknown to the surety, previously been a defaulter in the same office, the surety cannot claim release on the ground that the state has deceived him by appointing such a man. *State v. Rushing*, 17 Fla., 226.

² *Murray v. Hoboken Land Co.*, 18 How., 272; *People v. Van Epps*, 4 Wend., 387, 390; *Lewis v. Garrett's Adm'r*, 6 Miss., 434; *Chappee v. Thomas*,

the difficulty that would otherwise exist were the rights of a party to be concluded without giving him the opportunity of a judicial hearing.

It has been affirmed in Kentucky that it is competent to make the auditor's statement of the amount of taxes evidence against the sheriff who acted as collector of taxes in a proceeding against him for an accounting, and also in favor of the sheriff and against his deputy, who received the list to collect; and to give a summary remedy against both.¹ And, in another case, it was more distinctly decided that the auditor's statement must be conclusive where the statute so declares. "We acknowledge," it is said, "that this . . . does curtail the privilege of defense to be made by a collector, and places him on a footing different from that of other defendants in our courts, and we have no doubt that it is necessary to do so for the security of the revenue, and that, without it, not only great confusion would be produced in the finances of the state, but many frauds would be practiced on the treasury. If this defense of tender and refusal, or discount, or whatever it may be called, is allowed, what will soon be the consequence? The collectors need never settle their accounts with the proper department, for, if they do, it will only acquit them of costs. [And, after suggesting the probable evil results, it is added:] To prevent this the state has selected its own auditor, and required every claim to pass through his hands before any can be allowed, or any debtor be released. This rigor with regard to officers of the revenue is not new in the science of government."²

5 Mich., 53; *Pratt v. Donovan*, 10 Wis., 378; *Philadelphia v. Commonwealth*, 52 Pa. St., 451; *Whitehurst v. Coleen*, 53 Ill., 247.

¹ *Johnson v. Thompson*, 4 Bibb, 294. The point arose only incidentally in this case.

² *Mills, J.*, in *Commonwealth v. Rodes*, 5 T. B. Monr., 318, 324, citing, in support of his views, the action of the federal government in making transcripts from the books of the treasury evidence of delinquencies. For similar expressions, see *Waldron v. Lee*, 5 Pick., 323; *Smyth v. Titcomb*, 31 Me., 272. It was held in *Board of Justices v. Fennimore, Coxe*, 242, that a committee of the county commissioners did not conclude the collector by their settlement with him, but he might show errors on being sued for the balance. In Texas the controller's statement of accounts is not evidence in a suit against the collector. *Albright v. The Governor*, 25 Tex., 687. This would be the rule anywhere, in the absence of an express statute making it evidence.

In other cases, similar statutes have been enforced without any question being made of the competency to adopt them.¹

A summary distress warrant against the collector and his sureties can only be awarded where the bond is in accordance with the statute, and where all the statutory conditions exist. The process being extraordinary and in derogation of the common law, the steps leading to it must all have been taken; and if it is issued under any other circumstances than those under which the statute gives it, the officer issuing it will be a trespasser.² The liability is *strictissimi juris*, and cannot be extended a single step beyond the statutory permission. The same remark may be made of the case of application for judgment on motion. The statute must be strictly pursued, as the ordinary legal intendments do not apply in aid of the proceedings in such a case.³ But where the statute has been strictly pursued, the summary remedies have been sustained by the courts without hesitation. "The federal government," it is said by an able jurist of Georgia, "may summarily enforce the collection of its revenue out of defaulting receivers or other duly appointed agents. Upon like principles the state may collect taxes immediately out of the defaulting citizen; for that purpose the tax collector is authorized to issue execution. These powers of the government are founded in an imperious necessity. They are necessary to the preservation of the government, to the administration of the law, indeed to a maintenance of all the rights of the people. If the government were forced to submit the case of every defaulting tax payer

¹ See *Prather v. Johnson*, 8 H. & J., 487; *Billingsley v. State*, 14 Md., 369.

² *Weimer v. Bunbury*, 30 Mich., 201; S. C., 2 Am. Law Times, 87.

³ *Nabors v. The Governor*, 8 Stew. & Port., 15. And see *Walker v. Chapman*, 23 Ala., 116; *Graham v. Reynolds*, 45 Ala., 578. As to the recitals in the record, see *Hardaway v. The County Court*, 5 Humph., 557. Where the statute authorizes summary judgment against the collector and his sureties, the collector is a necessary party, and if he be dead, the summary remedy is gone. *Governor v. Powell*, 23 Ala., 579. If the bond is taken to the county trustee when it should have been to the governor, the summary remedy cannot be had. *Mallory v. Miller*, 2 Yerg., 113. And see *Boughton v. State*, 7 Humph., 190. So a bond dated fourteen months after the collection is *prima facie* not the statutory bond, and motion for judgment on it should be denied. *De Soto County v. Dickson*, 34 Miss., 150. But the fact that the penalty of the bond is smaller than the statute requires is no objection to it. *Mabry v. Tarver*, 1 Humph., 94.

and tax gatherer and financial agent to a jury, with the delays and uncertainties attending a judicial investigation, it could not command its revenue, it could not be administered.”¹

The necessity for a strict compliance with the statute in the issue of such process is seen in the further fact that the officer who issues it is usually a mere ministerial officer, without judicial power. As has been said in a case from which quotation has already been made, and in which, by statute, an inferior court issued the process, “the inferior courts have judicial powers, but I apprehend that this is not one. They act as mere agents of the state. They are instructed by the act to issue execution for the amount which appears to be due. There is no issue to try; there is no judgment to be pronounced. As *auditors*, it is their business to ascertain the amount due. and then to issue execution. So the state treasurer is the mere agent of the state. His business is to state the collector's account, and, if he is in arrear, to issue execution.”²

¹ *Lumpkin, J.*, in *Tift v. Griffin*, 5 Ga., 185, 191. The learned judge comments in this case upon the claim that the tax collector was entitled to a trial by jury, and declares that the case is, and always has been, and must be, an exception to the right of jury trial. And see *Waldron v. Lee*, 5 Pick., 323; *Smyth v. Titcomb*, 31 Me., 272; *Bassett v. The Governor*, 11 Ga., 307; *Harper v. Commissioners*, 23 Ga., 566; *Daggett v. Everett*, 19 Me., 373; *School District v. Clark*, 33 Me., 482; *Cruikshanks v. Charleston*, 1 McCord, 360; *Prather v. Johnson*, 3 H. & J., 487; *Billingsley v. State*, 14 Md., 369; *Hobson v. Commonwealth*, 1 Duv., 172; *Weimer v. Bunbury*, 30 Mich., 201.

² *Tift v. Griffin*, 5 Ga., 185, 193. It is added that, if the duty were judicial, it would make no difference, because it is exceptional.

The ordinary may issue execution against the collector and his sureties in a proper case, although he himself is a surety. And notice before issuing it need not be given the collector. *Walden v. Lee County*, 60 Ga., 296. An execution issued under the Georgia statute by the comptroller-general against a defaulting collector is an execution for taxes under the state constitution, and is enforceable against property exempted for the family from ordinary final process. *Cahn v. Wright*, 66 Ga., 119. For a discussion of statutory proceedings on behalf of the state against a defaulting collector and his bondsmen, see *Timberlake v. Brewer*, 59 Ala., 108. A warrant cannot be issued against a collector unless he is delinquent as to taxes so committed to him for collection that he could legally compel payment thereof. A liability for moneys voluntarily paid him cannot be thus enforced, and action will lie against the officer who issues a warrant to enforce it. *Pearson v. Canney*, 64 Me., 183. But in Maine a treasurer is not liable to a collector for issuing a warrant against him for failure to collect and pay over, if the assessors have given the treasurer a certificate that they have delivered to the col-

Precisely the same reasons sustain those acts of the legislature which forbid the courts interfering with the process which is issued in revenue cases. If it is important that the party in default should be precluded from a resort to dilatory proceedings of one kind, it is equally important that the power to interpose others should not be allowed to him.¹ Here again is a rule which seems severe, but the statutes which prescribe it do not go beyond those which have been sustained by the courts, in which is taken away the right to maintain replevin for property taken for taxes, or to take any other proceedings calculated to embarrass the collector's action. The legal view of such statutes is that, while they take away a specific remedy, they nevertheless leave to the party other remedies which are adequate to do him eventually full justice.²

Even as regards the summary proceedings, however, there are some principles which will constitute protection to the collector and his sureties. One of these must be, that they can only be proceeded against on notice with a hearing on the question of delinquency. We say nothing here of the evidence which may be received on the hearing; of its quality or its conclusiveness; but the principle, that one is not to be condemned unheard, should be considered inviolable. The hearing will of course be summary, and a substituted notice might be sufficient, where, in proper cases, the law so provides. Another is, that there shall be some official showing of the delinquency; something of an authoritative character, and based upon documents, returns or records, which show the facts. It has been decided in one case that an officer who could have no better evidence of a collector's default than the legal presumption that another officer, whose

lector a list and warrant in due form of law, notwithstanding such warrant was in fact legally insufficient. *Snow v. Winchell*, 74 Me., 408.

¹ *Eve v. State*, 21 Ga., 50; *Scofield v. Perkerson*, 46 Ga., 350.

² It has been decided in Georgia that the governor may be authorized to vacate the commission of a defaulting tax collector and fill the vacancy. "The running of the state machinery is so intimately connected with its treasury, and may be said to be so dependent upon it, and it is of such transcendent importance to its citizens and the public, that it cannot be subjected to the ordinary rules governing in other cases." *Trippe, J.*, in *State v. Frazier*, 48 Ga., 137. But the remedy by summary judgment for taxes collected cannot be had against one who has been ousted on *quo warranto* as a usurper. *Hartley v. State*, 3 Kelley, 233, 237.

business it was to deliver to the collector the proper tax rolls and warrant, had performed that duty, could not be empowered to issue execution on such a presumption, since the like presumption would be equally strong in favor of the collector, and should consequently protect him.¹ It was also decided in the same case that any such summary process—at least where the statute had prescribed no form—should show on its face the existence of all the facts necessary to give jurisdiction to issue it.²

The conclusion to be drawn from the authorities appears to be, that the officer, by accepting the public trust, submits himself to the laws which provide remedies for the enforcement of his duties, with this restriction, that final process is not to be issued against him unless the officer issuing it has evidence that a default has occurred. And so far as the officer himself is concerned, as his obligation does not spring from contract, but comes from the law itself, he may perhaps be subjected to such change of remedies, or provision for new remedies, as may be made by changes in the statute after his appointment or election. But summary remedies cannot be given against sureties except as they have assented to them, either expressly by their bond, or by implication in giving the bond under a statute which provides for them. And changes in the statute law which, if applied to their contract, would subject them to further responsibility, or to other remedies unknown to the common law, could not be applied at all.

The same principle seems to apply here as to the remedy by suit against the collector: while he cannot be compelled to

¹ *Weimer v. Bunbury*, 30 Mich., 201. In this case the court fully sustained the power to provide for this summary process, but held that a county treasurer, in whose office there was no evidence that the collector had ever had the tax warrant, and no evidence of delinquency, except the mere fact that the time for making return of taxes collected and delinquent had expired, could not be authorized to issue execution against the collector. Compare *Commonwealth v. Wilson, Myers* (Ky.), 127.

² *Weimer v. Bunbury*, 30 Mich., 201, citing to the point that jurisdictional facts must appear, *Nichols v. Walker*, Cro. Car., 394; *Rex v. Manning*, 1 Burr., 377; *Rex v. Mayor, etc., of Liverpool*, 1 Burr., 2244; *Frary v. Dakin*, 7 Johns., 75; *Mills v. Martin*, 19 Johns., 7; *People v. Koeber*, 7 Hill, 39; *Dakin v. Hudson*, 6 Cow., 221; *Bridge v. Ford*, 4 Mass., 642; *Cloutman v. Pike*, 7 N. H., 209; *Barrett v. Crane*, 16 Vt., 246; *Chandler v. Nash*, 5 Mich., 409; *Platt v. Stewart*, 10 Mich., 260; *Hart v. Newsom*, 14 Mich., 333.

make an illegal collection, or be rendered liable for neglect to do so, yet, if he actually collects a tax, he cannot defeat the summary proceeding by showing that the tax was unauthorized.¹

¹ *Palmer v. Craddock, Myers* (Ky.), 182. An act authorizing the treasurer to issue execution against persons making default in listing their property for taxation was considered and sustained in *State v. Allen*, 2 McCord, 55. But this seems to be going a great way. That a law for summary judgment against the collector and his sureties is not unconstitutional, see *Worth v. Cox*, 89 N. C., 44, citing *Oates v. Darden*, 1 Murphy, 500; and *Prairie v. Worth*, 78 N. C., 169. And see *State v. McBride*, 76 Ala., 51, that the judgment taken, though by default, is conclusive of the amount due.

CHAPTER XXIII.

ENFORCING OFFICIAL DUTY UNDER THE TAX LAWS.

Customary provisions. Under any system of taxation, most careful provisions are essential to insure obedience to the law on the part of those who are intrusted with its administration. The serious consequences that ensue when any important provision of law is overlooked or disregarded are sufficient to render such regulations prudent, and the perpetual temptations which invite officers to disobedience or evasion of the law must admonish the government of their necessity. It is to be borne in mind also that tax laws, however necessary, do not enlist the affections of the people, and that the public sympathy is not unlikely to fail the officers when they most need it in the performance of their duties. In general, the people submit to taxation as a hard necessity; and as every individual is likely to be impressed with a conviction that the laws seldom or never operate with equality or justice, he is also likely to be entirely willing to make his case one that shall escape the heavy burdens. The tax official is therefore expected to enforce the law against a community, the members of which excuse to themselves an evasion of its provisions on the ground that even then they perform their duties as nearly as do the others upon whom the like duty rests; and will feel, if compulsory steps are taken against them, something like a sense of personal wrong. The difficulty is complicated by the fact that the officers who make the assessments are chosen by the people assessed, and as the local assessments are usually made the basis for state taxation, their constituents will expect them to make the valuations sufficiently low to protect them against unfair assessments elsewhere. The sense of official duty must be strong and the firmness considerable that can resist under such circumstances the pressure for some departure from the strict rule of law; and the conclusive evidence that it is not always resisted is found in the notorious fact that men who take solemn oath to perform to the best of their ability the duty of assessing property at its fair cash value are ac-

customed to assess it at from one-fourth to two-fifths only, excusing their disobedience of the law on the general disobedience of others. The provision for a state equalization as a correction of this evil does not appear to cure this demoralizing disregard of law and official oaths, nor does any legal process seem adequate to the case.

Of the securities relied upon for the performance of duty by tax officials, besides those which may be found in the character of the officials themselves, or that may rest in the power of removal, the following may be mentioned:

1. *The Official Oath.* Upon this much less reliance is placed than formerly, for the reason, perhaps, that the community has come to tolerate—it may almost be said to demand—a disregard or evasion of its provisions, when the apparent interest of the district seems to require it. Moreover, as has been shown in another place, an official oath is not absolutely essential, and if neglected, the proceedings may still be valid. The oath is consequently of little or no importance, and probably might be abolished without detriment to the public service; certainly without detriment to the public morals.¹

2. *An Official Bond.* This is usually required of collectors only. The value of this depends on the law, on its terms and on the sureties, and there is no occasion to add here to what has been said in the last preceding chapter.

3. *Penalties for Neglect of Duty.* Of these great use is made. They are either penalties to be recovered in a civil action, or they are imposed as criminal punishments. For the cases of various officers connected with the public revenue system, particularly collectors, appraisers and other officers or agents in the internal revenue and customs service of the United States, it has been found necessary to go further, and to make some criminal misconduct and delinquencies punishable as felonies.

¹ Sufficient evidence of this is furnished too often by the further fact that men appointed from the ranks of respectability to perform duties under the internal revenue and other tax laws are found in very many cases to pay not the least regard to official obligations or official oaths, but to use the position as one of vantage for the purposes of public plunder.

4. *Common Law Remedies.* These lie back of those given by statute. The most useful and efficient of them all is that which is afforded by the writ of *mandamus*.

Mandamus: its nature. The writ of *mandamus* is a summary writ, issuing from the proper court, which commonly is the highest court of common law jurisdiction of the state, commanding the officer or body to whom it is addressed to perform some specific duty, which the party applying for the writ is entitled of right to have performed.¹ The writ issues only when the party to whom it is directed is in default; it cannot confer upon him an authority to do an act which could not voluntarily have been done; but it is a mandate to compel the exercise of an authority which the respondent already possessed but which he has wrongfully refused or neglected to perform. It is therefore a complete answer to the application for the writ, in any case, that the respondent has no authority of law to do the act which the applicant would have performed;² or that some further act remains to be done to complete the applicant's right.³ The writ, therefore, cannot require an official act by one after he has gone out of office,⁴ nor by one who, though elected, has never qualified and entered upon the performance of his duties.⁵ Nor can it issue in advance of

¹ 3 Bl. Com., 110; *Commonwealth v. Pittsburgh*, 34 Pa. St., 496; *Marathon v. Oregon*, 8 Mich., 372; *Ex parte Nelson*, 1 Cow., 417; *State v. Police Jury*, 29 La. An., 146; *High on Extraordinary Remedies*, ch. I.

² *Meriwether v. Garrett*, 102 U. S., 472; *Ex parte Rowland*, 104 U. S., 604; *Railway Co. v. Olmstead*, 46 Ia., 316; *Rice v. Walker*, 44 Ia., 458; *State v. Fournet*, 30 La. An., 1103; *State v. Police Jury*, 34 La. An., 95; *Saloy v. New Orleans*, 33 La. An., 79; *United States v. Clark County*, 95 U. S., 769; *United States v. Labette County*, 7 Fed. Rep., 318. *Mandamus* will not lie to compel an officer to notify a board to lay a tax to pay state scrip which has been judicially declared void. *State v. Comptroller-General*, 4 S. C., 195; *Graham v. Parham*, 3 Ark., 676.

³ *State v. Rice*, 35 Wis., 178; *State v. Herron*, 29 La. An., 848.

⁴ *State v. Perrine*, 34 N. J., 254. That where proceedings have been begun against a board, they may be continued against their successors, see *Bassett v. Barbin*, 11 La. An., 672. But the levy of a tax cannot be compelled after the time fixed by law for the levy has expired. *Ellicott v. Levy Court*, 1 Har. & J., 359. See *State v. Taylor*, 59 Md., 388. Nor can it be compelled by the surviving members of an extinct corporation, nor by a new corporation not in privity with the one extinct. *Barkley v. Levee Commissioners*, 93 U. S., 258.

⁵ *State v. Beloit*, 21 Wis., 280.

the time for the performance of a duty, on any assumption that it will not be performed in due season.¹

The Writ Not of Right. Even when a *prima facie* case for the writ is made out, its award rests in the discretion of the court, which will allow or deny it according as 'in its opinion justice requires,'² and it is in general a sufficient reason for denying it that another adequate remedy exists. Thus, it has been refused when applied for to compel the board of supervisors to audit and allow to one wrongfully assessed the tax he had paid; he having, in that case, an adequate remedy by suit against the assessors who had assessed him without jurisdiction.³

Discretionary Authority. The writ is not awarded to control the exercise of a discretionary authority, and it is therefore usually said that a judicial duty cannot be enforced by means of it. Such a statement is not accurate; a judicial duty

¹ *Commissioners of Schools v. County Commissioners*, 20 Md., 449; *State v. Burbank*, 22 La. An., 298. A *mandamus* will not be issued to compel the spreading of a tax on the roll in advance of the time when it is to be done. On the contrary, it will be assumed that the officer will perform his duty when the time comes. *Zanesville v. Richards*, 5 Ohio St., 589, 593.

Where the holder of ditch orders, which are not paid because the taxes have been set aside, can have the taxes re-assessed, he will not be entitled to an immediate levy on *mandamus*. *Brownell v. Supervisors*, 49 Mich., 414.

When a tax has been paid and the marshal has transferred to the payer the tax execution, *mandamus* will not lie at the suit of the land owner to compel the marshal to re-transfer the execution upon receipt of the tax. *Freeman v. Holcombe*, 67 Ga., 337.

The writ of *mandamus* cannot compel a board to meet and levy a tax at a time when it is not authorized by law to meet. *Graham v. Parham*, 32 Ark., 676. When the board of public instruction are to determine the amount of school taxes and the county commissioners to levy them, *mandamus* does not lie to compel the assessor to enter the school tax for collection until the proper determination is made. *Jones v. Board of Pub. Inst.*, 17 Fla., 411.

² *Weber v. Zimmerman*, 23 Md., 45; *Stickney, Ex parte*, 40 Ala., 160; *People v. Judge of Wayne Circuit*, 19 Mich., 296.

³ *People v. Supervisors of Chenango*, 11 N. Y., 563; *Byles v. Golden*, 52 Mich., 612; *State v. Miami Co.*, 63 Ind., 497; *Indianapolis v. McAvoy*, 86 Ind., 587. But where, by law, it is the duty of the auditor in a proper case to draw a warrant for repayment of a tax illegally collected, he may be compelled by *mandamus* to do so. *Henderson v. State*, 53 Ind., 60.

is as susceptible of being enforced by the process as any other when the right is clear, and when the judicial officer, if he obey the law, has no option, but must do some specific thing which the law requires of him. The more accurate statement would be, that while a judicial officer, or one exercising a judicial or discretionary authority, may be compelled to proceed in the performance of duty, he cannot be coerced in his judgment or compelled to exercise his discretion in a particular manner by means of this writ. But when a judge or other officer has no discretion as regards the particular act to be done, and a refusal to do some specific thing would be a wrongful denial of a right or a remedy, *mandamus* is a proper and suitable process to compel him to perform his duty.¹

¹ See *Ex parte Bradley*, 7 Wall., 364; *Stafford v. Union Bank*, 17 How., 275; *Ex parte Burr*, 9 Wheat., 529; *Ex parte Bradstreet*, 7 Pet., 634; *Meyer v. Dubuque Co.*, 43 Ia., 592. Where a board ought to hear an application for the laying of a tax and grant or refuse it, so that the applicant may appeal or pursue some other remedy, the refusal to entertain the application is ground for *mandamus*. *Pfister v. State*, 82 Ind., 382. A duty is said not to be certain and allowing of no discretion which can only be made to appear by ignoring the law and treating it as unconstitutional. *Ex parte Lynch*, 16 S. C., 32.

A singular instance of overlooking the distinction mentioned in the text is seen in *Ex parte Ostrander*, 1 Denio, 679; the more singular from the fact that it in effect overruled several previous cases in the same state. The case was one in which the court of common pleas had wrongfully dismissed an appeal; and the supreme court held the reinstatement could not be compelled by *mandamus*, even though the party wronged had no other remedy, because the common pleas had cognizance of the matter. And this, too, though the court found the dismissal to have been "in manifest violation of the provisions of the statute on that subject," and "an exercise of a power which the court did not possess." The previous cases of *Ex parte Caykendoll*, 6 Cow., 53; *People v. Superior Court*, 5 Wend., 114, and *People v. N. Y. Common Pleas*, 19 Wend., 118, which are plainly opposed to this, are not noticed in the opinion; but the case has often since been cited as authority, probably because the general principle which it lays down but misapplies — that a judicial discretion will not be controlled by this writ — is manifestly sound. We say misapplied, because, as the supreme court found, the common pleas had no discretion in the premises, and were clearly guilty of abuse. Recent New York cases place the doctrine on safer ground. In *Howland v. Eldredge*, 43 N. Y., 457, 461, *Grover, J.*, says of judicial tribunals: "They may, by *mandamus*, be compelled to proceed and determine the matter, but they cannot be compelled to decide in any particular way. If they could, it would no longer be their judgment or discretion, but that of the court awarding the writ." Applying this rule to auditing boards, the court often

It will not only lie, therefore, to compel an auditing board to proceed to the consideration of an account, and to pass upon it in some manner, but if the charges are legal, and it is the clear duty of the board under the statute to make the allowance,

compels them to allow claims which are legal demands, after they have once decided they will not do so. See *People v. Supervisors of Delaware*, 45 N. Y., 196, 200, per *Folger, J.*, who cites *Hull v. Supervisors of Onondaga*, 19 Johns., 259; *Wilson v. Supervisors of Albany*, 12 Johns., 416. In the still later case of *People v. Supervisors of Otsego*, 51 N. Y., 401, 407, *Earl, Com.*, explains the rule more fully, and shows how little foundation there is for the doctrine of *Ex parte Ostrander*, that a judicial body cannot be compelled to undo wrongful action by means of this writ. An extract from the decision in this case will be given further on.

Ex parte Bradley, 7 Wall., 364, is in striking contrast to *Ostrander's case*. An attorney, as the court found, had been unlawfully disbarred by an inferior court. "We agree," says Mr. Justice *Nelson*, "that this writ does not lie to control the judicial discretion of the judge or court, and hence where the act complained of rested in the exercise of this discretion, the remedy fails. But this discretion is not unlimited, for if it be exercised with manifest injustice, the Court of King's Bench will command its due exercise. Tapping on *Mandamus*, 13, 14. It must be a sound discretion and according to law. As said by Chief Justice *Taney*, in *Ex parte Secomb*, 19 How., 13: 'The power, however, is not an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice or personal hostility.' And by Chief Justice *Marshall*, in *Ex parte Burr*, 9 Wheat., 530: 'The court is not inclined to interpose unless it were in a case where the conduct of the circuit or district court was irregular or was flagrantly improper.' The judge who dissents in the case does so on other grounds. The following cases may be referred to as supporting like views: *Ex parte Conway*, 4 Ark., 302; *Wright v. Johnson*, 5 Ark., 687; *Ex parte Pile*, 9 Ark., 336; *Day v. Justices of Fleming*, 3 B. Monr., 198; *Applegate v. Applegate*, 4 Met. (Ky.), 236; *Castello v. St. Louis County Court*, 28 Mo., 259; *Roberts v. Holsworth*, 5 Halst., 57; *Merced Mining Co. v. Fremont*, 7 Cal., 130; *Ortman v. Dixon*, 9 Cal., 23; *People v. Bacon*, 18 Mich., 247; *People v. Judge of Wayne Circuit Court*, 22 Mich., 493; *People v. Pearson*, 2 Ill., 473; *Illinois Central R. R. Co. v. Rucker*, 14 Ill., 353; *Stephenson v. Mansony*, 4 Ala., 317; *Hudson v. Daily*, 18 Ala., 722; *Ex parte Lowe*, 20 Ala., 330; *Shadden v. Sterling*, 23 Ala., 518; *Ex parte Thornton*, 46 Ala., 384. Other Alabama cases make a more liberal use of this writ than would be sanctioned in other states. The whole doctrine may be thus summarized: If a body having judicial powers shall refuse to proceed to do what the law requires, it may be compelled to do it by this writ. If it has done an act which the law does not authorize, its duty is to undo it on request, and this duty may be compelled by this writ. But if it has acted in a matter which by the law was committed to its judgment or discretion, *mandamus* will not lie to correct its errors, for judgment and discretion are not to be controlled or coerced by this process.

that duty the members may be compelled to perform by means of this writ.¹

Case of Assessments. In the application of these principles to cases in which assessments are complained of as excessive or relatively unfair, it is manifest that the scope for the employment of the writ is not extensive. Assessors exercise a *quasi* judicial authority, and when property is to be taxed by value, the value must be determined by their judgment. If they fail to proceed in the performance of duty, they may be compelled to act, but no court can decide for them what their judgment is or ought to be. These principles are not only applicable to the case of the assessors proper but also to that of the appellate boards who review and revise their decisions, and they are well summed up by the supreme court of Massachusetts, in a case in which county commissioners had declined to abate a tax on behalf of one who claimed to have been over-rated. "If the commissioners," it is said, "had refused to hear and determine upon the complaint, this court would have issued a *mandamus* requiring them to do it. But the question whether the petitioner's taxes should be abated or not was a judicial question. And although it is within the province of this court to require the commissioners to decide the question, yet we have no power to decide it for them, or to determine what decision they shall make. No judicial officer, in determining a matter legally submitted to his discretion, can ever be required to be governed by the dictates of any judgment but his own. We are clearly of opinion that in refusing to abate the petitioner's taxes, the commissioners acted judicially, upon a subject of which they had final jurisdiction, and in which the exercise of their discretion cannot be revised by any other tribunal."² Similar language has been

¹ *Bright v. Supervisors of Chenango*, 18 Johns., 242; *Hull v. Supervisors of Oneida*, 19 Johns., 259; *People v. Supervisors of New York*, 83 N. Y., 473; *People v. Supervisors of Otsego*, 51 N. Y., 401; *People v. Supervisors of Macomb*, 3 Mich., 475; *Gunn's Adm'r v. Pulaski County*, 3 Ark., 427. Where the county court is to order a surveyor's report to be recorded "unless it see some objection to the report," the duty may be compelled by *mandamus*. *Delaney v. Goddin*, 12 Grat., 266; *Randolph v. Stalnaker*, 13 Grat., 523.

² *Gibbs v. County Commissioners of Hampden*, 19 Pick., 298, citing *Chase v. Blackstone Canal Co.*, 10 Pick., 244; *United States v. Lawrence*, 3 Dallas,

made use of in Pennsylvania in a case in which an inferior court had issued the writ to compel school directors to exonerate a person taxed. "This," it is said, "was an unprecedented application of the writ of *mandamus*. It is not the ordinary official duty of school directors to exonerate taxes, but rather to levy and collect them. If they were backward in the exercise of this official function, *mandamus* might be used to stir them up. But when they have set themselves in motion, and are proceeding to discharge the duty imposed by law, they are no longer subject to *mandamus*. Exoneration is a discretionary power incidental to their office, and in this instance would seem to have been exercised by a refusal to grant the relief asked for. We have no power to control a discretion vested in them, and no appeal lies from them to judicial tribunals."¹ This rule undoubtedly applies to all classes of assessments, and to all other actions of assessors which they are to perform according to the dictates of their own judgment. In New York, where a statute made it the duty of town assessors, when a majority of tax payers owning more than one-half the taxable property of the town had signed a certain paper, to make affidavit of the fact for a certain purpose important to the town, a *mandamus* to compel them to perform the duty was held unauthorized. "The affidavit of the assessors must be in accordance with what they believe to be the fact, otherwise they incur the moral guilt of perjury, irrespective of any determination the court may have made thereon. By the seventeenth section of the act, false swearing by the assessors is made perjury, and, should it turn out that they are right, and the court wrong, in their views, the only ground upon which they could escape conviction would be that the affidavit was not their voluntary act, but the result of coercion, which they had no power to resist. If this appeared upon the face of the affidavit, it is entirely clear that in no legal sense would it be their affidavit at all, but a mere nullity. It follows that there is no remedy provided by the act for the correction of

42. *Mandamus* will not lie to control the action of supervisors in equalizing assessments unless their refusal to proceed according to law is established. *Attorney-General v. Supervisors*, 42 Mich., 72.

¹*Woodward, J., in School Directors of Bedford v. Anderson*, 45 Pa. St., 388, 390.

errors into which the assessors may fall in respect to the matter referred to their determination. The statute having declared it to be their duty to make the affidavit when the fact exists, the court have power, by *mandamus*, to compel them to proceed and examine the evidence and determine the fact, and if, from their determination, it appears that the requisite consent has been given, to make an affidavit in accordance therewith. This is the universal rule in respect to all subordinate courts and tribunals clothed with the exercise of judgment or discretion. They may, by *mandamus*, be compelled to proceed and determine the matter, but cannot be compelled to decide in any particular way. If they could, it would no longer be their judgment or discretion, but that of the court awarding the writ. Their determination is conclusive, unless some mode of review is provided."¹

Where, however, the judgment of the proper board has been exercised and the sum at which property should be assessed has been determined upon, and any further act remains to be done to complete the work of assessment, the proper officer or board to do the act may be compelled by this writ to perform the duty. If assessors, for example, should refuse to conform their action to that of the board of review—their duty to do so being purely ministerial—*mandamus* would be the only speedy and effectual remedy available to correct their misconduct.² So the writ will lie to compel assessors to strike from the assessment roll non-taxable property which they have included in it. Here is a clear case of excess of jurisdiction; nothing is submitted to their discretion, because by the law the subject-matter of the controversy is put beyond their authority, and they can lawfully neither list it, nor value it.³ It will lie also

¹Howland v. Eldredge, 48 N. Y., 457. *Mandamus* will not lie to compel assessors to make oath that they have valued property as required by law, when in fact they have not done so. "Courts do not sit to compel men to take false oaths; and whatever duty the assessors may have omitted, they owe no duty to the public to commit crime, and no public exigency can require it of them." *Andrews, J.*, in *People v. Fowler*, 55 N. Y., 252, 254.

²*State v. Assessors*, 30 La. An., 261. See *People v. Supervisors of Ulster*, 65 N. Y., 300, reversing 63 Barb., 83; *People v. Supervisors of Ontario*, 85 N. Y., 323.

³*People v. Assessors of Barton*, 44 Barb., 148; *People v. Olmsted*, 45 Barb., 644. Compare *Miltnerberger v. St. Louis County Court*, 50 Mo., 172, which

where property is assessed to the wrong person; both the public and the individual assessed being concerned in having the assessment so made that a legal and just tax can be levied upon it. And if assessors omit from the roll property which is taxable, they may be compelled to insert it on the roll on the application of the proper law officer of the state.¹ So if some official act is required to be done before some portion of the taxable property can be assessed — such as a survey, or the determination of a township line — *mandamus* will lie to compel the performance of such act.²

In all these cases there is a clear legal right of the public or of a private party to have performed a certain act which the officer refuses to perform; and it is immaterial what is the nature of the duty, if in the particular case the officer has no discretion. Such cases would stand in pointed contrast to one in which attempt should be made to control the judgment or discretion of assessors, or of the appellate board of review,

possibly would appear *contra* if all the facts were given, but the statement of the case is somewhat imperfect. The case cites *Dunklin County v. District Court*, 28 Mo., 449, and *State v. La Fayette County Court*, 41 Mo., 221, which are cases of a different nature. *Mandamus* will lie to supervisors to compel them to obey an order of court to correct an erroneous assessment and refund moneys collected on it. *People v. Supervisors of Ulster*, 65 N. Y., 300.

¹ *People v. Shearer*, 30 Cal., 645. The case was one in which possessory rights in the public lands were held to be taxable, and ordered to be placed upon the roll. Possibly a private individual might have been relator in this case. See *People v. Halsey*, 53 Barb., 547; S. C. on appeal, 87 N. Y., 344. It was so held in *Hyatt v. Allen*, 54 Cal., 353. See, also, *People v. Purviance*, 12 Ill. Ap., 216.

² See *People v. Supervisors of Essex*, 85 N. Y., 612; *People v. Purviance*, 12 Ill. Ap., 216; *State v. Edgefield Co. Com'rs*, 18 S. C., 597; *Jones v. Board of Public Instruction*, 17 Fla., 411.

Mandamus issued to supervisor to compel him to deliver to the board of supervisors the corrected assessment roll of his town, that the same with proper warrant may be delivered to sheriff for collection. *People v. Hardenburgh*, 90 N. Y., 411.

If a county clerk has delivered, in compliance with the statute, the assessment books to a *de facto* assessor claiming under color of a legal appointment, he cannot be compelled by *mandamus* to obtain the books, or to make new ones, and deliver them to one claiming to be the duly elected assessor. The appointment cannot be collaterally questioned, and *mandamus* will not lie unless the right is clear. *People v. Leib*, 85 Ill., 494.

after an appeal has been taken to it.¹ So the assessor, when he has a mere ministerial duty to perform, like that of the delivery to some other officer of a correct copy of the assessment roll, in a case where he has assumed to make unauthorized changes, may be compelled on this writ to perform it.² And county commissioners, when they constitute the appellate tribunal for the hearing of complaints against assessments, may be compelled by this writ to proceed to the hearing, this being a right of the party which they have no discretion to deny.³

Political Duties. Recurrence to the general principles already stated will make it plain that *mandamus* is not a proper remedy for a failure in the performance of political duties, or for errors, intentional or otherwise, in their performance. Such duties are always confided to the political sense and political judgment of the people or their representatives, and their reasons for any particular action or failure to take action cannot in general be inquired into. If, therefore, the people of a township, or the proper board having the power, shall fail to vote such taxes as seem to be needful, the courts cannot interfere by *mandamus*. If they could do so, it would be the courts, and not the people, who in effect would exercise the local political authority.⁴

To this general rule, however, there are some very important exceptions. The power of the people to vote local taxes, it has already been seen, is not independent and absolute. They are restrained within certain bounds, and on the other hand they are compelled to act in some cases and to make levies, however unwilling they may be to do so. The most common case is, where a tax for some general purpose is required, and

¹ *Gibbs v. County Commissioners*, 19 Pick., 298. See *Miltenberger v. St. Louis County Court*, 50 Mo., 172.

² *People v. Ashbury*, 44 Cal., 616.

³ This seems to be recognized in *James v. Bucks County*, 18 Pa. St., 73, where, however, the party had deprived himself of the right to be heard. And see *Virginia, etc., Company v. County Commissioners*, 5 Nev., 841.

⁴ See *Union County Court v. Robinson*, 27 Ark., 116, where the endeavor was made to compel school district authorities to increase the school levy which the people had voted for the year, on a showing that it was insufficient for the support of proper schools.

a municipality neglects or refuses to levy the portion assigned to it by law. Here the local political community has no discretion, and its officers may be compelled by *mandamus* to obey the law. This remedy, therefore, may be had to compel a board of supervisors to assess upon the county the amount due from it to the state, after it has been adjusted and settled by the competent authority; and to compel a township to levy a tax as required by law to make good to the county a loss sustained by the default of the township treasurer.²

The remedy is equally available where the officers of a municipality wrongfully neglect or refuse to levy a tax for the satisfaction of some demand already established and settled, and for which the law requires a tax to be laid.³ In such cases the remedy may be had on behalf of the state or the municipality concerned, or by any individual whose demand the tax should pay. Thus, if one has recovered a judgment against a municipality which can only be paid by means of taxation, the levy of a tax to pay it may in proper cases be compelled.⁴ It

¹ *People v. Supervisors of Jackson*, 24 Mich., 237.

² *Hart v. Oceana Co.*, 44 Mich., 417; *Veghte v. Bernards*, 42 N. J., 388.

Mandamus will lie to compel the supervisor to extend school tax according to the estimate furnished him by district directors, though the county court (without authority) has forbidden it. *State v. Byers*, 67 Mo., 706.

³ See *Manor v. McCall*, 5 Ga., 522; *Beaman v. Board of Police*, 42 Miss., 237; *Commissioners of Schools v. County Commissioners*, 20 Md., 449; *Ex parte Common Council of Albany*, 8 Cow., 858; *Whitely v. Lansing*, 27 Mich., 131; *Morgan v. Commonwealth*, 55 Pa. St., 456; *Robinson v. Supervisors of Butte County*, 43 Cal., 353.

⁴ *Knox County v. Aspinwall*, 24 How., 376; *Supervisors v. United States*, 4 Wall., 435; *Von Hoffman v. Quincy*, 4 Wall., 535; *Galena v. Amy*, 5 Wall., 705; *Walkley v. Muscatine*, 6 Wall., 481; *Riggs v. Johnson County*, 6 Wall., 166; *Weber v. Lee County*, 6 Wall., 210; *United States v. Keokuk*, 6 Wall., 514; *Benbow v. Iowa City*, 7 Wall., 313; *Mayor, etc., v. Lord*, 9 Wall., 409; *Supervisors v. Durant*, 9 Wall., 415; *State v. Madison*, 15 Wis., 30; *State v. Beloit*, 20 Wis., 79; *State v. Milwaukee*, 20 Wis., 87; *Watertown v. Cady*, 20 Wis., 501; *State v. Racine*, 22 Wis., 258; *Hasbrouck v. Milwaukee*, 25 Wis., 122; *Whitely v. Lansing*, 27 Mich., 131; *Coy v. Lyons City*, 17 Ia., 1; *Boynnton v. Newton*, 34 Ia., 510; *Huntington v. Smith*, 25 Ind., 486; *Olney v. Harvey*, 50 Ill., 453; *Lutterloh v. Commissioners*, 65 N. C., 403; *Gooch v. Gregory*, 65 N. C., 142; *Gorgas v. Blackburn*, 14 Ohio, 252; *Frank v. San Francisco Co.*, 21 Cal., 668; *Flagg v. Palmyra*, 33 Mo., 440; *State v. Hug*, 44 Mo., 116; *Commonwealth v. Allegheny Co.*, 37 Pa. St., 277, 290; *United States v. New Orleans*, 98 U. S., 381; *Wolff v. New Orleans*, 103 U. S., 358; *United States v. Vernon Co.*, 8 Dill., 281; *United*

is customary to make express provision by statute for such cases, and when the statute requires the levy of a tax the case is clear. When the statute does not expressly require it, the duty may perhaps be equally plain if the municipality has been clothed with the requisite power; for in contracting a debt a municipality impliedly contracts with the creditor that the taxing powers conferred upon it by the state shall be employed for the satisfaction of the obligation.¹ And the powers it had

States v. Jefferson Co., 5 Dill., 310; *Clews v. Lee Co.*, 2 Woods, 474; *Smith v. Com'rs of Tallapoosa*, 2 Woods, 596; *State v. County Com'rs*, 19 Fla., 17; *Fisher v. Charleston*, 17 W. Va., 595.

Any citizen may be relator to compel payment. *Decatur Co. Board v. State*, 86 Ind., 8; *State v. Fyler*, 48 Conn., 145. It seems to be not necessary in Missouri to show that demand was made upon the officers to levy the tax. *State v. Slavens*, 75 Mo., 508. The writ may be issued in Missouri by any court having jurisdiction to compel payment of the judgment. *State v. Rainey*, 74 Mo., 229. It is not error of which the respondent can complain that the tax ordered is to be distributed through several years. *Palmer v. Jones*, 49 Ia., 405.

An injunction against levying on public property does not bar an application for a *mandamus* by the creditor to compel the levy of a special tax to pay the municipal debt. *Brunswick v. Dure*, 59 Ga., 803. *Mandamus* will lie to compel a city to levy a tax to pay a judgment, though it has been enjoined from doing so in a suit to which the judgment creditor was not a party. *Smith v. Tallapoosa Co.*, 2 Woods, 596. If the constitution of a state limits the power of a city to tax, it cannot be exceeded to pay debts, but it will be compelled to go to the limit of the power, and the legislature has no right to appropriate all the tax to one class of debts. *Sibley v. Mobile*, 3 Woods, 535.

¹ *Von Hoffman v. Quincy*, 4 Wall., 535; *Riggs v. Johnson Co.*, 6 Wall., 166; *United States v. New Orleans*, 98 U. S., 881; *Galena v. Amy*, 5 Wall., 705; *Loan Association v. Topeka*, 20 Wall., 655; *Rees v. Watertown*, 19 Wall., 117; *United States v. Macon Co.*, 99 U. S., 582; *Wolff v. New Orleans*, 108 U. S., 358; *Ralls Co. Court v. United States*, 105 U. S., 733; *State v. Police Jury*, 34 La. An., 673; *Sibley v. Mobile*, 3 Woods, 535. This principle does not apply where other means than taxation are provided for meeting the obligation. *Water Commissioners v. East Saginaw*, 33 Mich., 164; *United States v. New Orleans*, 2 Woods, 230. In South Carolina the principle is doubted. *Mandamus* was applied for to compel the levy of a tax to pay a judgment recovered against a town to which, by charter, no express power to tax was given. "Such power," say the court, "can only be implied on the ground of necessary implication. To raise such an implication it would be necessary to hold that municipal powers cannot be effectively granted without the taxing power — a proposition that we cannot affirm; no such power of taxation can therefore be implied." The writ was denied. *State v. Maysville*, 12 S. C., 76.

when the debt was created cannot subsequently be lessened or hampered to the prejudice of the creditor.¹ And it may be added that no subsequent change in the municipal boundaries, or in its organization or powers, short of its entire destruction, will affect the right of creditors to proceed against it or against its officers in any of the customary methods.² Nor is it indispensably necessary in all cases that judgment should have been recovered, in order that the duty to levy a tax may be imperative. If the amount of the demand is absolutely fixed and determined as it would be by judgment, and the law makes it the duty of the proper officers to levy a tax for its payment as a settled demand, this is sufficient, and *mandamus* may issue if performance of the duty is neglected or refused.³ Indeed, it

¹ See *ante*, pp. 76, 347. Also *Goodale v. Fennell*, 27 Ohio St., 426; *Lilly v. Taylor*, 88 N. C., 489; *Brodie v. McCabe*, 33 Ark., 690.

² The holder of city bonds obtained judgment upon them against the municipality which, under a new title and with different powers of taxation, had succeeded to the city. *Held*, that he might by *mandamus* compel the new body to levy a tax for the payment of his judgment. *United States v. Port of Mobile*, 4 Woods, 536. When a special tax is authorized for a particular demand, and it is inadequate to the purpose, payment from the general fund may be compelled. *United States v. Clark Co.*, 95 U. S., 769; *Knox County Court v. United States*, 109 U. S., 229. See *Foot v. Howard Co. Court*, 4 McCrary, 218. Where an appropriation to pay the amount of a tax voted by a township has been made, not exceeding the legal percentage of taxation for such purpose, the appropriation is a binding obligation from which the town is not discharged by such subsequent decrease in its taxable property that a levy does not produce the amount voted, and a further tax, not exceeding the statutory limitation, may be compelled. *Decatur Co. Board v. State*, 86 Ind., 8. See *Robinson v. Butte Co.*, 43 Cal., 353. *Mandamus* held to lie to compel the levy of a special tax where an effectual method of enforcing payment, which existed when the contract was made, had been taken away. *State v. New Orleans*, 34 La. An., 1149.

That confederating to prevent the collection of a tax to pay a judgment may be actionable, see *Findlay v. McAllister*, 113 U. S., 104.

³ *Schoolbred v. Charleston*, 2 Bay, 63; *Wilkinson v. Cheatham*, 43 Ga., 253; *Clark Co. Court v. Turnpike Co.*, 11 B. Monr., 143; *Rodman v. Justices of Larue*, 3 Bush, 144; *People v. Supervisors of Columbia*, 10 Wend., 363; *People v. Bennett*, 54 Barb., 480; *People v. Supervisors of Otsego*, 51 N. Y., 401; *Robinson v. Supervisors of Butte*, 43 Cal., 353; *Tarver v. Commissioners*, 17 Ala., 527; *Pegram v. Commissioners*, 64 N. C., 557; *State v. Smith*, 11 Wis., 65; *State v. Clinton County*, 6 Ohio St., 280; *Cass v. Dillon*, 16 Ohio St., 38; *State v. Harris*, 17 Ohio St., 608; *Columbia County v. King*, 13 Fla., 451; *Commonwealth v. Pittsburgh*, 34 Pa. St., 496; *United States v. Ster-*

has been held in the case of bounty bonds, which by the law under which they were issued were "a valid and lawful claim against the township," to "be paid in the same manner as the ordinary township expenses" are paid, that is to say, by the levy of a tax by the township officers, an action upon the bonds would not lie; *mandamus* being the appropriate and also the adequate remedy.¹

Mandamus will also lie to compel the levy of any tax the levy of which is by law imperative, even though it be for purely local purposes. The principle is that the law should be obeyed, and in a matter of public importance any citizen is concerned to compel obedience.²

But *mandamus* will not lie to compel the levy of a tax in excess of the legal limitation;³ for, as has been already stated, this writ does not confer power; it only compels, in proper

ling, 2 Biss., 408; *Roscommon v. Supervisors*, 49 Mich., 454; *United States v. School District*, 20 Fed. Rep., 294; *Gardner v. Haney*, 86 Ind., 17; *State v. New Orleans*, 34 La. An., 477; *State v. Board of Education*, 27 Ohio St., 96; *Commonwealth v. Councils of Pittsburgh*, 88 Pa. St., 66; *Morton v. Controller-General*, 4 S. C., 430; *East St. Louis v. Zebley*, 110 U. S., 331.

¹ *Dayton v. Rounds*, 27 Mich., 82; *Robinson v. Butte Co.*, 43 Cal., 353; *State v. New Orleans*, 34 La. An., 477.

When the proper tax has been levied, so that it has become the duty of the treasurer to make payment on presentation of the obligations, it is not necessary for the holder to have an order from the county commissioners for the purpose, and, consequently, they will not be compelled to issue one. *State v. McCrillus*, 4 Kan., 250.

The writ will not issue to compel the payment of that which is unsettled and in respect to which a trial may be had in the usual manner. *Loomis v. Rogers*, 53 Mich., 135; *Mich. Paving Co. v. Common Council*, 34 Mich., 201. See *School Dist. No. 9 v. School Dist. No. 5*, 40 Mich., 551.

When a contract provides for the payment of one party out of levies for certain years, but the municipality fails to pay, the creditor is entitled to *mandamus* to collect a tax sufficient to pay him according to the assessment roll of the year when the levy is made. *Nelson v. St. Martin's Parish*, 111 U. S., 716.

² See *State v. Fyler*, 48 Conn., 145; *Decatur Co. Board v. State*, 86 Ind., 8. *Mandamus* to compel levy of a fence tax. *State v. Com'rs of Edgefield*, 18 S. C., 597. To compel a county tax for specified public purposes. *People v. Supervisors of New York*, 2 Keyes, 288. Denied to compel payment of claims issued without authority. *Peck v. Supervisors*, 36 Mich., 377. Denied to compel levy of a tax separate from the regular taxes. *State v. Kennington*, 10 S. C., 299.

³ *United States v. Macon Co.*, 99 U. S., 583; *Ralls Co. Court v. United States*, 105 U. S., 733; *Sparland v. Barnes*, 98 Ill., 595; *East St. Louis v.*

cases, the exercise of existing power. And it will not be employed to compel the payment of judgments or other demands to an extent that would deprive the municipality of means for ordinary and necessary municipal purposes.¹ Nor will it lie to compel a city to appropriate a part of its revenue already raised to pay demands not provided for in raising it, when all such revenue is already appropriated and the law forbids any diversion,² nor to compel the enforcement of a special assess-

Zebley, 110 U. S., 321; Cope v. Collins, 37 Ark., 649; Sibley v. Mobile, 3 Woods, 535.

As to what would be a levy in excess of legal authority, see a special case in East St. Louis v. Zebley, 110 U. S., 321. A statute allowing a court to order a levy to pay a judgment may co-exist with one limiting the municipality in laying taxes to a certain rate, and not be controlled by it. See Shields v. Chase, 32 La. An., 409.

The limitation by law of a county tax does not operate as a limitation of town taxes. Wabash, etc., R. Co. v. McCleave, 108 Ill., 368.

¹ East St. Louis v. Trustees, 6 Ill. App., 130; Cromartie v. Commissioners, 87 N. C., 134.

When a city was limited in taxing to one and one-half per cent. on the valuation, but the charter and general laws further provided that in case of return *nulla bona* after judgment against the city, *mandamus* might issue to levy, assess and collect a special tax to pay the judgment, held that the former provision applied to ordinary taxation, and that in addition to it the collection of a further tax to pay a judgment might be enforced by *mandamus*. Louisiana v. United States, 103 U. S., 289.

Where the statute authorizing a *mandamus* is repealed after the writ has issued, the court must nevertheless proceed to give redress on the writ. Memphis v. United States, 97 U. S., 293. And it has power to decide what objects shall be included in the levy of a tax under the writ. Memphis v. Brown, 97 U. S., 300.

If it does not distinctly appear that the judgment is founded in contract, it will not be enforced by *mandamus* as against a constitutional provision setting a limit to taxation. Farrot v. East Baton Rouge, 34 La. An., 491, citing and following earlier cases. Compare State v. New Orleans, 36 La. An., 687.

² State v. New Orleans, 34 La. An., 469. Compare Same v. Same, 34 La. An., 477.

Where a warrant is expressly payable out of the taxes of specified past years, the owner cannot compel taxation now to pay a judgment rendered on such warrant. State v. Police Jury, 33 La. An., 1122.

A judgment creditor of a city garnished property of the city, and pending an appeal in the matter applied for a *mandamus* to compel a tax levy to pay his judgment. Held, that the writ would not be granted as it did not appear that he had no other adequate remedy. Hitchcock v. Galveston, 4 Woods, 308.

ment by a sale of property after the time limited for the purpose by the law under which the assessment was laid,¹ nor to require a second levy for the payment of a demand before proper proceedings have been had to enforce the full collection of the first levy;² nor to require the levy of a tax otherwise than in the regular course of law.³

Legislative Duties. *Mandamus* never lies to coerce the performance of legislative duties, either by the legislature of the state or by any inferior and subordinate body; not only because legislation is foreign to judicial duties, but also because, in its nature, legislative action is discretionary. But an inferior legislative body may doubtless be required by this writ to convene for the purposes of action when the law makes it a duty; and where ministerial action is required of a body which also exercises legislative functions, its performance may be compelled by *mandamus* on the like reasons as when the act is to be performed by an individual officer.⁴

Executive Duties. The writ will not be awarded to the executive of the nation or state; such officer being an independent department of the government, as much so as the judiciary itself.⁵ But all other executive officers,⁶ as well as all ministerial and administrative officers, are subject to the writ

¹ *State v. Taylor*, 59 Md., 338.

Mandamus will lie to compel the recorder of a village to proceed to advertise for sale lands specially assessed, even though he may think the assessment illegal, if it is not bad on its face. *Common Council v. Whitney*, 33 Mich., 158.

² *Duperier v. Police Jury*, 31 La. An., 709; *Kline v. Ascension*, 28 La. An., 538; *Huey v. Police Jury*, 33 La. An., 1091.

³ *State v. Shreveport*, 33 La. An., 1179. *Mandamus* will not issue to compel the levy of a tax to pay a judgment until the judgment is registered, when a statute requires registry as a condition precedent, although such statute passed after the making of the contract recovered upon. It affects the remedy only, not the right. *State ex rel. Ranger v. New Orleans*, 32 La. An., 493.

⁴ Many of the cases referred to under the head of political duties are cases involving and requiring legislative action.

⁵ There is some conflict on this point, but the weight of authority is as here stated. See the cases collected in *Cooley's Const. Lim.*, 5th ed., 183, n.

⁶ *Morton v. Comptroller-General*, 4 S. C., 430; *Houghton Co. v. Auditor-General*, 36 Mich., 27.

where the duty to be performed is clear and imperative. The writ will therefore lie to a state officer to compel him to reject taxes which have been returned to him upon lands which were exempt from the levy.¹ It will also lie to compel the proper officer to issue a distress warrant against a defaulting collector; though it is said that if it is manifest from an inspection of the proceedings that the collector has no authority to collect the tax, by reason of its illegality, or that the persons assessed, on being compelled to pay it, would have a remedy back for restitution, the court will not grant a process to enforce a collection that would be fruitless and oppressive.² But neither this writ nor any other will lie against a state officer

¹ *People v. Auditor-General*, 9 Mich., 184. The duty of the auditor-general to reject taxes, in this case, depended upon the date when the patents for the lands issued; a fact only to be brought to his knowledge by evidence, but which made the duty clear when it was proved. In that regard the case resembled *People v. Supervisors of Otsego*, 51 N. Y., 401.

² *Smyth v. Titcomb*, 31 Me., 272, 281, per *Howard, J.* See, also, *Waldron v. Lee*, 5 Pick., 323, which covers all the same ground. A ruling like this in principle was made in *People v. Halsey*, 53 Barb., 547; S. C. on appeal, 37 N. Y., 844. The case was one in which a county treasurer had assumed to question an assessment, as being unjust, and had refused to issue his warrant for the collection of the tax. The court held that he had no discretion in the premises, and ordered a *mandamus* to issue. It was also decided in the same case that a private individual, having a common interest with the rest of the community in the collection of the tax, might be relator in the proceeding. On this last point *Fullerton, J.*, in 37 N. Y., 844, 848, says: "Inasmuch as the people themselves are the plaintiffs in a proceeding by *mandamus*, it is not of vital importance who the relator should be, so long as he does not officiously intermeddle in a matter with which he has no concern. The office which a relator performs is merely the instituting a proceeding in the name of the people, and for the general benefit. The rule, therefore, as it is sometimes stated, that a relator in a writ of *mandamus* must show an individual right to the thing asked, must be taken to apply to cases where an individual interest alone is involved, and not to cases where the interest is common to the whole community. This is the rule adopted in many of the states. *Hamilton v. The State*, 3 Ind., 452; *State v. County Judge*, 7 Ia., 186; *State v. Bailey*, 7 Ia., 390; *County of Pike v. State*, 11 Ill., 202. The rule is different in other states. *Heffner v. The Commonwealth*, 28 Pa. St., 108; *The People v. The Regents of the University*, 4 Mich., 98; *The People v. The Inspectors of State Prison*, 4 Mich., 187; *Arberry v. Beavers*, 6 Tex., 457; *Zebulon Sanger v. Kennebec Co.*, 25 Me., 291. But the practice which has so long prevailed here, though never, so far as I can discover, passed upon directly by the court of last resort, where the objection was raised, seems to be a reasonable and convenient one, and ought now to be considered as settled."

when the proceeding will in effect be a suit against the state, unless by law the state permits itself to be sued.¹

Ministerial Duties in General. The purchaser at a tax sale may have *mandamus* to compel the delivery to him of the proper certificate as evidence of his purchase,² or of a proper deed, if the one delivered to him is defective.³ And the owner, whose title has been cut off by a tax sale, may have *mandamus* to compel the payment to him of any surplus moneys received on the sale.⁴ It is no answer in any such case that the officer was to perform the duty in view of the facts made to appear to him, and that in his view the facts failed to make out a case for action; for if he is in error upon the facts, when he is not made the judge, his error cannot take away a right.⁵ But discretionary powers may be given by the law to any ministerial officer; and when they are, the rules already given must apply.⁶

Collectors and Receivers of Public Moneys. *Mandamus* will lie to compel a collector to proceed in the collection of a tax even though there would be other remedy against him in case of his failure.⁷ Also to compel him to give the tax payer

¹ *Antoni v. Greenhow*, 107 U. S., 769; *Carter v. Greenhow*, 114 U. S., 817; *Marye v. Parsons*, 114 U. S., 325. But a state auditor may be enjoined at the suit of an individual from the performance of merely ministerial duties. *Chesapeake, etc., R. Co. v. Miller*, 19 W. Va., 408.

² *State v. Magill*, 4 Kan., 415. See *State v. Bowker*, 4 Kan., 114.

³ *Clippinger v. Tuller*, 10 Kan., 877. But not where the failure to obtain a deed was his own fault or mistake. *Klokke v. Stanley*, 109 Ill., 192.

⁴ *People v. Hammond*, 1 Doug. (Mich.), 276.

⁵ See *Bryson v. Spaulding*, 20 Kan., 427, where the officer was required to make a tax deed conform to the facts, though the record was erroneous. See, also, *Common Council v. Whitney*, 53 Mich., 158.

⁶ See *Houghton County v. Auditor-General*, 36 Mich., 271; *Same v. Same*, 41 Mich., 28. An officer will not be compelled to make return that a tax sale was in compliance with the law when the fact was otherwise. *Hewell v. Lane*, 53 Cal., 213.

⁷ *State v. Fyler*, 48 Conn., 145; *State v. Whitworth*, 8 Lea, 594; *United States v. Buchanan Co. Court*, 5 Dill., 285; *United State v. Lafayette Co. Court*, 5 Dill., 288.

For a case of *mandamus* to compel payment by the collector to the county of a county tax, see *Sheridan v. Rahway*, 44 N. J., 587.

Where an illegal tax sale has been made and the tax subsequently validated, the tax is to be considered unpaid, and the land owner may have

credit for taxes paid,¹ and to receive the taxes without charge of interest when under the law no interest is payable.² Also to require the acceptance of county warrants in payment when the law requires it and they are tendered,³ and no action of the board to which he is in general responsible will excuse his disobedience to the requirements of law either in respect to the collection of moneys or to the disposition to be made of them after collection.⁴ It will also lie to compel a county treasurer to pay into the state treasury the state's proportion of the county levy,⁵ and to compel the refunding of moneys illegally collected of individuals where the law requires such refunding;⁶ and this in the case of taxes on exempt property, even though the exemption depends upon matters of fact which he is to inquire into and pass upon. The refunding in such a case is a mere ministerial duty; the officers are supposed to know the law, and it is their duty to apply it to the facts as they find them.⁷ And if taxes after collection have been paid over to the wrong custodian, he may be compelled by *mandamus* to pay to the right.⁸

General Remarks. The cases mentioned sufficiently indicate the general nature of those in which the writ of *mandamus* may afford the proper remedy. It will be seen that it is

mandamus to compel the proper officer to receive and receipt it. *Clementi v. Jackson*, 92 N. Y., 591.

¹ *State v. Schnecko*, 11 Mo. Ap., 165.

² *People v. O'Keefe*, 90 N. Y., 419.

³ *Daniel v. Askew*, 36 Ark., 487.

⁴ See *Jones v. Wright*, 34 Mich., 371.

⁵ *State v. Staley*, 38 Ohio St., 259.

⁶ *People v. Supervisors of Otsego*, 51 N. Y., 401; *East Saginaw v. County Treasurer*, 44 Mich., 278; *George's Creek, etc., Co. v. Com'rs of Allegany Co.*, 59 Md., 255. See for special cases, *Madison Co. v. Smith*, 95 Ill., 328; *People v. East Saginaw*, 40 Mich., 336. In Louisiana *mandamus* will not lie to compel a collector to pay into the parish treasury moneys collected. *State v. Boulit*, 26 La. An., 259.

⁷ *People v. Supervisors of Otsego*, 51 N. Y., 401. The case was one of taxation of national securities, which, under the law and the decisions of the courts, were not within the jurisdiction of the assessors. It was made the duty of the supervisors to refund the tax, which they could only do on a showing of facts. The board adopted a resolution that the claim was invalid, and that it be disallowed, but this was a manifest evasion of duty.

⁸ *State v. Treasurer*, 35 La. An., 1148.

awarded as well on behalf of the public authorities, to compel performance of the successive official duties, under the revenue laws, as on behalf of private parties, whose rights have not been regarded in taxation or in any of the proceedings which are to result in taxation. On behalf of the state, the writ may issue against officers of corporations where a duty is imposed upon them under the tax laws; such, for instance, as that of furnishing a list of the stockholders for assessment,¹ or of paying over a tax on dividends which have been declared by the corporation.²

Federal jurisdiction. The federal courts have no general power to issue the writ of *mandamus* to compel the performance of duties under the state tax laws. That jurisdiction belongs to the province of state authority. The federal courts may, nevertheless, issue the writ in order to compel municipalities to levy taxes for the satisfaction of judgments which had been rendered in such courts, and which the local authorities neglected or refused to provide for by taxation, though clothed by law with full authority to do so. This is a power incident and necessary to their general jurisdiction,³ and will only be exercised where judgment has been obtained.⁴ A suit for the purposes of the writ may, however, be brought in the federal court, though the state court would have had authority to compel payment of the demand without judgment.⁵ In some cases, under state laws, these courts have appointed commissioners to

¹ *Insurance Co. v. Baltimore*, 23 Md., 296, 309. The writ may also be awarded to prevent a diversion of funds held in trust by a municipal corporation. *Pike Co. v. State*, 11 Ill., 203.

² *State v. Mayhew*, 2 Gill, 487. See *Person v. Warren R. R. Co.*, 32 N. J., 441, which was one of *mandamus* to the lessee of a road to compel the payment of a tax upon it. When the duty of paying a tax upon the capital stock of a corporation rests upon the president, it is no answer by the incumbent to a *mandamus* that he was not president when the taxes accrued. *Emory v. State*, 41 Md., 38.

³ See *Knox County v. Aspinwall*, 24 How., 376, and other cases cited in note 4, p. 735; *Rees v. Watertown*, 19 Wall., 107, opinion by Hunt, J.; *Heine v. Levee Commissioners*, 19 Wall., 655, opinion by Miller, J., and the opinion of Mr. Justice Bradley, in the case last named, in 1 Woods, 246. Also *United States v. New Orleans*, 2 Woods, 230; *Vance v. Little Rock*, 30 Ark., 435.

⁴ *Davenport v. Dodge Co.*, 105 U. S., 237.

⁵ *Davenport v. Dodge Co.*, 105 U. S., 237.

levy a tax when the local officers have refused to provide for it.¹ But for this purpose the proper statutory authority must exist.² If officers fail to comply with the command of the writ they will be punished as for contempt, and liable in damages,³ and it will be no excuse to them that a state court has undertaken to enjoin their action—the state courts being powerless to interfere.⁴ It might be otherwise if the state jurisdiction had been submitted to.⁵

¹ *Supervisors v. Rogers*, 7 Wall., 175, cited and explained in *Rees v. Watertown*, 19 Wall., 107, 117.

² *Rees v. Watertown*, 19 Wall., 107. The fact that no one can be found to serve as collector will not be ground for equitable relief. *Thompson v. Allen Co.*, 18 Fed. Rep., 97; *Rees v. Watertown*, *supra*. And see *Finnegan v. Fernandina*, 15 Fla., 379.

³ See *Dow v. Humbert*, 91 U. S., 294; *Newark, etc., Inst. v. Panhorst*, 7 Biss., 90.

⁴ *Riggs v. Johnson Co.*, 6 Wall., 166; *United States v. Keokuk*, 6 Wall., 514; *Mayor v. Lord*, 9 Wall., 409; *Clews v. Lee Co.*, 2 Woods, 474; *Hawley v. Fairbanks*, 108 U. S., 543; *United States v. Silverman*, 4 Dill., 224.

⁵ See *Smith v. Commissioners of Tallapoosa*, 2 Woods, 596; *Hawley v. Fairbanks*, 108 U. S., 543.

If funds are collected under judicial direction by duly authorized taxation, they cannot be appropriated to any other use than that for which they were raised, and a collector may be compelled by judicial orders to collect such taxes by sale of property or by suit or in any other way authorized by law, and to apply the proceeds on judgments of the court. *Meriwether v. Garrett*, 102 U. S., 472.

CHAPTER XXIV.

THE REMEDIES FOR WRONGFUL ACTION IN TAX PROCEEDINGS.

Right to a remedy. In one of the early chapters of this work reference was made to the fundamental principle of constitutional right that no one shall be deprived of his property except by the law of the land, or, as it is sometimes expressed, by due process of law; and it was said that this principle was as much applicable in tax cases as in any others. It was also said, in substance, that however summary and apparently arbitrary may be the methods and processes in the levy and enforcement of taxes, they cannot deprive the citizen, when his property is taken by virtue or under pretense thereof, of a trial of the right to take it, before some impartial tribunal, to which the public authorities must justify their proceedings.¹ What the tribunal shall be, and what the proper remedy to seek in it, may be determined by either the common or the statute law; but from the one or the other, or from equity as an assistant to both, adequate redress for any actual wrong is supposed to be always attainable.

Wrongs in tax cases. The wrongs of which one may have occasion to complain in tax cases may arise from either of the following causes:

The contracting improperly or unlawfully of a debt which can only be paid through taxation.

The voting of a tax by the public authorities for an illegal purpose.

The voting of a tax for a purpose that may be legal, but in a way not allowed by law.

The levy of an excessive tax, whether the excess comes from a disregard of a constitutional or statutory limitation, or arises from the frauds or mistakes of officers.

The charging of the party in the assessment with subjects of taxation which are either exempt by law, or for other reason not assessable to him.

¹ *Ante*, pp. 47-53.

The taxing him in a district in which he is not taxable.

The laying upon him of an excessive or partial assessment, or imposing inadmissible costs or penalties.

The laying of the tax on some erroneous and inadmissible principle.

The failure to obey the law in the proceedings to the injury of the party's rights.

The sale or forfeiture of the party's property under circumstances rendering it illegal.

To treat of these separately would involve much repetition, and it will be more convenient to speak of wrongs in connection with the remedies appropriate to their redress.

Abatement of taxes. There are always methods in which one who is wrongfully assessed for taxation, or unequally taxed, may have abatement of the assessment or of the tax without resort to the customary legal remedies. While the assessor still has the list or roll in his hands uncompleted, he may abate any assessment on his own motion, or on application, when satisfied that it is either wholly or in part illegal or unjust. No statute could be necessary for this. But when the assessment has passed from his hands, the right to an abatement must in general depend upon the statute. No doubt the legislature might abate taxes, and probably the legislative authority of a municipality might do the same as regards a municipal tax, where no legislative or constitutional provision was in the way; but taxing officers or boards must have special authority to warrant their doing so. In the absence of special authority, they are to accept the assessment as legal and just, and levy and collect the taxes accordingly.

The remedy usually given by statute is one for direct review either by the assessor himself, or in some form of appellate proceeding.

Reviews and appeals. A review in some states is directed to be had before the assessor himself, with authority in that officer, to abate the tax altogether if he finds the party unlawfully taxed, or taxed for property which is exempt or which he does not own,¹ or to reduce the assessment, when excess is com-

¹ *State v. Ormsby County*, 7 Nev., 392. When a person is liable to taxation for personal or real estate in a particular district, his sole remedy for

plained of, if in the opinion of the officer the complaint is well founded.¹ Whatever may be the relief sought, the party applying for it must comply strictly with the provisions of the statute which confers the right.² But the authority to review is more likely to be conferred upon some court or other appellate tribunal, which will either sit for the purpose of hearing complaints generally, or which will be empowered to hear such appeals as are brought to it in some mode which the statute prescribes. And here, also, the rule of strict conformity to statutory provisions is to be observed.

When the tax is illegal, one is not obliged to apply for an abatement, unless the statute makes that the sole remedy; but he may contest the tax when attempt is made to collect it.³ But for a merely excessive or unequal assessment, where no principle of law is violated in making it, and the complaint is of an error of judgment only, the sole remedy is an application for an abatement, either to the assessors or to such statutory board as has been provided for hearing it. The courts either of common law or of equity are powerless to give relief against the erroneous judgments of assessing bodies, except as they may be specially empowered by law to do so.⁴ And this prin-

excessive valuation, or for including in the assessment property of which he is not the owner, or for which he is not liable to taxation, is by application to the assessors for an abatement. *Bourne v. Boston*, 2 Gray, 494, 496, citing *Howe v. Boston*, 7 Cush., 273; *Lincoln v. Worcester*, 8 Cush., 55. Compare *Lee v. Templeton*, 6 Gray, 579. This doctrine applied to one properly taxed for real estate in a town, but improperly taxed for other real estate not in the town. *Salmond v. Hanover*, 18 Allen, 119. Compare *Bailey v. Buell*, 59 Barb., 158, reversed, 50 N. Y., 662.

¹ *State v. Powers*, 24 N. J., 406; *Phillips v. Stevens Point*, 25 Wis., 594. Authority to abate taxes for overvaluation will not embrace a case where one complains that he is assessed for property he does not own. *Walker v. Cochran*, 8 N. H., 166.

² *State v. Parker*, 34 N. J., 49; *State v. Bishop*, 34 N. J., 45; *Otis Co. v. Ware*, 8 Gray, 509; *State v. Horner*, 38 N. J., 212; *People v. Com'rs of Taxes*, 99 N. Y., 254. For statutory proceedings for abatement of taxes, see *Cocheco Co. v. Stratford*, 51 N. H., 455.

³ *Babcock v. Granville*, 44 Vt., 325.

⁴ *Stafford v. Albany*, 6 Johns., 1; S. C., 7 Johns., 541; *Matter of Beekman St.*, 20 Johns., 269; *Matter of Canal St.*, 11 Wend., 154; *Matter of Mount Morris Square*, 2 Hill, 14; *Matter of Canal and Walker Sts.*, 12 N. Y., 406; *Petition of Eager*, 46 N. Y., 100; *Western R. R. Co. v. Nolan*, 48 N. Y., 513; *Kimber v. Schuylkill Co.*, 20 Pa. St., 366; *Hughes v. Kline*, 30 Pa. St., 237;

ciple is applicable to statutory boards of equalization, which are only assessing boards with certain appellate powers, but whose action, if they keep within their jurisdiction, is conclusive except as otherwise provided by law.¹

Wharton v. Birmingham, 37 Pa. St., 371; *Clinton School District's Appeal*, 56 Pa. St., 315; *Stewart v. Maple*, 70 Pa. St., 221; *Everitt's Appeal*, 71 Pa. St., 216; *County Court v. Marr*, 8 Humph., 634; *Holton v. Bangor*, 23 Me., 264; *Stickney v. Bangor*, 30 Me., 404; *Gilpatrick v. Saco*, 57 Me., 277; *Gravel Road Co. v. Black*, 32 Ind., 468; *Richardson v. Scott*, 47 Miss., 236. See *Brook v. Shelton*, 47 Miss., 243; *Weaver v. State*, 39 Ala., 535; *Tripp v. Insurance Co.*, 12 R. I., 435; *Attorney-General v. Supervisors*, 42 Mich., 72; *San Jose Gas Co. v. January*, 57 Cal., 614; *New Orleans v. Buckner*, 28 La. An., 414; *Frost v. New Orleans*, 28 La. An., 417; *Meyer v. Rosenblatt*, 78 Mo., 495; *Allen v. Sharp*, 2 Exch., 352; *Alexandria, etc., Co. v. Dist. of Col.*, 1 Mackey, 217.

¹ See *People v. Supervisors of San Francisco*, 50 Cal., 228; *Central, etc., R. Co. v. Placer Co.*, 43 Cal., 365; *People v. Ashbury*, 46 Cal., 523; *Rhoads v. Cushman*, 45 Ind., 85; *International, etc., R. Co. v. Smith*, 54 Tex., 1; *Carlisle Sch. Dist. v. Hepburn*, 79 Pa. St., 159; *Kittle v. Shervin*, 11 Neb., 65; *Ottawa, etc., Co. v. McCaleb*, 86 Ill., 556; *Union Trust Co. v. Weber*, 96 Ill., 346.

There is no constitutional provision which prevents the passage of an act taking away the pre-existing right of a tax payer to stay by writ of prohibition the collection of taxes illegally assessed. *State v. County Treasurer*, 4 S. C., 520. Where property is to be assessed by value, an appellate assessing board cannot add a penalty on affirming an assessment. *Jones v. Commissioners*, 5 Neb., 561. Or costs. *Hall v. Greenwood Co.*, 22 Kan., 37.

If one has failed to make the statutory return and to appeal to the board of equalization, he can have no remedy in the courts. *Price v. Kramer*, 4 Col., 546. In Georgia the making return of its property is a condition precedent to the right of a railroad company to contest the validity of a tax by means of an affidavit of illegality. *Macon, etc., R. Co. v. Goldsmith*, 62 Ga., 468; *Goldsmith v. Augusta, etc., R. Co.*, 62 Ga., 468; *Goldsmith v. Georgia R. Co.*, 62 Ga., 435; *Goldsmith v. Southwestern R. Co.*, 62 Ga., 495; *Goldsmith v. Central R. Co.*, 62 Ga., 509. For a like rule in Maine, see *Freedom v. County Com'rs*, 66 Me., 192; *Fairfield v. Same*, 66 Me., 385.

Where a board has a statutory power to determine upon exemptions, its action cannot be ignored and a review had on injunction. *West Bend v. Brown*, 47 Ia., 25; *Preston v. Johnson*, 104 Ill., 623.

On review of assessments under a statute which authorizes the board to increase or lessen if "satisfied from the evidence taken," an arbitrary increase without evidence is void. *Shove v. Manitowoc*, 57 Wis., 5. Distinguishing *McIntyre v. White Creek*, 43 Wis., 620; *Lawrence v. Janesville*, 46 Wis., 364.

That in Nebraska a city board of equalization has no power to increase the valuation of all the property in the city, see *Kittle v. Shervin*, 11 Neb., 65. That in North Carolina the county commissioners, sitting as a board of

For a merely *irregular* assessment the statutory remedy is also the exclusive remedy. It is supposed to be adequate to all the requirements of justice, and it is the party's own folly if he fails to avail himself of it.¹

review, can of their own motion raise the valuations of property, see *Commissioners v. Atlanta, etc., R. Co.*, 86 N. C., 541. And they can rescind their action in exonerating a tax payer if they become satisfied it is erroneous. *Lemly v. Commissioners*, 85 N. C., 379.

¹ *Windsor v. Field*, 1 Conn., 279; *Hughes v. Kline*, 30 Pa. St., 230; *Aldrich v. Railroad Co.*, 21 N. H., 359; *Conlin v. Seaman*, 22 Cal., 546; *Chambers v. Satterlee*, 40 Cal., 497, 519; *Emery v. Bradford*, 29 Cal., 75; *Nolan v. Reese*, 32 Cal., 484; *Peoria v. Kidder*, 26 Ill., 351; *Deane v. Todd*, 22 Mo., 90; *Beeson v. Johns*, 59 Ia., 166; *Patterson v. Baumer*, 43 Ia., 477; *Chicago, etc., R. Co. v. Cole*, 75 Ill., 591; *Republic Life Ins. Co. v. Pollak*, 75 Ill., 292; *Ottawa, etc., Co. v. McCaleb*, 81 Ill., 556; *New Orleans v. Canal, etc., Co.*, 32 La. An., 157. In Maryland, it is said, if the party fails to avail himself of the remedy given by statute, he cannot come into equity unless he makes out a very clear case; by which is meant, doubtless, a case within the ordinary jurisdiction of equity. *Church v. Baltimore*, 6 Gill, 391; *O'Neal v. Bridge Co.*, 18 Md., 1.

If one is taxed for the whole of certain property when he is liable only for an undivided share, his remedy is by application for abatement. If he does not apply, and is sued for the whole, he cannot then avoid paying the whole. *Davis v. Macy*, 124 Mass., 193. See *Westhampton v. Searle*, 127 Mass., 502; *Brigins v. Chandler*, 60 Miss., 862.

Assessing lands as town lots by number, when no plat is recorded or mentioned, is not merely irregular, but fatally defective. *People v. Chicago, etc., R. Co.*, 96 Ill., 369; *Johnstone v. Scott*, 11 Mich., 232.

That the rule of conclusiveness of action is applicable to appellate tribunals also, see *Weaver v. State*, 39 Ala., 535; *N. O. Gas Light Co. v. Assessors*, 31 La. An., 270; *Same v. Same*, 31 La. An., 475; *Alexandria, etc., Bridge Co. v. Dist. Columbia*, 1 Mackey, 217; *Adsit v. Lieb*, 76 Ill., 198; *Union Trust Co. v. Weber*, 96 Ill., 347. Suit will not lie at law for the levy of an irregular or excessive assessment which might be corrected on review or appeal. *Wright v. Boston*, 9 Cush., 233; *Bourne v. Boston*, 2 Gray, 494; *Commonwealth v. Cary, etc., Co.*, 98 Mass., 19. When special appeal to a subordinate court is given, there can be no appeal thence to the supreme court unless expressly given, but *certiorari* will lie to review regularity. *Kimber v. Schuylkill Co.*, 20 Pa. St., 366. Where the right is given to any person to appeal from a special assessment, the city against whom an assessment is made may appeal. *Matter of Opening of Streets*, 20 La. An., 497. If it appears that the board of review proceeded on erroneous principles, a court may perhaps correct the valuation, but an error in the fact of the value of property cannot be judicially corrected. *Wilmington, etc., R. Co. v. Brunswick Co.*, 72 N. C., 10; *Wade v. Craven Co.*, 74 N. C., 81; *Richmond, etc., R. Co. v. Orange Co.*, 74 N. C., 506. The action of a county

The grounds on which one should have an abatement are not necessarily such as arise on a consideration of his assessment considered by itself, but they may include the assessments of others so far as, by reason of their not being what they should be, they affect him injuriously. One may, therefore, justly claim an abatement of an assessment which, considered by itself, is not too high, if those of others are relatively and purposely made too low.¹ He may also ask that an assessment made without jurisdiction be vacated; though this is not essential, since such an assessment is altogether illegal and may for that reason be disregarded and contested when steps are taken to enforce it.² And he has a right to be heard upon any grounds which, in his view, make his assessment wanting in conformity to the law, or either positively or relatively unequal or unjust.³

To render the action of appellate assessing boards final upon individuals, it is necessary that the boards themselves should observe such statutory rules as have been prescribed for them for the protection of the interests of tax payers. If, for example, the board by law is required to meet at a certain specified time, and it meets at another at which tax payers have neither actual nor constructive notice to appear, its action at such time is unauthorized and invalid; and so it will be if the statute re-

board in Kansas does not seem to be conclusive. *Commissioners v. Sergeant*, 24 Kan., 572.

A town meeting has no authority to remit any part of a person's assessment after the statutory tribunal has fixed it. *State v. Fyler*, 48 Conn., 145. A county board has no authority to abate any but county taxes. *Madison Co. v. Smith*, 95 Ill., 328. It cannot, after judgment, vacate a forfeiture of lands to the state. *Ibid.*

¹ *Manchester Mills v. Manchester*, 57 N. H., 309; *Same v. Same*, 58 N. H., 38; *Pelton v. National Bank*, 101 U. S., 143; *Cummings v. National Bank*, 101 U. S., 153. See *Row v. People*, 87 Ill., 365.

² See *Commonwealth v. Cary, etc., Co.*, 98 Mass., 19; *Weller v. St. Paul*, 5 Minn., 95; *Williams v. Saginaw*, 51 Mich., 120. An act that proceedings on the sale of land for local improvements shall not be questioned collaterally, but may, at any time, be reviewed by *certiorari*, or other proper proceeding, in the supreme or circuit court, sustained. *State v. Jersey City*, 35 N. J., 381. And see *Smith v. Cleveland*, 17 Wis., 556.

³ In the case of a special assessment objection may be taken to the items that make up the cost for which the assessment is laid. *Grace v. Board of Health*, 135 Mass., 490.

quires notice to be given of its meetings, and the record of the board shows no notice.¹

In what is above said respecting the conclusiveness of the action of assessors, it is assumed that the case is free from fraud on their part. If fraud is charged, there may be a remedy in equity under principles to be stated further on.²

In some states an appeal is given from the assessors, or from assessing boards, to some specified court, to which is given limited powers of review. A court, whatever its grade, would be one of limited jurisdiction for such a purpose, and must keep within it.³

¹ *Nixon v. Ruple*, 30 N. J., 58. In *Kelly v. Corson*, 8 Wis., 183, and 11 Wis., 1, the effect of errors in the action of a board of equalization was considered. *See *Marsh v. Supervisors*, 43 Wis., 502; *Ross v. Crawford Co. Com'rs*, 16 Kan., 411.

² The mode of reasoning by which assessing boards have reached their conclusions is not open to review by the courts. *Republic Life Ins. Co. v. Pollak*, 75 Ill., 292; *People v. Big Muddy Iron Co.*, 89 Ill., 116; *English v. People*, 96 Ill., 566; *Traders' Ins. Co. v. Farwell*, 103 Ill., 413.

³ That the power to hear an appeal for abatement of a tax is judicial, see *Edes v. Boardman*, 58 N. H., 580, questioning *Auditor v. Railroad Co.*, 6 Kan., 500. The appeal is an equitable proceeding, and only so much of the tax will be abated as the appellant ought not to pay. For any error of law or fact for which redress may be had in this proceeding, no suit will lie against selectmen acting in good faith. *Edes v. Boardman*, 58 N. H., 580. See *Carpenter v. Dalton*, 58 N. H., 615. As to who is a "party aggrieved" and entitled to appeal in New York, see *Matter of Phillips*, 60 N. Y., 16; *Petition of Gantz*, 85 N. Y., 536, overruling *Matter of Moore*, 8 Hun, 513, and *Matter of Saunders*, 10 W. Dig., 351. For method of reviewing in New York, see *Strusburgh v. New York*, 45 N. Y. Sup. Ct. R., 508. A motion to vacate an assessment may be lost by lapse of time. *Matter of Lord*, 21 Hun, 555; S. C., 78 N. Y., 109; *Matter of Brady*, 46 N. Y. Sup. Ct. R., 36. If an appeal from the action of a board of equalization is given, it cannot be lost by the irregular action of the board. *Ingersoll v. Des Moines*, 46 Ia., 553. In Louisiana, after refusal by the assessors to reduce an assessment, and after the rolls have been delivered to the collecting officers, the assessors may be brought into court by the aggrieved party, and their action reviewed. *Gay v. Assessors*, 34 La. An., 370. If appeal to a court is not made in the statutory time, the court has no jurisdiction. *Wells v. Board of Education*, 20 W. Va., 157. In proceedings to restrain the cutting down of an assessment, the person assessed is a necessary party. *Armstrong v. County Court*, 15 W. Va., 190.

When a statute allows an appeal to the court from an illegal assessment, the illegality must be in a matter of law, independent of the exercise of

Refunding taxes. This is only an abatement, made after the tax has been paid or enforced. A general right exists in the state to refund any tax collected for its purposes, and a corresponding right probably exists in the common council, or other proper boards, of cities, villages, towns, etc., to refund to individuals any sums paid by them as corporate taxes which are found to have been wrongfully exacted, or are believed to be, for any reason, inequitable. But, no executive or ministerial officer could have any such authority, unless expressly given by law.¹

Remedy by certiorari. At the common law the writ of *certiorari* lies to remove into the supreme court of judicature the proceedings of inferior tribunals, in order that their errors may be corrected when it is alleged that they have exceeded their jurisdiction. In some of the states, considerable use has been made of this writ in tax cases, sometimes with, and sometimes without, statutory regulations. When the writ is by statute, a broader scope may be, and usually is, given to it than it has at the common law.² The common law writ is not one of right,

discretion as to value vested in the taxing officers. *Shear v. Com'rs of Columbia Co.*, 14 Fla., 76.

When the statute provides a special remedy for the collection of a personal tax by suit and a mode of reviewing the judgment, the party is confined to that mode of review. *Washington Co. v. Germ. Am. Bank*, 28 Minn., 360.

¹In New York the county court may order the refunding of "any tax illegally or improperly assessed or levied." *Boardman v. Sup'rs of Tompkins*, 85 N. Y., 359. This applied to a case where a resident who was assessed for personalty showed that he had none. *Matter of Coleman*, 80 Hun, 544.

For proceedings under a statute which, when drain tax is set aside, authorizes the court to proceed to determine what is justly chargeable to plaintiff and award accordingly, see *Peck v. Watros*, 30 Ohio St., 590.

How school taxes should be refunded in Iowa where the district was divided after the tax was laid, see *Spencer v. Riverton*, 56 Ia., 85. A local aid tax, where the money has been deposited with the county treasurer, should be refunded from that fund. *Barnes v. Marshall Co.*, 56 Ia., 20. See *Des Moines, etc., R. Co. v. Lowry*, 51 Ia., 486; *Stone v. Woodbury*, 51 Ia., 522.

²When the relief sought by the applicants would affect all other tax payers and residents of a town equally with themselves, in arresting the collection of an alleged illegal tax, it has been held that it should be denied unless applied for by all. *Libby v. West St. Paul*, 14 Minn., 248. The writ

but is granted on the special facts; and the court has a discretion to refuse to grant it in any case, when great mischiefs might be likely to follow the setting aside the proceedings complained of.¹ It may even dismiss the writ after it has been granted, without a consideration of the merits, if, in the opinion of the

held applicable to a case where a board of equalization had acted in a matter over which it had no jurisdiction: *Royce v. Jenny*, 50 Ia., 676; see *Louisville, etc., R. Co. v. Bate*, 12 Lea, 678; but not to a case where the levying board were proceeding to levy a tax on an erroneous certificate that a tax had been voted. *Cattell v. Lowry*, 45 Ia., 478. It will not be allowed where there has been an unauthorized increase in an assessment, the remedy at law being ample. *State v. Washoe County*, 14 Nev., 140.

As to the general nature of the writ in New York, see *People v. Walter*, 68 N. Y., 408. What reviewable upon it: *People v. Commissioners of Taxes*, 91 N. Y., 593. The return by statute is not conclusive and there may be a reference to take testimony. *People v. Smith*, 24 Hun, 66. In proceedings by a city to levy a tax for water bonds, no question as to the validity or regularity of the bonds can arise. *People v. Long Island City*, 76 N. Y., 20.

If it appear on the face of the records that proceedings necessary to give jurisdiction had not been taken, an assessment by the county court is void and would be quashed on *certiorari*, and the tax should not be enjoined. *Murphy v. Harbison*, 29 Ark., 340.

In Michigan *certiorari* is not allowed in tax cases under the general laws. *Whitbeck v. Hudson*, 50 Mich., 86. But it is a common remedy to review proceedings in laying out drains and assessing the cost upon lands benefited, but the court will review upon it nothing but jurisdictional questions. The following are cases: *Kroop v. Forman*, 31 Mich., 144; *Strachan v. Brown*, 39 Mich., 168; *Lane v. Burnap*, 39 Mich., 736; *Taylor v. Burnap*, 39 Mich., 739; *Milton v. Drain Com'r*, 40 Mich., 229; *Whistler v. Same*, 40 Mich., 541; *Willcheck v. Edwards*, 42 Mich., 105; *Dunning v. Drain Com'r*, 44 Mich., 518; *Wright v. Rowley*, 44 Mich., 557; *Lampson v. Drain Com'r*, 45 Mich., 150; *Reinig v. Munson*, 46 Mich., 138; *Van Buskirk v. Drain Com'r*, 48 Mich., 258; *Chapman v. Same*, 49 Mich., 305; *Null v. Zierle*, 52 Mich., 540; *Whiteford v. Probate Judge*, 53 Mich., 130. There are many others. By statute, cases where the proceedings are susceptible of being corrected must be brought by regular suit into the circuit courts. See *Tucker v. Drain Com'r*, 50 Mich., 5. Proceedings in laying out highways are also reviewed on *certiorari*. See *People v. Highway Com'rs*, 14 Mich., 528; *Van Auken v. Same*, 27 Mich., 414; *Names v. Same*, 30 Mich., 490.

For the proceedings on *certiorari* in New Jersey, see *Citizen's Gas Light Co. v. Alden*, 41 N. J., 648; *Woodbridge v. State*, 43 N. J., 262. A party who neglects to appeal should be given no redress on *certiorari*. *State v. Snedeker*, 43 N. J., 78.

¹ In *Fractional School District v. The Joint Board*, 27 Mich., 3, the writ was refused when applied for to review the proceedings in establishing a school district, fifteen months after the action had been taken; the district

court, it was granted improvidently.¹ The writ must be applied for in due season, and before the proceeding, which it is desired to review, has passed beyond the control of the tribunal in which it was taken.² If, therefore, the writ is issued to review the action of assessors, after the assessment roll has passed from their hands into the hands of the supervisor, it will be dismissed for that reason.³ The writ is not awarded to review political action, and, therefore, the action of a town or any other municipality, or of any of the local boards, in determining upon the purposes for which taxes shall be levied, or the time and manner of levying them, when that is committed to their judgment, or fixing upon the sums to be levied, or the objects of expenditure, or anything of a like nature, is not subject to review by means of it.⁴ The writ will be refused where an appeal is given which affords an adequate remedy, or, in other words, which is not so restricted in its scope as to preclude the party from a review of the errors of which he complains.⁵ It will not lie to review any merely discretionary

in the mean time having organized and taken upon itself corporate functions. See *Bird v. Perkins*, 33 Mich., 28.

¹ *Magee v. Cutler*, 43 Barb., 239; *People v. Supervisors of Allegany*, 15 Wend., 198; *Susquehanna Bank v. Supervisors of Broome*, 25 N. Y., 312; *Matter of Lantis*, 9 Mich., 324. The writ should not be allowed where the purpose is merely to enable a party to recover back taxes paid by procuring a reversal of the proceedings. *Pepole v. Commissioners of Taxes*, 43 Barb., 494; *People v. Reddy*, 43 Barb., 539.

² As to the effect of laches in general, see *Petition of Lord*, 78 N. Y., 109; *State v. Binninger*, 42 N. J., 528; *Matter of Lantis*, 9 Mich., 324.

³ *People v. Delaney*, 49 N. Y., 655. See *People v. Supervisors of Queens*, 1 Hill, 195, 199.

⁴ *People v. Supervisors of Allegany*, 15 Wend., 198; *Benton v. Taylor*, 46 Ala., 388. See *Dwight v. Springfield*, 4 Gray, 107; *Dillon, Mun. Corp.*, §§ 739-743.

⁵ The New York decisions on the subject of the remedy by *certiorari* are very numerous, and in *People v. Betts*, 55 N. Y., 600, 602, they are reviewed by *Folger, J.*, in the following language: "The office of a common law *certiorari* is, in strictness, merely to bring up the record of the proceedings of an inferior court or tribunal, to enable the court of review to determine whether the former has proceeded within its jurisdiction; and not to correct mere errors in its proceedings. *People v. Commissioners of Highways, etc.*, 30 N. Y., 72. True, it has been sometimes intimated, and sometimes held, that in the absence of any other remedy, and to prevent a failure of justice, the party will be suffered by it to bring up, not only the naked question of jurisdiction, but the evidence, as well as the ground or principles on which

action of any tribunal;¹ nor is it within the proper scope of the writ to review the decisions of inferior tribunals on the merits. The court awarding it, therefore, will not look into the evidence on which the inferior tribunal may have acted,

the inferior body acted, and the questions of law on which the relator relies. *Susquehanna Bank v. Supervisors, etc.*, 25 N. Y., 312; *Baldwin v. Buffalo*, 35 N. Y., 375; *Swift v. Poughkeepsie*, 37 N. Y., 511. Many cases are cited in *The People v. Assessors*, 39 N. Y., 81, and it is there held that the office of the writ extends to the review of all questions of jurisdiction, power and authority of inferior tribunals to do the acts complained of, and to all questions of regularity of their proceedings. In *People v. Assessors*, 40 N. Y., 154, it is held that the writ may bring up for review the decision that a given state of facts is not legally sufficient to compel a board of assessors to the conclusion that certain property was not liable to assessment; in other words, a decision of law. See, also, *People v. Board, etc.*, 39 N. Y., 506, *Freeman v. Ogden*, 40 N. Y., 105; *People v. Hamilton*, 39 N. Y., 107; *Western R. R. Co. v. Nolan*, 48 N. Y., 513. In *People v. Delaney*, 49 N. Y., 655, inclining the other way, it was held that a departure by assessors from the statutory standard for estimating the value of property on the assessment roll cannot be corrected on *certiorari*. In *People v. Supervisors, etc.*, 51 N. Y., 442, it was held that it was the office of a *certiorari* to review the determinations of inferior boards where a claim was rejected, as not just or legal. And in *People v. Allen*, 52 N. Y., 538, a *certiorari* brought up for review the decision of the defendants upon a question of law. It is thus seen that the office of a common law writ of *certiorari* has been somewhat enlarged since the decision in 30 N. Y., *supra*. But it will also be seen that it is in cases where the relator has no other available remedy, and where injustice would be done if the writ was not permitted to do its work. The rule still remains unimpaired, at least in principle, that where there is a remedy by appeal, the writ will be confined to its original and more appropriate office. *Storm v. Odell*, 2 Wend., 287. See, also, *In re Mt. Morris Square*, 2 Hill, 14, 27." To the foregoing may be added *People v. Nearing*, 27 N. Y., 306. That *certiorari* does not lie where there is an adequate remedy by appeal, see *Withowski v. Skalowski*, 46 Ga., 41; *Peacock v. Leonard*, 8 Nev., 84, 157, 247; *State v. Apgar*, 31 N. J., 358; *Macklot v. Davenport*, 17 Ia., 379; *State v. Bentley*, 23 N. J., 532. When, in assessing upon abutting lots the expense of a local improvement, a jury is allowed on their demand to parties dissatisfied with the assessment, the demand for a jury is the proper remedy for an excessive assessment and not *certiorari*. *Jones v. Boston*, 104 Mass., 461, citing *North Reading v. County Commissioners*, 7 Gray, 109; and see *Whiting v. Boston*, 106 Mass., 89.

¹The action of the auditor-general in charging back certain taxes to a county in his settlement with it, being within his official discretion, cannot be reviewed on *certiorari*. *Supervisors of Midland v. Auditor-General*, 27 Mich., 165. Tax payers of different townships cannot join in *certiorari* to set aside different taxes for the same general purpose when the objections raised are not common to all the taxes. *Woodworth v. Gibbs*, 61 Ia., 396.

except so far as may be necessary to the determination of any jurisdictional question that may depend upon it.¹ The proper office of the writ is to ascertain whether the inferior tribunal has acted in a case of which it had jurisdiction, and has lawfully exercised its jurisdiction in what it has assumed to do: to keep the inferior tribunal within the limits of the law, and not to make its judgments conform to the opinion of the superior tribunal on the facts.

The following conclusions are deduced by the authorities from these general principles: That the writ does not lie to the collector of taxes or any other mere ministerial officer to review either his action or any of the prior action on which his own was based;² that assessments cannot be revised and set aside on this writ on the ground merely that they are excessive or unequal;³ or that the assessors have erred in any matter of judgment, or have been guilty of irregularities in the exercise of their authority, not being of a nature to de-

¹ *Matter of Mount Morris Square*, 2 Hill, 14, 27, per *Cowen, J.*, citing *Rex v. Moreley*, 2 Burr., 1040, 1042; *Philadelphia & Trenton R. R. Co.*, 6 Whart., 25, 41. And see *Jackson v. People*, 9 Mich., 111; *Low v. Galena, etc.*, R. R. Co., 18 Ill., 324; *Commissioners v. Supervisors of Carthage*, 27 Ill., 140; *Central Pacific R. R. Co. v. Placer Co.*, 43 Cal., 365; *Swift v. Poughkeepsie*, 37 N. Y., 511; *People v. Assessors of Brooklyn*, 39 N. Y., 81. See the general subject considered: *Caron v. Martin*, 26 N. J., 594; *Gaertner v. Fond du Lac*, 34 Wis., 497; *People v. Assessors of Brooklyn*, 39 N. Y., 81, 88; *People v. Assessors of Albany*, 40 N. Y., 154. While valuations are not subject to review on *certiorari*, if the assessors enter on the roll property not subject to taxation, and refuse on application to strike it out, the action, it is held, may be reviewed in this mode. *People v. Ogdensburg*, 48 N. Y., 390. *Mandamus* would seem, however, to be a more appropriate remedy. The writ will lie in the case of a warrant issued by a justice of the peace to collect militia penalties. *State v. Kirby*, 6 N. J., 143.

² *People v. Supervisors of Queens*, 1 Hill, 195. This was a case in which counsel moved for a *certiorari*, prohibition, *mandamus*, "or some other writ, instrument, process, order or proceeding," to review the action of town auditors in allowing a large sum against the town, for the expense of certain suits which it was claimed were not a proper charge against it. The errors complained of all originated in this allowance. The tax roll was at the time in the collector's hands, and the court held that no relief could be given in any of the modes proposed.

³ *Owners of Ground v. Albany*, 15 Wend., 374; *People v. Ogdensburg*, 48 N. Y., 390; *Jones v. Boston*, 104 Mass., 461; *Randle v. Williams*, 18 Ark., 380; *State v. Kingsland*, 23 N. J., 85; *State v. Ross*, 23 N. J., 517; *State v. Danser*, 23 N. J., 552; *State v. Powers*, 24 N. J., 400; *State v. Manchester*, 25 N. J., 581.

prive them of jurisdiction or to take from the party complaining any substantial right.¹ The discretionary action of a county board in equalizing the assessments of the county, like the assessments themselves, is not subject to review on this process.² In the following cases action may be set aside on *certiorari*: Where the assessment is erroneous in point of law, either because the assessors have adopted some inadmissible basis in making it, or because they have disregarded any of the mandatory provisions of statute on which parties assessed have a right to rely for their protection;³ where errors of a like character are committed by any appellate jurisdiction which is empowered by statute to review, revise or equalize the assess-

¹ *Jones v. Boston*, 104 Mass., 461; *People v. Fredricks*, 48 Barb., 173; *Newark ads. State*, 32 N. J., 453; *State v. Newark*, 32 N. J., 491; *Matter of Mount Morris Square*, 2 Hill, 14. If a corporation, in opening a street and assessing the expense, act within the scope of the authority conferred upon it, and comply with the forms prescribed by the statute, the proceedings will not be reversed on *certiorari*, though its own by-laws may have been disregarded. *Ex parte Mayor, etc., of Albany*, 23 Wend., 277. But where there are questions of jurisdiction in the appointment of commissioners to make the assessment, *certiorari* will lie. *Patchin v. Brooklyn*, 13 Wend., 864. An assessment will not be set aside because of its including property not taxable with that which is, if the whole valuation is not excessive for that which is taxable. *State v. Haight*, 35 N. J., 178.

² *Smith v. Supervisors of Jones Co.*, 30 Ia., 531; *People v. Supervisors of Allegany*, 15 Wend., 198; *People v. Supervisors of Queens*, 1 Hill, 195.

³ See *Newburyport v. County Commissioners*, 12 Met., 211 (where the question was whether the commissioners were not legally bound to assess at the valuation which the tax payer had given in the list which he had furnished as required by law); *Heywood v. Buffalo*, 14 N. Y., 534; *Genesee, etc., Bank v. Livingston Co.*, 53 Barb., 223; *Hatch v. Buffalo*, 38 N. Y., 276; *People v. Ogdensburgh*, 48 N. Y., 390; *Western R. Corp. v. Nolan*, 48 N. Y., 513; *Kennedy v. Troy*, 77 N. Y., 493; *State v. Clothier*, 30 N. J., 351 (where it is held that *certiorari* may be brought though the tax has been collected by distress and sale. But see, as to this, *National Bank of Chemung v. Elmira*, 53 N. Y., 49; *Ohio, etc., R. R. Co. v. Lawrence Co.*, 27 Ill., 50; *State v. McClurg*, 27 N. J., 253 (where it is decided that if an excessive tax is assessed it will be set aside for the excess only); *State v. Quaife*, 23 N. J., 89 (where a similar ruling was had); *State v. Newark*, 27 N. J., 185 (where, on *certiorari*, an assessment was set aside which assumed to be made by benefits, where from the nature of the case there could be no benefits); *California, etc., R. R. Co. v. Supervisors of Butte*, 18 Cal., 671; *Swann v. Cumberland*, 8 Gill, 150; *Buckner, Ex parte*, 4 Eng. (Ark.), 73; *Carroll v. Mayor*, 12 Ala., 173; *Kelso v. Boston*, 120 Mass., 297 (where it is said that the omission from an assessment of some of the parties benefited may be corrected on this writ); *Stone v. Viele*, 38 Ohio St., 314.

ments;¹ and where municipal bodies in levying assessments for local improvements exceed their authority, or lay down erroneous principles to govern the action of the assessors or commissioners who are to make them.²

In reviewing a case on *certiorari* the court is confined to the record of the tribunal reviewed. Extrinsic evidence cannot be received to contradict or control it unless the statute has made provision therefor.³ If the tax is rendered illegal by facts not appearing of record, some other remedy must be sought.⁴ On *certiorari* the court will not set aside the whole of a tax proceeding if justice can be done to the party without doing so,⁵ unless, perhaps, where by law, in case it is vacated, there can be a new assessment; in which case, vacating the whole may be most likely to accomplish the general purposes of the law for making the levy.⁶

¹ In New York, where street assessments were to be submitted to the common council for confirmation, and that body was empowered to alter the same in such manner as, in its opinion, justice might require, the act of confirmation was held to be an exercise of judicial authority, and subject to be removed into the supreme court by *certiorari*. *Leroy v. New York*, 20 Johns., 420; *Starr v. Rochester*, 6 Wend., 564; *Matter of Mount Morris Square*, 2 Hill, 14; *People v. New York*, 5 Barb., 43; *People v. Brooklyn*, 9 Barb., 535. So in Massachusetts, the proceedings of county commissioners in reviewing assessments on appeal were held reviewable in this mode. See *Parks v. Boston*, 8 Pick., 218; *Gibbs v. County Commissioners*, 19 Pick., 298; *Newburyport v. County Commissioners*, 12 Met., 211; *Lincoln v. Worcester*, 8 Cush., 55, 61. A similar ruling in New Jersey: *State v. Falkinburge*, 15 N. J., 320; *State v. Parker*, 34 N. J., 49. And in Missouri: *State v. St. Louis County Court*, 47 Mo., 594; *State v. Dowling*, 50 Mo., 184. And see *Floyd v. Gilbreath*, 27 Ark., 675.

² In New Jersey, it is said that the action of municipal bodies in levying assessments for local improvements must be kept strictly within the limits assigned to them by the statute, and if the assessments appear not to be within those limits, they shall not only be liable to reversal on *certiorari*, but also be held void and insufficient to support a title professing to be founded on them. *State v. Jersey City*, 35 N. J., 381; *State v. Hudson City*, 29 N. J., 104, 475.

³ *Charlestown v. County Commissioners*, 109 Mass., 270. See *Hatch v. Buffalo*, 38 N. Y., 276; *Hannibal, etc., R. Co. v. State Board*, 64 Mo., 294.

⁴ *Floyd v. Gilbreath*, 27 Ark., 675; *Hatch v. Buffalo*, 38 N. Y., 276; *State v. Manning*, 41 N. J., 275; *Vance v. Little Rock*, 30 Ark., 435.

⁵ *State v. Kingsland*, 23 N. J., 85, citing *King v. King*, 2 T. R., 235; *Lawton v. Commissioners*, 2 Caines, 182.

⁶ *State v. Bergen*, 34 N. J., 438. But whether on *certiorari* the court will

Injunction: General rule of equitable relief. It is not a matter of right that a party should have relief in equity on a showing of illegality in tax proceedings unless he can show in addition that his case comes under some acknowledged head of equity jurisdiction. The mere fact that the law has been or is about to be violated, even when the violation is accompanied with a threat to proceed against the party to enforce an unlawful levy, will not of itself furnish any ground for equitable interposition.¹ In ordinary cases a party must find his remedy in the courts of law, and it is not to be assumed that he will fail to find one entirely adequate to his proper relief. But there are certain cases with which the courts of law cannot adequately deal. Their preventive remedies are few and of narrow scope; and where the case is such that if threatened

set aside an assessment after an act of the legislature to confirm it, even though that act be invalid, see *State v. Apgar*, 31 N. J., 358.

Questions as to the constitutionality of a statute providing for local improvements, and as to compliance by the authorities with the terms of such statute, must be raised in Massachusetts on *certiorari*. *Taber v. New Bedford*, 185 Mass., 162; *Snow v. Fitchburg*, 186 Mass., 179.

A proceeding to set aside an assessment is not an action "affecting the title to real property or an interest therein." *Nichols v. Voorhis*, 74 N. Y., 28.

¹*Dows v. Chicago*, 11 Wall., 108; *Hannewinkle v. Georgetown*, 15 Wall., 547; *State Railroad Tax Cases*, 92 U. S., 575; *Savings and Loan Society v. Austin*, 46 Cal., 416; *Floyd v. Gilbreath*, 27 Ark., 675; *Mooers v. Smedley*, 6 Johns. Ch., 27; *Messeck v. Supervisors*, 50 Barb., 190; *Hanlon v. Supervisors*, 57 Barb., 383; *Heywood v. Buffalo*, 14 N. Y., 584; *Susquehanna Bank v. Broome County*, 25 N. Y., 312; *McDonald v. Murphree*, 45 Miss., 705; *Sayre v. Tompkins*, 23 Mo., 443; *First National Bank v. Meredith*, 44 Mo., 500; *Barrow v. Davis*, 46 Mo., 394; *McPike v. Pew*, 48 Mo., 525; *U. P. R. R. Co. v. Lincoln County*, 2 Dill., 297; *Weaver v. State*, 39 Ala., 535; *Cook County v. Chicago, etc.*, R. R. Co., 35 Ill., 460. But see *Williams v. Peinney*, 25 Ia., 436; *Jeffersonville v. Patterson*, 32 Ind., 140; *Burnes v. Leavenworth*, 2 Kan., 454; *Warden v. Supervisors*, 14 Wis., 618; *Corrothers v. Board of Education*, 16 W. Va., 527; *McClung v. Livesay*, 7 W. Va., 329; *Douglass v. Harrisville*, 9 W. Va., 162; *Gillette v. Denver*, 21 Fed. Rep., 822; *Swinney v. Beard*, 71 Ill., 27; *Finnegan v. Fernandina*, 15 Fla., 379; *Montgomery v. Sayre*, 65 Ala., 564; *Mobile v. Baldwin*, 57 Ala., 62; *Albany, etc., Bank v. Maher*, 19 Blatch., 175; *Alexander v. Dennison*, 2 MacArth., 562; *Frost v. Flick*, 1 Dak., 131; *Ivinson v. Hance*, 1 Wy., 270.

This doctrine is applicable to the case of special assessments. *Dean v. Davis*, 51 Cal., 406. Where railroad property is only subject to taxation under a state assessment, a tax based on a county assessment will be enjoined. *Union Pac. R. Co. v. Cheyenne*, 118 U. S., 16.

action is allowed to be taken the mischief will be irremediable, equity, under old and well established principles, will interfere, because equity alone can do complete justice under such circumstances.

Cases of fraud, accident or mistake, and cases of cloud upon the title to one's property, are also cases with which equity can most effectually deal, and it takes jurisdiction in tax cases as it does in all others where any one of these grounds of jurisdiction appears.¹ There are cases also in which equity on a single record might dispose of controversies which at law would require a multiplicity of suits; and this fact may furnish ample ground for equitable jurisdiction; for both the public and the parties concerned are interested in avoiding unnecessary litigation.

The available remedy in equity, when any is admissible, is commonly that by injunction.² It is probable that this remedy

¹ *Lumber Co. v. Hayward*, 20 Fed. Rep., 422; *Wells v. Dayton*, 11 Nev., 161.

In Illinois it is said equity will interfere to enjoin the collection of a tax only when the tax is unauthorized by law, or is laid on property not subject to taxation, or where the assessment or levy has been made without legal authority, or fraud has intervened. *Wabash, etc., R. Co. v. Johnson*, 108 Ill., 11, citing *Cook County v. Railroad Co.*, 35 Ill., 466; *Porter v. Railroad Co.*, 76 Ill., 596; *National Bank v. Cook*, 77 Ill., 622. See *Exchange Bank v. Miller*, 19 Fed. Rep., 372. The collection will be enjoined after tender has been made of state obligations which by law are receivable for taxes. *Allen v. Railroad Co.*, 114 U. S., 311. A court of equity may restrain the collection of an illegal tax though the code does not specify this among the heads of equity jurisdiction. *Gates v. Barrett*, 79 Ky., 295. That excessive levies may be enjoined, see *Burlington, etc., R. Co. v. Saunders Co.*, 16 Neb., 123; *Miles v. Ray*, 100 Ind., 166; *Binkert v. Jansen*, 94 Ill., 283; *St. Clair School Board's Appeal*, 74 Pa. St., 252.

It has been held that a corporation cannot sue to restrain a tax on the shares of stock of its stockholders. *Waseca Co. Bank v. McKenna*, 32 Minn., 468. But see *Pelton v. National Bank*, 101 U. S., 143; *Cummings v. National Bank*, 101 U. S., 153. In West Virginia it is said an injunction will not in general be allowed, in case of an illegal tax, if the party was subject to the jurisdiction. But if property not subject to taxation is taxed, or if a tax is imposed beyond the constitutional limit, collection will be enjoined. *Christie v. Malden*, 23 W. Va., 667.

² Where bill is filed to restrain the collection of a school district tax, the district should be made a party. *Atchison, etc., R. Co. v. Wilhelm*, 33 Kan., 206. If the district is such *de facto*, the regularity of its organization is not to be questioned in such a suit. *Atchison, etc., R. Co. v. Wilson*, 33 Kan., 223.

has been sometimes awarded with too little regard to any other consequences than those which concerned the individual applying for it. But the personal consequences are not the only ones which should be kept in view in these cases. When the illegalities complained of affect only the person complaining, an injunction which restrains proceedings as to him may cause no considerable mischief, and may very properly be awarded if a sufficient case is made out; but when they affect the whole tax levy, as they often do, a court should be extremely cautious in awarding, on the complaint of one person, or even of several, a process which may reach the cases of others not complaining, and which may seriously embarrass all the operations of the government depending on the source of revenue which by means of it would be stopped. Courts have frequently remarked upon the impossibility of the government calculating with any certainty upon its revenues if the collection of taxes was subject to be arrested in every instance in which a tax payer or tax collector could make out *prima facie* a technical case for arresting such collection; and it is justly said to be much better to let the individual pay to the government the demands it makes upon him, and if he considers them wholly or in part illegal, apply for the refunding of the money with interest afterwards.¹

So serious have been the embarrassments by an improvident employment of the writ of injunction and other obstructive process, that the legislature has in some cases deemed it necessary to interpose and forbid the issue of injunction, replevin or other specified writs, the tendency of which would be to embarrass collections.² The courts also have sometimes im-

¹ *Eve v. State*, 21 Ga., 50; *Cody v. Lennard*, 45 Ga., 85; *Scofield v. Perkerson*, 46 Ga., 350. A tax will not be enjoined unless it appears to be upon the duplicate in the officer's hands. *Worley v. Harris*, 83 Ind., 493.

² That restraining collection of taxes may be prohibited, see *Snyder v. Marks*, 109 U. S., 189; *Kensett v. Stivers*, 18 Blatch., 397; *Paul v. Railroad Co.*, 4 Dill., 35; *Moore v. Holloway*, 4 Dill., 52; *Grimmell v. Des Moines*, 57 Ia., 144; *Rinard v. Nordyke*, 76 Ind., 130; *Meaker v. Koch*, 76 Ind., 66; *Mulikin v. Reeves*, 71 Ind., 281; *Faris v. Reynolds*, 70 Ind., 359; *Wilson v. Weber*, 8 Ill. Ap., 125; *Swinney v. Beard*, 71 Ill., 27; *San Jose Gas Co. v. January*, 57 Cal., 614; *Alkan v. Bean*, 8 Biss., 83; *Astor v. New York*, 39 N. Y. Sup. Ct. R., 120. Unless it appears that the officer has the power to levy by virtue of the proper warrant a tax will not be enjoined, but the

posed conditions to equitable remedies in cases where they deemed the public interest to demand it. Thus where an injunction has been applied for to restrain the collection of a tax, partly legal and partly not, the court has made the payment of the legal a condition precedent,¹ and it has been

party left to legal remedies if his property is seized. *Brown v. Herron*, 59 Ind., 61; *Millikin v. Bloomington*, 72 Ind., 161; *Anthony v. Sturgis*, 86 Ind., 479. The courts are forbidden to interfere with the collection of state taxes in Georgia; but the prohibition will not be applied to a case where a pretended tax is wholly illegal. *Decker v. McGowan*, 59 Ga., 805; *Smith v. Goldsmith*, 63 Ga., 736; *Wright v. Railroad Co.*, 64 Ga., 783.

¹ *State Railroad Tax Cases*, 92 U. S., 575; *National Bank v. Kimball*, 108 U. S., 732; *Conway v. Waverley*, 15 Mich., 257; *Palmer v. Napoleon*, 16 Mich., 176; *Hersey v. Milwaukee County*, 16 Wis., 185; *Bond v. Kenosha*, 17 Wis., 284; *Myrick v. La Crosse*, 17 Wis., 442; *Mills v. Johnson*, 17 Wis., 598; *Mills v. Charleton*, 29 Wis., 400; *Dean v. Borchsenius*, 30 Wis., 236; *O'Kane v. Treat*, 25 Ill., 557; *Taylor v. Thompson*, 42 Ill., 9; *Briscoe v. Allison*, 43 Ill., 291; *Reed v. Tyler*, 56 Ill., 288; *Barnett v. Cline*, 60 Ill., 205; *Harrison v. Haas*, 25 Ind., 281; *Roseberry v. Huff*, 27 Ind., 12; *Board of Commissioners v. Elston*, 32 Ind., 27; *Cauldwell v. Curry*, 93 Ind., 363; *Adams v. Castle*, 30 Conn., 404; *Morrison v. Hershire*, 32 Ia., 271; *Corbin v. Woodbine*, 33 Ia., 297; *Shelton v. Dunn*, 6 Kan., 128; *Lawrence v. Killam*, 11 Kan., 499; *Wilson v. Longendyke*, 32 Kan., 267; *Challiss v. Hekelnkaemper*, 14 Kan., 474; *Hagaman v. Cloud Co.*, 19 Kan., 394; *Union Pac. R. Co. v. Ryan*, 2 Wy. Ter., 391; *Twombly v. Kimbrough*, 24 Ark., 459; *Frazer v. Siebern*, 16 Ohio St., 614; *Parmelee v. Railroad Co.*, 3 Dill., 25; *Worthen v. Badgett*, 32 Ark., 496; *Alexander v. Dennison*, 2 MacArth., 562; *Huntington v. Palmer*, 7 Sawy., 355; *Alabama, etc., Ins. Co. v. Lott*, 54 Ala., 499; *Montgomery v. Sayre*, 65 Ala., 564; *Casady v. Lowry*, 49 Ia., 523; *Knox v. Dunn*, 22 Kan., 683; *Gandy v. Commissioners*, 23 Kan., 738; *Pritchard v. Madren*, 24 Kan., 486; *Arnold v. Supervisors*, 43 Wis., 627; *Kaehler v. Dobberpuhl*, 56 Wis., 480; *Moore v. Wayman*, 107 Ill., 193; *Mobile & O. R. Co. v. Moseley*, 52 Miss., 127; *Overall v. Ruenzi*, 67 Mo., 203; *Johnson v. Roberts*, 102 Ill., 655; *Cheney v. Jones*, 14 Fla., 587; *Allegany Co. Com'rs v. Union Mining Co.*, 61 Md., 545; *Tallahassee Mfg. Co. v. Spigener*, 49 Ala., 262.

As to the necessity of a tender in the bill, see *State Railroad Tax Cases*, 92 U. S., 575; *Allegany Co. Com'rs v. Union Mining Co.*, 61 Md., 545; *Wright v. Railroad Co.*, 64 Ga., 783; *Hare v. Carnall*, 39 Ark., 196; *Connors v. Detroit*, 41 Mich., 128.

If the tax is excessive by reason of the list not including some lots which should have been embraced, the collection will not be enjoined until the amount really chargeable to complainant has been paid. *Ottawa v. Barnes*, 10 Kan., 270. If the bill shows precisely the amount of the excess of the taxes which are claimed to be illegal, and only asks to have the collection of the illegal taxes restrained, the bill will not be dismissed for want of a formal offer to pay the legal taxes. *Clement v. Everest*, 29 Mich., 19. Com-

strongly intimated, in a case where it was alleged the assessment had, by fraud, been made too high, that the payment of what the party conceded would be his just proportion, ought to be required before injunction should issue, in order that the proceeding may be as little as possible injurious to the public interest.¹

The cases in which equitable relief will most often be sought will be briefly considered separately.

Illegal Corporate Action. When a municipality or its officers take or threaten to take action in the creation of a debt or in the incurring of obligations which if allowed to go on must eventually result in taxation, the only effectual remedy may be in enjoining such action *in limine*. As the action, if illegal,

pare *Board of Commissioners v. Elston*, 33 Ind., 27. If the legal and illegal taxes are so blended that they cannot be distinguished, a prohibition may go for the whole. *State v. Hodges*, 14 Rich., 256. See *Hebard v. Ashland Co.*, 55 Wis., 145. That a tax for a proper purpose in excess of the legal limit should be upheld as far as legal, see *McPherson v. Foster*, 43 Ia., 48.

¹ *Merrill v. Humphrey*, 24 Mich., 170; *Frazer v. Siebern*, 16 Ohio St., 614. Where a bill is filed praying that the levy of state, county and township taxes be restrained, alleging them all to be invalid, if complainant fails to show any illegality in the state and county taxes, the bill will be dismissed. *Pillsbury v. Auditor-General*, 26 Mich., 245. But if the tax is void *in toto*, the complainant is under no obligation to pay or tender anything. *Albany, etc., Bank v. Maher*, 9 Fed. Rep., 884. If it is void only for want of a formality, the complainant should pay, or offer to pay, the taxes due. *Wood v. Helmen*, 10 Neb., 65. See *Hunt v. Easterday*, 10 Neb., 165; *Union Pac. R. Co. v. Ryan*, 2 Wy., 391.

Where a statutory remedy is given it must be sought in the statutory time. But in case of accident, mistake or misfortune, relief may be given afterwards. *Trust & Guaranty Co. v. Portsmouth*, 59 N. H., 33, citing *Dewey v. Stratford*, 40 N. H., 203; *Manchester Mills v. Manchester*, 57 N. H., 309, and 58 N. H., 38. In a purely statutory proceeding it is competent to provide that the complainant shall pay costs. *Willard v. Redwood Co.*, 22 Minn., 61.

Injunction will not lie to restrain collection of a legal railroad aid tax, because of the insolvency of the company, nor because no order has been made to collect for the purpose of appropriating the tax to railroad aid. *Wilson v. Hamilton Co.*, 68 Ind., 507.

An ordinance which was adjudged void, allowing forty separate executions to be levied on the goods of the same person for a continuing failure to pay the tax required thereby, the collection will be enjoined. *Gould v. Atlanta*, 55 Ga., 678. The courts of Georgia are very liberal in applying the remedy by injunction in the case of illegal taxation. See *Southwestern R. v. Wright*, 68 Ga., 311. And as to Florida, see *Smith v. Long*, 20 Fla., 697.

would constitute usurpation of authority, the state through its law officer has undoubted right to interfere by bill.¹ But this is not always a satisfactory remedy, because the public authorities might be indisposed to resort to it or to pursue it with sufficient vigor to render it effectual. The more common remedy, therefore, is for tax payers to file bills on their own behalf. The right to do this has been seriously contested in some cases, it being insisted that, until a tax is actually laid, the grievance, if any, is purely a public grievance, and public grievances must be redressed on the application of the proper public authorities: it is urged that individuals can proceed in equity only when their interests are separate and individual; and such interests are only affected by the unlawful action when a tax is laid and has become an individual charge against the several persons taxed.² On the other hand, it is said that the case is to be distinguished from the cases of purely public wrongs, in which the general public are alike concerned; that the tax payers constitute a class specially damaged by the unlawful act, in the increase of the burden of taxation upon their property. They have, therefore, a special interest in the subject-matter of the suit distinct from that of the general public, and the jurisdiction of equity may be sustained on the ground that the injury which would be done by the unlawful municipal action would be irreparable. This would meet any objection on the ground that the parties would have a remedy at law when the tax came to be levied.³ There is great force in this view. In many

¹ See *Attorney-General v. Detroit*, 26 Mich., 263, and cases cited; *State v. Sanderson*, 54 Mo., 203; *State v. Saline County Ct.*, 51 Mo., 350; *Mathis v. Cameron*, 63 Mo., 504.

The state, it has been held, cannot interpose to enjoin the collection of a school district tax when tax payers in a private action have ample protection. *State v. McLaughlin*, 15 Kan., 228.

A township in its corporate capacity cannot enjoin a tax laid upon the tax payers of the township. *Center Township v. Hunt*, 16 Kan., 430.

² *Doolittle v. Supervisors of Broome*, 18 N. Y., 155; *Roosevelt v. Draper*, 23 N. Y., 318; *Miller v. Grandy*, 13 Mich., 540; *Conklin v. Commissioners*, 13 Minn., 454; *Morgan v. Graham*, 1 Woods, 124. In Massachusetts a remedy is given by statute. *Cooley v. Granville*, 10 Cush., 56; and many subsequent cases were brought under statutes conferring jurisdiction.

The holding of an election to vote upon a tax which it is claimed will be illegal if laid will not be enjoined. *Roudanez v. New Orleans*, 29 La. An., 271.

³ *Bartol*, Ch. J., in *Baltimore v. Gill*, 31 Md., 375, 394. In the recent case of *Crampton v. Zabriske*, 101 U. S., 601, 609, it is said that "of the right of resident tax payers to invoke the interposition of a court of equity to pre-

cases the injury that would result from the enforcement of an illegal tax would be irreparable, because the tax moneys when collected are under control of the public authorities, and if made use of by them, though under circumstances amounting to misappropriation, are effectually lost to the tax payers, since if they sue to recover what they have paid, they will inevitably be taxed again to make up the deficiency which the repayment to them must cause. It is well settled that a misappropriation of public moneys, whereby a deficiency in its revenues is caused, will not render a subsequent tax illegal, even though it is levied for the very purpose of supplying the deficiency thus illegally caused;¹ and the importance of an interference *in limine* is therefore manifest.

Some states have endeavored to prevent misappropriations by providing in their constitutions that a tax shall be applied only to the object designated by the law in pursuance of which it is laid;² but while such a provision is obligatory

vent an illegal creation of a debt which they, in common with other property holders of the county, may otherwise be compelled to pay, there is at this day no serious question. . . . Certainly in the absence of legislation restricting the right to interfere in such cases to public officers of the state or county, there would seem to be no substantial reason why a bill by or on behalf of individual tax payers should not be entertained to prevent the misuse of corporate powers. The courts may be safely trusted to prevent the abuse of their powers in such cases."

¹See *Wright v. Dunham*, 13 Mich., 414; *Withington v. Howard*, 8 Cush., 66; *Moore v. School Directors*, 59 Pa. St., 232. That misappropriation may be restrained, see *Union Pac. R. Co. v. Dawson Co.*, 12 Neb., 254; *State v. Macon Co. Court*, 68 Mo., 29. That in New York tax payers as such cannot maintain a bill to restrain the paying out of moneys on unfounded claims, see *Kilbourne v. St. John*, 59 N. Y., 21, citing *Susquehanna Bank v. Supervisors of Broome*, 25 N. Y., 312. Compare *Hills v. Savings Bank*, 36 Hun, 161; *Osterhout v. Hyland*, 27 Hun, 167. Taxation to pay city bonds cannot be enjoined unless the city can make defense to the bonds. *Wilkinson v. Peru*, 61 Ind., 1.

²Under such a provision funds raised for general township purposes cannot be diverted to the payment of railroad aid bonds. *National Bank v. Barber*, 24 Kan., 534. See, for a like principle, *Doty v. Ellsbree*, 11 Kan., 209. And for peculiar cases, see *State v. Leavenworth*, 2 Kan., 61; *Graham v. Horton*, 6 Kan., 343; *Atchison, etc., R. Co. v. Woodcock*, 18 Kan., 20. That in Illinois moneys raised for the county cannot be diverted to the purposes of a part of the towns, see *Sleight v. People*, 74 Ill., 47. For an interesting case raising the constitutional question, see *Fairfield v. People*, 94 Ill., 244. And see, as to Georgia, *Truett v. Justices*, 20 Ga., 102. In South Carolina it is held that, where the money has been raised, if the object is no longer attainable, or there is no law sanctioning the appropriation to it,

upon the officers, it is one easy of evasion by men upon whom the sense of public duty rests but lightly. The occasions for interference to prevent misappropriation are therefore not uncommon; and the courts have interfered, on the application of tax payers, not only where a tax legally laid and collected was about to be misapplied,¹ but also where the tax was collected for an illegal purpose, so that, if the moneys were applied to that purpose, the application would in a legal sense be misappropriation.²

The reasons for preventive remedies are very forcible when it is proposed to create a corporate debt and issue as evidence of it negotiable securities under authority of law to contract in that form, and to put such securities into circulation. The effective remedy must usually in such cases be preliminary to the threatened illegal action; and the very decided preponderance of authority is that the proper redress may be had upon the application of individual tax payers.³

the money may be devoted to objects under the same general head, if no legislative contract be violated thereby. *State v. Leaphart*, 11 S. C., 458. Compare *Morton v. Comptroller*, 4 S. C., 430. See, for another case, *State v. Cobb*, 8 S. C., 123. Compare *Long v. Richmond*, 76 N. C., 273.

The constitutional provision is imperative. *Dean v. Lufkin*, 54 Tex., 266. The moneys raised cannot be diverted to other objects. *State v. Haben*, 22 Wis., 660. And see, as to this last point, *Board of Liquidation v. McComb*, 92 U. S., 531.

Where poll taxes are required by the constitution to be devoted to educational purposes, they may be used to pay previous school debts. *State v. Cobb*, 8 S. C., 123. A provision in a state constitution devoting certain privilege taxes to a particular purpose will modify to that extent previous municipal charters devoting the tax to other purposes. *State Board of Education v. Aberdeen*, 56 Miss., 518.

¹ That a city may be enjoined from misappropriating money collected to pay a public debt, see *Maenhaut v. New Orleans*, 2 Woods, 108; *Chisholm v. Montgomery*, 2 Woods, 584; *Ranger v. New Orleans*, 2 Woods, 128. A tax payer may maintain a suit to enjoin the illegal repayment of taxes by the supervisors. *Hospers v. Wyatt*, 63 Ia., 264. In New York by statute a tax payer may bring suit to vacate the audit of fraudulent and collusive claims. It seems in that state claims once rejected cannot be allowed by a subsequent board. *Osterhoudt v. Rigney*, 98 N. Y., 222; *Osterhoudt v. Supervisors*, 98 N. Y., 239.

² See *Rutz v. Calhoun*, 100 Ill., 391; and compare *Strohm v. Iowa City*, 47 Ia., 42. A railroad aid tax voted but not earned will be enjoined. *Curry v. Decatur Co.*, 61 Ia., 71.

³ See *Mandeville v. Riggs*, 2 Pet., 482; *Dodge v. Woolsey*, 18 How., 331; *Sharpless v. Philadelphia*, 21 Pa. St., 147; *Page v. Allen*, 58 Pa. St., 338; *New London v. Brainard*, 22 Conn., 552; *Webster v. Harwinton*, 32 Conn.,

Proceedings to restrain municipal action of any description ought to be prompt, as confusion in public action is likely to be caused by it. It has been held in Massachusetts that persons taxed for school purposes, when the district has been illegally constituted, may unite in a bill to restrain the collection of the tax, notwithstanding a delay of thirteen months since the illegal action to establish the district, and notwithstanding in the mean time a tax has been levied and collected, and other important action has been had by the district.¹ In Michigan, after several years had elapsed, the court refused to permit the regularity of the organization to be attacked in equity, and the cases referred to in the opinion tend strongly in the direction of holding that, on grounds of public policy, it should not be suffered, even after a short delay, if the district, in the mean time, had become peaceably organized, and was in the exercise of authority as such.²

What is above said regarding unlawful municipal action in certain cases will apply in all others in which individual citizens are wronged. A tax payer may therefore file a bill to restrain tax proceedings against himself where he has been unlawfully set off from one municipality into another.³

131; *La Fayette v. Cox*, 5 Ind., 38; *Oliver v. Keightley*, 24 Ind., 514; *Terrett v. Sharon*, 34 Conn., 105; *Barr v. Deniston*, 19 N. H., 170; *Merrill v. Plainfield*, 45 N. H., 126; *Colton v. Hanchett*, 13 Ill., 615; *Drake v. Phillips*, 40 Ill., 388; *Rice v. Smith*, 9 Ia., 570; *McMillan v. Lee County*, 3 Ia., 311; *Grant v. Davenport*, 36 Ia., 396; *Fleming v. Mershon*, 36 Ia., 413; *Wade v. Richmond*, 18 Grat., 583; *Douglass v. Placerville*, 18 Cal., 643; *Stevens v. Rutland, etc. R. R. Co.*, 29 Vt., 545; *Gifford v. New Jersey R. R. Co.*, 10 N. J. Eq., 171; *Baltimore v. Gill*, 31 Md., 375; *Hooper v. Ely*, 46 Mo., 505; *Steines v. Franklin County*, 48 Mo., 167; *Hodgman v. Chicago, etc., R. Co.*, 20 Minn., 48; *Simmer v. St. Paul*, 23 Minn., 408; *Curtenius v. Hoyt*, 37 Mich., 583; *Counterman v. Dublin*, 38 Ohio St., 515. See, also, *Gray v. Chapin*, 2 Sim. & Stu., 267; *Bromley v. Smith*, 1 Sim., 8. For a statutory remedy now given to tax payers in New York, see *Ayers v. Lawrence*, 59 N. Y., 192. In a suit to enjoin the collection of a tax to pay the bonded debt of a school district, the district is a necessary party. *Hays v. Hill*, 17 Kan., 360; *Voss v. School District*, 18 Kan., 467.

¹ *Holmes v. Baker*, 16 Gray, 259. The opinion barely refers to the delay, saying that "The plaintiffs have been guilty of no delay or negligence which should deprive them of a remedy by injunction against the future illegal proceedings of the defendant."

² *Stuart v. Kalamazoo*, 30 Mich., 69, citing *People v. Maynard*, 15 Mich., 463; *Fractional School District v. The Joint Board*, 27 Mich., 3.

³ *Simpkins v. Ward*, 45 Mich., 559. See *Peru v. Bearss*, 55 Ind., 576; *Windman v. Vincennes*, 58 Ind., 480.

Voting the Tax. The action of the proper authorities in voting a tax cannot be restrained on the ground that they are voting more than is necessary for the purpose;¹ nor on an allegation that there is an intent to appropriate some portion of the sum voted to a purpose not authorized by law;² nor because complainant is injured by unreasonable delay in doing the work for which the tax is laid.³ Nor can the making of an assessment be enjoined, the act being judicial,⁴ nor the selection of a particular business for taxation, the act being legislative.⁵

Joint Complaint by Several Persons Taxed. When the supposed illegality in a tax proceeding affects a single person only, or affects him in a peculiar manner, distinguishing his case from that of others, he cannot unite with others in a suit to restrain such proceeding. A joint bill by two or more parties, setting out distinct grounds on which each sought relief, would be dismissed as multifarious.⁶ But where the illegality extends to the whole assessment, or where it affects, in the same man-

¹ *Wharton v. School Directors*, 42 Pa. St., 358. The levy of a tax within the limits of legislative authority is an act of sound discretion, and cannot render the board ordering it liable to the parties whose property is taken for its satisfaction. *Moore v. School Directors*, 59 Pa. St., 232.

A levy of special tax is not made void by being made payable at an earlier day than it should have been under the statute—the full time having in fact been allowed for payment. *Gilkeson v. Frederick Justices*, 13 Gratt., 577.

² *Truesdell's Appeal*, 58 Pa. St., 148. The principle was involved in *Morgan v. Graham*, 1 Woods, 124, in which it was attempted to restrain state officers from issuing bonds under what was alleged to be an unconstitutional law.

³ *Whiting v. Boston*, 106 Mass., 89.

⁴ *Western R. R. Co. v. Nolan*, 48 N. Y., 513.

⁵ *Ex parte Schmidt*, 2 Tex. Ap., 196.

⁶ *Kerr v. Lansing*, 17 Mich., 34; *Hudson v. Atchison County*, 12 Kan., 140. Compare *Cutting v. Gilbert*, 5 Blatch., 259; *Wood v. Bangs*, 1 Dak., 179; *Goodwin v. Savannah*, 53 Ga., 410.

Where a national bank has paid under protest the tax assessed upon its shareholders, a bill in equity on the ground of multiplicity of suits will not lie to have the tax adjudged invalid, but an action at law may be brought to recover back the money. *Kimball v. National Bank*, 1 Ill. Ap., 209. Compare *Albany, etc., Bank v. Maher*, 9 Fed. Rep., 884. A joint bill will not lie where the only joint interest is in a question of law; as where a number of kinds of business are taxed, and persons employed in them seek to contest the taxation. *McGrath v. Newton*, 29 Kan., 364. This principle

ner, a number of persons, so that the question involved can be presented without confusion by one bill filed by all or any number of those thus affected, there seems to be no sufficient reason why a joint bill should not be permitted. The reasons favoring it are, that it avoids the necessity of a multiplicity of suits, and the attendant trouble and expense; and the objection that the interests of complainants are several is sufficiently met by the fact that complete justice may be done to all in one suit on the single issue; whereas, if the parties did not join, the same issue must be passed upon in separate suits brought by the several complainants. Although there has been some hesitation in sanctioning such bills, the weight of authority is decidedly in favor of supporting them, and this method of redress is now most commonly resorted to where the case is appropriate for it.¹

said to be applicable where a number of persons in the same business are separately assessed. *Youngblood v. Sexton*, 32 Mich., 406.

One person cannot file a bill to restrain the collection of a tax from another. *Missouri River, etc., R. R. Co. v. Wheaton*, 7 Kan., 232. To a bill filed by a stockholder to restrain illegal taxation of the corporation, the corporation must be made a party. *Davenport v. Dows*, 18 Wall., 626.

The United States Supreme Court cannot acquire jurisdiction where injunction is sought by several tax payers who are taxed severally and none of them to the amount of \$5,000. *Russell v. Stansell*, 105 U. S., 803.

A joint bill cannot be filed to set aside sales made of the complainants' lands separately for a sewer assessment. *Brunner v. Bay City*, 46 Mich., 236.

A city cannot enjoin the collection within it of a tax to pay bonds alleged to be illegal. "The city has no property subject to taxation, and whether the taxes levied upon citizens shall be collected or not is a matter of their own concern." *Waverley v. Auditor*, 100 Ill., 354.

¹ *Bull v. Read*, 18 Grat., 78; *Johnson v. Drummond*, 20 Grat., 419; *Floyd v. Gilbreath*, 27 Ark., 675; *Stevens v. Rutland, etc., R. R. Co.*, 29 Vt., 545; *Holmes v. Baker*, 16 Gray, 259; *Mott v. Pennsylvania R. R. Co.*, 30 Pa. St., 39; *Page v. Allen*, 59 Pa. St., 338; *Manly v. Raleigh*, 4 Jones' Eq., 370; *Galloway v. Jenkins*, 63 N. C., 147; *Kerr v. Lansing*, 17 Mich., 34; *Scofield v. Lansing*, 17 Mich., 437; *Motz v. Detroit*, 18 Mich., 495; *Webster v. Harwinton*, 32 Conn., 131; *Terret v. Sharon*, 34 Conn., 105; *Sherman v. Carr*, 8 R. I., 431; *Upington v. Oviatt*, 24 Ohio St., 232; *Vanover v. The Justices*, 27 Ga., 354; *Baltimore v. Porter*, 18 Md., 284; *La Fayette v. Cox*, 5 Ind., 38; *Baltimore v. Gill*, 31 Md., 375; *Nill v. Jenkinson*, 15 Ind., 425; *Oliver v. Keightley*, 24 Ind., 514; *Harward v. St. Clair, etc., Company*, 51 Ill., 130; *Hooper v. Ely*, 46 Mo., 505; *Steiner v. Franklin County*, 48 Mo., 167; *Barr v. Deniston*, 19 N. H., 170; *McMillan v. Lee County*, 8 Ia., 311; *Mandleville v. Riggs*, 2 Pet., 482; *King v. Wilson*, 1 Dill., 555; *Coulson v. Portland*,

But the mere saving of the expense of several suits at law, where each of the complainants has an adequate remedy, is no ground for sustaining a joint suit in equity where no other ground of equitable relief is apparent. This is well explained by the supreme court of Connecticut, in a case in which a joint petition was filed to restrain the collection from several complainants of sewer assessments made upon their lands severally, and which were claimed to be illegal. "The multiplicity of suits, which the petition seeks to avoid, does not injuriously affect any one of the petitioners. No one of them has occasion to expect any such multiplicity affecting himself. One suit is all that any one of them has to fear, and the object of this bill would seem to be to relieve these parties severally from that one suit, and to consolidate the apprehended litigation. In other words, to enforce a consolidation rule by means of the extraordinary powers of the court of chancery. If the assessment were against one person only, it is not claimed that he could transfer from a court of law to a court of equity the question of his liability. But how is the condition of any one of these petitioners the worse because others are assessed for the same improvement? It would undoubtedly be convenient to try the questions relating to these warrants in one comprehensive law suit. But it does not seem to the court that the case presented by the bill is one of such irreparable injury, or of inadequate relief at law, as to warrant us in taking it away from the legal tribunals."¹

Deady, 481. For a case under the Kansas statute, see *Wyandotte, etc., Bridge Co. v. Wyandotte County*, 10 Kan., 326. See, also, *Bristol v. Johnson*, 34 Mich., 123; *Albany, etc., Bank v. Maher*, 9 Fed. Rep., 884; 19 Blatch., 175; *Louisville, etc., Co. v. Gaines*, 3 Fed. Rep., 266; *Greedup v. Franklin Co.*, 30 Ark., 101; *Vaughan v. Bowie*, 30 Ark., 278; *City Nat. Bank v. Paducah*, 2 Flipp., 61; *Blandirff v. Harrison Co.*, 50 Ia., 164; *Newsmyer v. Railroad Co.*, 52 Mo., 81; *Corrothers v. Board of Education*, 16 W. Va., 527; *Chesapeake, etc., R. Co. v. Miller*, 19 W. Va., 408; *Schumacker v. Toberman*, 56 Cal., 508.

If the bill is filed to have taxes declared void, the several municipalities concerned should be joined as defendants. *Adams v. Auditor-General*, 43 Mich., 453. The parties who unite as complainants should state in the bill that they file it on behalf of themselves and all others similarly situated. *McClung v. Livesay*, 7 W. Va., 329; *Doonan v. Board of Education*, 9 W. Va., 246.

¹ *Seymour, J.*, in *Dodd v. Hartford*, 25 Conn., 232, 238. And see *Sheldon v. School District*, 25 Conn., 224. Compare *Savings and Loan Association v.*

Protecting the Value of Securities. When public securities are issued, the coupons to which are by law receivable for taxes, if the state by subsequent enactment undertakes to defeat this right and the tax collectors refuse to receive the coupons in payment of taxes, a holder of coupons who does not show that he is also a tax payer cannot have injunction to restrain a tax collector from such refusal. A bill for the purpose is without precedent.¹

Personal Taxes. When a tax as assessed is only a personal charge against the party taxed, or against his personal property, it is difficult in most cases to suggest any ground of equitable jurisdiction. Presumptively the remedy at law is adequate. If the tax is illegal and the party makes payment, he is entitled to recover back the amount. The case does not differ in this regard from any other case in which a party is compelled to pay an illegal demand; the illegality alone affords no ground for equitable interference, and the proceedings to enforce the tax by distress and sale can give none, as these only constitute an ordinary trespass. To this point the decisions are numerous.² The exceptions to this rule, if any, must

Austin, 46 Cal., 416; Houghton v. Austin, 47 Cal., 646; Central Pacific R. R. Co. v. Corcoran, 48 Cal., 65; Harkness v. Board of Pub. Works, 1 MacAr., 121.

Tax payers may unite in a bill to enjoin payment of the whole tax when the interest is common, even though there may be no specific equities in favor of individual complainants. Sherman v. Benford, 10 R. I., 559.

¹ Marye v. Parsons, 114 U. S., 325.

² Brewer v. Springfield, 97 Mass., 152; Durant v. Eaton, 98 Mass., 469; Loud v. Charlestown, 99 Mass., 208; Whiting v. Boston, 106 Mass., 89; Hunnell v. Charlestown, 106 Mass., 850; Rockingham Savings Bank v. Portsmouth, 62 N. H., 17; Ritter v. Patch, 12 Cal., 298; Berri v. Patch, 12 Cal., 299; Worth v. Fayetteville, Winst. Eq. (N. C.), 70; Williams v. Detroit, 2 Mich., 560; Conley v. Chedic, 6 Nev., 222; Van Cott v. Supervisors of Milwaukee, 18 Wis., 247; Greene v. Mumford, 5 R. I., 472; McCoy v. Chillicothe, 3 Ohio, 370; Dodd v. Hartford, 25 Conn., 232; Sayre v. Tompkins, 23 Mo., 443; Barrow v. Davis, 46 Mo., 394; McPike v. Pew, 48 Mo., 525; Hopkins v. Lovell, 47 Mo., 102; Leslie v. St. Louis, 47 Mo., 474; Lockwood v. St. Louis, 24 Mo., 20; Fowler v. St. Joseph, 37 Mo., 228; Deane v. Todd, 23 Mo., 90; Youngblood v. Sexton, 32 Mich., 406; Hagenbuch v. Howard, 34 Mich., 1; Baltimore v. Railroad Co., 21 Md., 50; Dows v. Chicago, 11 Wall., 108; Hannewinkle v. Georgetown, 15 Wall., 547; Baldwin v. Tucker, 16 Fla., 258; Savings Bank v. Portsmouth, 52 N. H., 17; Brown v. Concord, 56 N. H., 375; Clark v. Ganz, 21 Minn., 387.

The doctrine of these cases is very succinctly stated by Bigelow, Ch. J.,

be of cases which are to be classed under the head of irreparable injury; as when the enforcement of a tax might destroy a valuable franchise;¹ or when property is levied upon which possesses a peculiar value to the owner beyond any possible market value it can have;² and other like cases where the recovery of damages would be inadequate redress. A case would be exceptional, also, if under the law no remedy could be had to recover back moneys paid.³ It must be conceded, however, that the courts in some states go further, and sustain the remedy by injunction in all cases of illegal taxation; proceeding in doing so upon the ground that "when officers or individuals have no legal authority to lay a tax, and they assume the right; or when persons are vested with the legal authority to lay a tax for a specified purpose, but instead of exercising that power they proceed to impose a tax which the law has not authorized, or lay it for fraudulent or unauthorized pur-

in *Brewer v. Springfield*, 97 Mass., 152, 154. "Until the plaintiffs have been compelled to pay the tax which they allege to have been illegally assessed upon them, they have suffered no wrong. When they have paid it they can recover it back by an action at law, which would furnish them an adequate and complete remedy." See, also, *Brooklyn v. Messerole*, 26 Wend., 132. In Connecticut, taxes on real and personal estate are held to stand on the same footing. See *Rowland v. School District*, 42 Conn., 30. In Illinois, if a party is assessed for personalty in one town when his domicile is in another, he may enjoin the tax. *Sivwright v. Pierce*, 108 Ill., 133; *Halstead v. Adams*, 108 Ill., 609.

Where the case is one of equitable jurisdiction the court may give relief as to the whole case, though as to some part of it there would be remedy at law. *Hebard v. Ashland Co.*, 55 Wis., 145.

¹ *Osborn v. Bank of United States*, 9 Wheat., 738, where an officer was enjoined from enforcing a heavy state tax unlawfully laid on a branch of the Bank of the United States, on the ground that to enforce it would drive the bank from the state and work irreparable mischief. See *Foote v. Linck*, 5 McLean, 616; *Wright v. Railroad Co.*, 64 Ga., 783; *Cummings v. National Bank*, 101 U. S., 153.

² See *Henry v. Gregory*, 29 Mich., 63, 70.

³ *First Nat. Bank v. Douglas Co.* 3 Dill., 298. Injunction allowed where by statute replevin was prohibited and the collector was irresponsible. *Deming v. James*, 72 Ill., 78. So where the tax had been paid. *Lewis v. Spencer*, 7 W. Va., 689. So where the collector was proceeding against another party than the one assessed. *Seeley v. Westport*, 47 Conn., 294. But this only on the application of the party he is proceeding against. *Waterbury Sav. Bank v. Lawler*, 46 Conn., 243; *Archer v. Railroad Co.*, 102 Ill., 493. See *Columbus, etc., R. Co. v. Grant Co.*, 65 Ind., 427.

poses; then a court of equity will interpose to afford preventive relief, by restraining the exercise of powers perverted to fraudulent or oppressive purposes."¹ But in the large majority of cases in which taxes are illegal, there is no fraud, actual or intended, and the illegality consists in an erroneous construction of powers, or in the unintentional omission of some necessary proceeding, or in other defect not inconsistent with good faith on the part of officers; and it seems a great stretch of equitable principles to treat such a case as one of legal fraud, and to be remedied on that ground. The equitable jurisdiction in these cases has grown up somewhat imperceptibly, and perhaps owes its origin as much to an idea that municipal officers, in the authority which affects the property of the people, are exercising a trust over which equity may properly assume a supervision, as to any supposed fraud, actual or constructive, which may be involved in their illegal action.² In

¹ *Drake v. Phillips*, 40 Ill., 338, 393, per *Walker*, Ch. J. See, also, *Foot v. Milwaukee*, 18 Wis., 270; *Toledo, etc., R. R. Co. v. La Fayette*, 23 Ind., 262; *Commissioners of Clay Co. v. Markle*, 46 Ind., 96; *Knight v. Flatrock, etc., Co.*, 45 Ind., 184; *Shoemaker v. Grant Co.*, 36 Ind., 175; *Riley v. Western Union Telegraph Co.*, 47 Ind., 511; *Spencer v. Wheaton*, 14 Ia., 88; *St. Clair Board's Appeal*, 74 Pa. St., 252; *McKonkey v. Smith*, 73 Ill., 318; *Lebanon v. Railway Co.*, 77 Ill., 539; *National Bank v. Cook*, 77 Ill., 629.

It is held the sale of land should be enjoined when there is leviable personalty. *Abbot v. Egerton*, 53 Ind., 196. Also that if the tax exceeds the charter limits, this is ground for injunction. *Binkert v. Jansen*, 94 Ill., 283; *St. Clair School Board's Appeal*, 74 Pa. St., 252.

² Mr. High, in his valuable Treatise on the Law of Injunctions, says: "It will be found on examination that courts of equity have been inclined, in the case of assessments by municipal corporations, to relax somewhat the stringency of the rule of non-interference as applied to the collection of state taxes. Though it is difficult to perceive any sufficient reason for such distinction, yet the distinction itself remains." § 869. See *Alexandria, etc., Co. v. District of Columbia*, 1 Mack., 217.

In Missouri it is said, "This court has been disposed to regard with favor proceedings which are preventive in their character; rather than compel the injured party to seek redress after the damage is accomplished." Overall *v. Ruenzi*, 67 Mo., 203, 207. But this perhaps to avoid multiplicity of suits. See *Ranney v. Bader*, 67 Mo., 476, 480; *Marsh v. Supervisors*, 49 Wis., 502.

In Wisconsin, by statute, if it appears in a suit to enjoin a tax that the tax is void, the proceedings may be stayed until a reassessment can be made. See *Kingsley v. Supervisors*, 49 Wis., 649; *Clark v. Lincoln Co.*, 54 Wis., 580; *Griggs v. St. Croix Co.*, 20 Fed. Rep., 341. In Illinois, by statute, an excess in a tax may be enjoined. *Mee v. Paddock*, 83 Ill., 494. As to the proof to make out an excessive school tax, see *Gage v. Bailey*, 102 Ill.,

view of the conflict in the decisions regarding the basis of equitable jurisdiction, it seems advisable to classify somewhat the cases which have been decided, indicating, wherever necessary, the points of divergence.

Excessive Assessments. For excessive assessments, when fraud is not charged, there can be no relief in equity. The remedy must be such as the statute has given.¹

Irregular Taxation. A tax will not be restrained on the ground merely that it is irregular or erroneous. Errors in the assessment do not render the tax void, nor are they necessarily injurious. As a rule, therefore, they do not constitute any reason whatever against the tax being enforced. Moreover the law has provided remedies for all such mere irregularities

11. Where a party is assessed for property neither owned nor controlled by him, the assessment is without authority of law, and may be enjoined. *Searing v. Heavy Sides*, 106 Ill., 85.

Where a bill seeks relief which a board of review might have given, some excuse must be shown for not obtaining it there. *Johnson v. Roberts*, 103 Ill., 655.

If commissioners have acquired jurisdiction of a proceeding for the establishment of a drain, mere irregularities on their part must be objected to by a statutory appeal, not by applying for an injunction. *Cauldwell v. Curry*, 98 Ind., 363.

¹ *Kimber v. Schuylkill Co.*, 20 Pa. St., 366; *Hughes v. Kline*, 80 Pa. St., 227; *Everitt's Appeal*, 71 Pa. St., 216; *Hutchinson v. Pittsburgh*, 72 Pa. St., 320. An injunction would seem to be the appropriate remedy where a town makes discriminations in the discounts on taxes, this not rendering the tax illegal. *Toby v. Wareham*, 2 Allen, 594. The United States Supreme Court cannot inquire whether or not the estimated value of land for state taxation is excessive, and cannot correct errors and mistakes of detail in state taxation. *Kelly v. Pittsburgh*, 104 U. S., 78; *Davidson v. New Orleans*, 96 U. S., 97.

The necessity of a tax for a purpose embraced in a municipal charter is not for the determination of the courts. *Hawkins v. Jonesboro*, 63 Ga., 527.

Courts will not relieve from the payment of interest and penalties on the ground of the party's title having been in dispute. *Litchfield v. Hamilton Co.*, 40 Ia., 66. But they may relieve where the penalty is unauthorized and excessive. *Litchfield v. Webster Co.*, 101 U. S., 778.

Equity cannot give relief against an assessment for taxation in consideration of the great depreciation in value resulting from public causes, *e. g.*, a rebellion. Such a consideration might appropriately be addressed to the legislative department, but not to the judicial. *White Sulphur Springs Co. v. Robinson*, 8 W. Va., 542.

and errors as do not go to the foundation of the tax, and parties complaining must be confined to these.¹ The cases cited in the margin will show the application of this rule in a great variety of cases.² Even where the error is one which might be damaging, like the failure of a review board to meet, the tax will not be enjoined without some showing that in-

¹ *Wagoner v. Loomis*, 37 Ohio St., 571. If the statutory remedy is lost by negligence, equity will not interfere. *Wilkerson v. Walters*, 1 Idaho, N. S., 564.

² *Dows v. Chicago*, 11 Wall., 108; *Hughes v. Kline*, 30 Pa. St., 227; *Clinton, etc., Appeal*, 56 Pa. St., 315; *Chicago, etc., R. R. Co. v. Frary*, 23 Ill., 34; *State v. Bremond*, 38 Tex., 116; *Jones v. Summer*, 27 Ind., 510; *Center, etc., Co. v. Black*, 32 Ind., 468; *Ottawa v. Walker*, 21 Ill., 605; *Metz v. Anderson*, 23 Ill., 410; *Purrington v. People*, 79 Ill., 11; *O'Neal v. Virginia, etc., Co.*, 18 Md., 1; *Mills v. Gleason*, 11 Wis., 470; *Mills v. Johnson*, 17 Wis., 598; *Brooklyn v. Messerole*, 26 Wend., 132; *Marklot v. Davenport*, 17 Ia., 379; *West v. Whittaker*, 37 Ia., 598; *Iowa, etc., Land Co. v. Sac Co.*, 39 Ia., 124; *Same v. Carroll Co.*, 39 Ia., 151; *Litchfield v. Hamilton Co.*, 40 Ia., 66; *Dodd v. Hartford*, 25 Conn., 232; *Greene v. Mumford*, 5 R. I., 472; *Lawrence v. Killam*, 11 Kan., 499; *Smith v. Leavenworth*, 9 Kan., 296; *Kansas Pacific R. R. Co. v. Russel*, 8 Kan., 558; *Merrill v. Gorham*, 6 Cal., 41; *Stilz v. Indianapolis*, 81 Ind., 532; *Patterson v. Baumer*, 43 Ia., 477; *Albany, etc., Mining Co. v. Auditor-General*, 37 Mich., 391; *Kaehler v. Dobberpuhl*, 56 Wis., 480; *Harrison v. Vines*, 46 Tex., 15; *Worley v. Harris*, 83 Ind., 493; *Brown v. Herron*, 59 Ind., 61; *Aurora v. Lamar*, 59 Ind., 400; *Challiss v. Atchison Co.*, 15 Kan., 49; *Stebbins v. Challiss*, 15 Kan., 55; *Dundy v. Richardson Co.*, 8 Neb., 508; *Sinclair v. Learned*, 57 Mich., 335; *Perley v. Dolloff*, 60 N. H., 504; *Frost v. Flick*, 1 Dak., 131. If an inferior tribunal decides that it has jurisdiction of proceedings ending in a tax levy, objections to the ruling cannot be taken for the first time in proceedings to enjoin the tax. *Reynolds v. Faris*, 80 Ind., 14.

"The power of the chancellor to restrain the collection of revenue is one that should never be exercised but in cases where the tax is levied on property exempt from taxation, where it is doubly taxed, where it is levied without any warrant of law by persons having no power to make the levy, or where a clear case of fraud in making the valuation of the property is shown. But in the latter case the proof must be clear and irresistible, and the injury likely to be produced considerable." *Union Trust Co. v. Weber*, 96 Ill., 346. See *Lemont v. Singer, etc., Co.*, 98 Ill., 94. If a tax deed is given on a judicial sale it will not be enjoined for errors, before judgment. *Moore v. Wayman*, 107 Ill., 192. To justify enjoining an illegal tax the illegality must go to the very root and substance of the tax, as would a failure to observe the equality provision of the constitution. *London v. Wilmington*, 78 N. C., 109. See *Brandirff v. Harrison Co.*, 50 Ia., 164; *Delphi v. Bowen*, 61 Ind., 29. If suit is brought for a tax, defense to it must be made there, and equity will not take cognizance of complaints afterwards. *Utah, etc., R. Co. v. Crawford*, 1 Idaho, N. S., 770.

jury resulted.¹ Nor even then except to the extent of the injury.²

It is not, however, a mere irregularity when one is denied his legal right to work out a road tax, and the amount is demanded in money,³ nor when a tax once paid is demanded a second time;⁴ nor when property is unlawfully exempted from taxation, thereby increasing the burden upon complainant;⁵ nor when property, which is exempt from taxation by law, is

¹ *Albany, etc., Mining Co. v. Auditor-General*, 37 Mich., 391; *Burt v. Auditor-General*, 39 Mich., 126; *South Platte Land Co. v. Crete*, 11 Neb., 344; *McIntyre v. White Creek*, 43 Wis., 620; *Foresman v. Chase*, 68 Ind., 500; *Ryan v. Leavenworth Co.*, 30 Kan., 185; *Sav. & Loan Society v. Ordway*, 38 Cal., 679; *Sioux, etc., R. Co. v. Osceola Co.*, 45 Ia., 168; *Perley v. Dolloff*, 60 N. H., 504; *Frost v. Flick*, 1 Dak., 131; *Dundy v. Richardson Co.*, 8 Neb., 508; *Carroll Co. v. Graham*, 98 Ind., 279; *Burlington, etc., R. Co. v. Cass Co.*, 16 Neb., 136.

² *London v. Wilmington*, 78 N. C., 109; *Huck v. Railroad Co.*, 86 Ill., 352; *Ricketts v. Spraker*, 77 Ind., 371. That there was sufficient personalty from which a tax on land might have been collected is no ground for enjoining proceeding against the land. * *Foresman v. Chase*, 68 Ind., 500. But see *Johnson v. Hahn*, 4 Neb., 139, *contra*.

Equity will not relieve on the ground of a very slight excess in the levy. *Smith v. Leavenworth*, 9 Kan., 296. Nor on the ground of an illegal tax collected of complainant in former years. *Fremont v. Mariposa County*, 11 Cal., 361. See *McIntosh v. People*, 93 Ill., 540.

An injunction will not be awarded merely because the officer, in collecting, is proceeding in a mode not the most equitable, if he is only doing what the statute permits. As where he is enforcing the mortgagor's tax against the mortgagee. *People's Savings Bank v. Tripp*, 13 R. I., 621.

To defeat a tax levied to pay interest on municipal bonds, it is necessary to show the bonds are void. *Edwards v. People*, 88 Ill., 340. Where the plaintiff was taxed for part of his personal property, which was also regularly assessed elsewhere, this was held to be merely a case of irregular assessment, and the remedy was before the board of equalization. *Harris v. Fremont Co.*, 63 Ia., 639. The mere failure to verify an assessment does not establish the fact of inequality or injustice. To warrant an injunction, injustice should appear, and the party should offer to pay what is right. *Field v. Marinette Co.*, 62 Wis., 532, criticising *Marsh v. Supervisors*, 42 Wis., 517. Irregularities will not be presumed. *Moore v. Albany*, 98 N. Y., 396.

³ *Miller v. Gorman*, 38 Pa. St., 309; *Biss v. New Haven*, 42 Wis., 605; *Sioux, etc., R. Co. v. Osceola Co.*, 45 Ia., 168.

⁴ *Commonwealth v. Supervisors of Colby*, 29 Pa. St., 121. To entitle one to relief from double taxation, it must appear that he has paid once. *Savings & Loan Society v. Austin*, 46 Cal., 415.

⁵ *Illinois Central R. R. Co. v. McLean County*, 17 Ill., 291; *Mott v. Pennsylvania R. R. Co.*, 30 Pa. St., 9. See what is said on this subject, *ante*, chapter VI.

assessed;¹ nor when one's assessment has been increased without giving him the notice to which by law he is entitled.² In all these cases the party taxed is denied a substantial right, or his tax is unlawfully increased beyond his due proportion, and his right to an adequate remedy is unquestionable. If, however, the tax is a personal tax only, it will appear from the references to decisions, which have already been made, that in a majority of the states the remedy by injunction would not be given, and the party would be turned over to his suit at law.³

Tax upon Lands; Cloud on Title. When a tax is assessed against a person in respect of his ownership of lands, and is a personal charge upon him, and not a lien upon the lands, there can be no grounds for equitable interference which would not exist in the case of a tax assessed upon personalty.⁴ In those states in which a personal tax would be restrained, if illegal, a tax upon land constituting a personal charge would be restrained also. In other states it would not be, unless some special ground of equity jurisdiction appeared.

¹ *Morris, etc., Co. v. Jersey City*, 1 Beas. Ch., 237; *Jones v. Davis*, 35 Ohio St., 474.

² *Darling v. Gunn*, 50 Ill., 424; *Cleghorn v. Postlewaite*, 43 Ill., 428; *Glassford v. Dorsey*, 2 Ill. Ap., 521.

A board of review having power to increase an assessment on notice, if they do so without notice the tax will not be enjoined without proof of substantial injustice. *McIntyre v. White Creek*, 43 Wis., 620. But if the increase is by unauthorized persons, the tax as to the excess will be restrained. *Coolbaugh v. Huck*, 86 Ill., 600.

If a public improvement is abandoned, the tax laid therefor will be enjoined. *Worthen v. Badgett*, 32 Ark., 496.

That irregularities are feared is no ground for injunction. *Louisville, etc., R. Co. v. Bate*, 22 Fed. Rep., 490. If a city has authority to enjoin one from continuing his business who fails to pay his license tax, such person cannot enjoin the city from collecting the tax. *New Orleans v. Becker*, 31 La. An., 644; *Goldsmith v. New Orleans*, 31 La. An., 646.

³ To the point that equity will give no relief in tax cases where the remedy at law is adequate, the following additional cases may be referred to: *Weaver v. State*, 39 Ala., 535; *Dodd v. Hartford*, 25 Conn., 232; *Magee v. Denton*, 5 Blatch., 130; *Missouri River, etc., R. R. Co. v. Wheaton*, 7 Kan., 232.

⁴ See *Williams v. Detroit*, 2 Mich., 560; *Brewer v. Springfield*, 97 Mass., 152; *Greene v. Mumford*, 5 R. I., 474; *Hunnewell v. Charlestown*, 106 Mass., 350; *Henry v. Gregory*, 29 Mich., 68; *Norton v. Boston*, 119 Mass., 194.

If the tax is a lien upon lands, it may then constitute a cloud upon the title; and one branch of equity jurisdiction is the removal of apparent clouds upon the title, which may diminish the market value of the land, and threaten a possible loss of it to the owner. A cloud upon one's title is something which constitutes an apparent incumbrance upon it, or an apparent defect in it; something that shows *prima facie* some right of a third party, either to the whole or some interest in it.¹ An illegal tax may or may not constitute such a cloud. If the alleged tax has no semblance of legality; if, upon the face of the proceedings, it is wholly unwarranted by law, or for any reason totally void, so that any person inspecting the record and comparing it with the law is at once apprised of the illegality, the tax, it would seem, could neither constitute an incumbrance, nor an apparent defect of title; and, therefore, in law, could constitute no cloud. If this be so, the jurisdiction which is exercised by courts of equity, to relieve parties by removing clouds upon their titles, could not attach in such a case. This has been held in many cases.² The case of an assessment made under an unconstitutional law is such a case,³ and so is one in which two or more parcels of land ap-

¹ See *Sanders v. Yonkers*, 63 N. Y., 489; *Temple Grove Seminary v. Cramer*, 98 N. Y., 121.

² *Messerole v. Brooklyn*, 8 Paige, 198; *Wiggin v. N. Y.*, 9 Paige, 16; *Van Doren v. N. Y.*, 9 Paige, 888; *Livingston v. Hollenbeck*, 4 Barb., 9, 16; *Van Rensselaer v. Kidd*, 4 Barb., 17; *Bouton v. Brooklyn*, 15 Barb., 875; *Cox v. Clift*, 2 N. Y., 118; *Scott v. Onderdonk*, 14 N. Y., 9; *Hatch v. Buffalo*, 38 N. Y., 276; *Newell v. Wheeler*, 48 N. Y., 486; *Dean v. Madison*, 9 Wis., 402; *Head v. James*, 13 Wis., 641; *Shepardson v. Supervisors of Milwaukee*, 28 Wis., 593; *Milwaukee Iron Co. v. Hubbard*, 29 Wis., 51; *Floyd v. Gilbreath*, 27 Ark., 675; *Mobile, etc., R. R. Co. v. Peebles*, 47 Ala., 317; *Robinson v. Gaar*, 6 Cal., 273; *Bucknall v. Story*, 36 Cal., 67; *Ewing v. St. Louis*, 5 Wall., 418; *Hannewinkle v. Georgetown*, 15 Wall., 547; *Crane v. Randolph*, 30 Ark., 579; *Detroit v. Martin*, 34 Mich., 170; *Curtis v. East Saginaw*, 35 Mich., 508; *Briggs v. Johnson*, 71 Me., 235; *Harkness v. Board of Public Works*, 1 MacA., 121; *Eastman v. Thayer*, 60 N. H., 408; *Busbee v. Lewis*, 85 N. C., 832.

³ *Wells v. Buffalo*, 80 N. Y., 253; *Townsend v. New York*, 77 N. Y., 542, which cites many cases. An assessment declared void in one proceeding for want of authority in those who laid it must be considered void as to all other persons, and therefore no lien or cloud upon title. *Chase v. Chase*, 95 N. Y., 878. There is no cloud on title when the facts which are relied on to show it are not such as *per se* to convey an apparent right, title or interest

pear by the record to have been sold together when the law forbids it.¹

When, however, the illegality or fatal defect does not appear on the face of the record, but must be shown by evidence *alivunde*, so that the record would make out a *prima facie* right in one who should become purchaser, and the evidence to rebut this case may possibly be lost, or be unavailable from death of witnesses or other cause, or when the deed given on a sale of the lands for the tax would, by statute, be presumptive evidence of a good title in the purchaser, so that the purchaser might rely upon that for a recovery of the lands until the illegalities were shown, the courts of equity regard the case as coming within their ordinary jurisdiction, and have extended relief on the ground that a cloud on the title existed or was imminent. The cases on this point are numerous, and in considerable variety, as would be anticipated in view of the different tax systems under which they have been made.² It has been

in the property. *Gilman v. Van Brunt*, 29 Minn., 271. See *O'Mulcahy v. Florer*, 27 Minn., 449.

Where a controller's certificate of sale shows illegality on its face, it will be presumed he will give no deed upon it, and he will not be enjoined from doing so unless he threatens it. *Clark v. Davenport*, 95 N. Y., 478. Where the property of the State University was taxed, which was clearly exempt, and the tax could create no cloud, it was held that an injunction should not issue. *Hollister v. Sherman*, 63 Cal., 38.

¹ *Lawrence v. Zimpleman*, 37 Ark., 643. If the proceeding is illegal in part only, it may be set aside as to that part. *Strusburgh v. New York*, 87 N. Y., 452. A firm cannot enjoin the sale of the individual property of one of the members for a tax against the firm, but the owner himself must sue. *Lyle v. Jacques*, 101 Ill., 644.

A bill to set aside a tax as a cloud upon title may be filed any time after the tax is laid. *Roe v. Lincoln Co.*, 56 Wis., 66, citing *Mitchell v. Milwaukee*, 18 Wis., 92. And see *Peck v. School District*, 21 Wis., 516. If the bill is filed with reference to the taxes of a single year, relief will not be given as to the taxes of other years under the prayer for general relief. *Beach v. Shoenmaker*, 18 Kan., 174.

² *Hannewinkle v. Georgetown*, 15 Wall., 547; *Dows v. City of Chicago*, 11 Wall., 108; *Dean v. Madison*, 9 Wis., 402; *Weeks v. Milwaukee*, 10 Wis., 242; *Jenkins v. Rock County*, 15 Wis., 11; *Mitchell v. Milwaukee*, 18 Wis., 92; *Crane v. Janesville*, 20 Wis., 305; *Grimmer v. Sumner*, 21 Wis., 179; *Hamilton v. Fond du Lac*, 25 Wis., 490; *Siegel v. Outagamie County*, 26 Wis., 70; *Judd v. Fox Lake*, 28 Wis., 583; *Shepardson v. Milwaukee*, 28 Wis., 598; *Wals v. Grosvenor*, 31 Wis., 681; *Conway v. Waverley*, 15 Mich., 257; *Palmer v. Rich*, 12 Mich., 414; *Scofield v. Lansing*, 17 Mich., 437; *Kan-*

held in some cases that if the purchaser at a tax sale must take upon himself the burden of showing the regularity of the proceedings, so that the deed itself is not *prima facie* evidence of title, the owner of the record title was sufficiently protected in this rule of law, and a bill in equity would not lie on his behalf to remove the lien of the tax, or to set aside the deed after a sale.¹ And in Connecticut it is held that although a proceeding may cast a cloud upon title, yet if the evidence to rebut the

yon v. Duchene, 21 Mich., 498; Shell v. Martin, 19 Ark., 139; Chaplin v. Holmes, 27 Ark., 414; Polk v. Rose, 25 Md., 153; Weller v. St. Paul, 5 Minn., 95; Gage v. Rohrbach, 56 Ill., 262; Gage v. Billings, 56 Ill., 268; Reid v. Tyler, 56 Ill., 288; Gage v. Chapman, 56 Ill., 311; Barnett v. Cline, 60 Ill., 205; Reed v. Reber, 62 Ill., 240; Lee v. Ruggles, 62 Ill., 427; Moers v. Smedley, 6 Johns. Ch., 28; Pettit v. Shepherd, 5 Paige, 493; Oakley v. Trustees of Williamsburg, 6 Paige, 262; Hanlon v. Supervisors of Westchester, 57 Barb., 383; Van Doren v. New York, 9 Paige, 388; Scott v. Onderdonk, 14 N. Y., 9; Ward v. Dewey, 16 N. Y., 519; Hatch v. Buffalo, 38 N. Y., 276; Allen v. Buffalo, 39 N. Y., 386; Overing v. Foote, 43 N. Y., 290; Crooke v. Andrews, 40 N. Y., 547; Newell v. Wheeler, 48 N. Y., 486; Heywood v. Buffalo, 14 N. Y., 534; Lapp v. Morrill, 8 Kan., 678; Harmer v. Boling, 8 Cal., 384; Cohen v. Sharp, 44 Cal., 29; Ward v. Ward, 2 Hayw., 226; Leigh v. Everheart's Executors, 4 T. B. Monr., 379; Harrison v. Haas, 25 Ind., 281; Morris Canal, etc., Co. v. Jersey City, 12 N. J. Eq., 227; Lockwood v. St. Louis, 24 Mo., 20; Fowler v. St. Joseph, 37 Mo., 228; Morrison v. St. Paul, 9 Minn., 108; Weber v. San Francisco, 1 Cal., 455; Robinson v. Gaar, 6 Cal., 273; Hardenburg v. Kidd, 10 Cal., 403; Ritter v. Patch, 12 Cal., 298; Pixley v. Huggins, 15 Cal., 127; Burr v. Hunt, 18 Cal., 303; Bucknall v. Story, 36 Cal., 67; Houghton v. Austin, 47 Cal., 646; Arrington v. Liscom, 34 Cal., 365; Coulson v. Portland, Deady, 481; Huntington v. Central Pacific R. R. Co., 2 Sawyer, 503; Thomas v. Gain, 35 Mich., 155; Marquette, etc., R. Co. v. Marquette, 35 Mich., 504; Mayall v. St. Paul, 30 Minn., 294; Burlington, etc., R. Co. v. Clay Co., 13 Neb., 367; Mechanics' Bank v. Kansas City, 73 Mo., 555; Hare v. Carnall, 39 Ark., 196; Brooks v. Howland, 58 N. H., 98; Greedup v. Franklin Co., 30 Ark., 101; Vaughan v. Bowie, 30 Ark., 278; Russell v. Déshon, 124 Mass., 342; Davis v. Boston, 129 Mass., 377; Minn. Linseed Oil Co. v. Palmer, 20 Minn., 468; Sewall v. St. Paul, 20 Minn., 511; Rood v. Mitchell Co., 39 Ia., 444.

It is no answer to the bill, in such a case, that the tax might have been collected from personal property. Scofield v. Lansing, 17 Mich., 437. The cloud upon the title is presumptively removed when personal property sufficient to satisfy the tax is levied upon. Henry v. Gregory, 29 Mich., 68. Sale of the land may be enjoined on a showing that there is personalty sufficient subject to levy. Johnson v. Hahn, 4 Neb., 139. Making of a deed on a sale may be enjoined. Worthen v. Badgett, 32 Ark., 496.

¹Guest v. Brooklyn, 79 N. Y., 624, citing Sharp v. Speir, 4 Hill, 76; Adams v. R. R. Co., 10 N. Y., 328; Merritt v. Portchester, 71 N. Y., 309; Hilton v. Bender, 69 N. Y., 75. See, also, Minturn v. Smith, 3 Sawy., 142.

prima facie case is of record, easily attainable and not likely to be lost, so that ultimately the owner would be sure to vindicate his title, the court of equity might in its discretion refuse an injunction.¹ On the other hand, there are many cases which ignore the distinction between proceedings void on their face for illegality, and proceedings which, though illegal in fact, are on their face presumptively valid, and which, if they do not give relief on the ground of illegality alone, will give it on the ground that any sale of the land under proceedings which assume to be by authority of law, and are conducted by public officers empowered to make such sales, is such a cloud upon the title of the owner as he ought, in equity, to be relieved against, if the officers are proceeding unlawfully, and have no authority in fact.² There is much to be said in favor of the rule adopted in these cases, which is certainly a convenient rule, and enables a party whose title is threatened, however feebly, to settle all questions concerning it once for all, and thus put an end to any annoyance or prejudice that might in any contingency otherwise result.³

¹ *Waterbury Savings Bank v. Lawler*, 46 Conn., 243. It is proper to add to relief the condition of paying taxes. *Phelps v. Harding*, 87 Ill., 442; *Farwell v. Harding*, 96 Ill., 32; *Durfee v. Murray*, 7 Ill. Ap., 213; *Smith v. Gage*, 12 Fed. Rep., 32; *Steuart v. Megler*, 54 Md., 454.

² See *Burnett v. Cincinnati*, 3 Ohio, 73; *Culbertson v. Cincinnati*, 16 Ohio, 574; *Ottawa v. Walker*, 21 Ill., 605, and cases cited; *Chicago, etc., R. R. Co. v. Frary*, 22 Ill., 34; *Barnard v. Hoyt*, 63 Ill., 341; *Holland v. Baltimore*, 11 Md., 186; *Baltimore v. Porter*, 18 Md., 284; *Litchfield v. Polk Co.*, 13 Ia., 70; *Pugh v. Youngblood*, 69 Ala., 296; *Leslie v. St. Louis*, 47 Mo., 474. And see *Blackwell on Tax Titles*, 483; *High on Injunctions*, ch. VII, where the cases are collected with the author's usual industry and care. The occupant of lands, though he be not the owner, may file a bill to remove the cloud cast by an illegal tax. *Barnard v. Hoyt*, 63 Ill., 341. If the sale was made after the time to which by statute the lien was continued, it is *ultra vires* and should be set aside. *Field v. West Orange*, 87 N. J. Eq., 434; *Johnson v. Van Horn*, 45 N. J., 136.

³ When record between other parties will be evidence in the suit. *Gage v. Busse*, 7 Ill. Ap., 433. When bill should be dismissed without prejudice, and the effect. *Gamble v. East Saginaw*, 43 Mich., 367. Where land of a partner was sold for a partnership assessment which was altogether void, it was held there need be no tender of the sum paid by the purchaser. *Wilmerton v. Phillips*, 103 Ill., 78. An owner of the reversion in trust may file a bill to set aside a sale as a cloud, but he must tender the taxes due at the time of sale and which have since accrued. *Steuart v. Megler*, 54 Md., 454. What the bill must charge. *Jenks v. Hatheway*, 48 Mich., 536. Amending the bill

It is proper, in vacating a tax, or a sale for taxes, as a cloud upon title, to require the party to pay any sum that is either a legal or an equitable charge against him, and which will be affected by the decree.¹ If the tax were wholly illegal in its essentials, of course no such requirement could be made, for no equity would support it.²

Quieting Title after a Sale. If land has been actually sold and conveyed for a tax, the original owner remaining in possession may have the validity of the sale tested by a bill in equity, filed for the purpose of quieting his title. The suit is analogous to a suit to remove a cloud from the title and is governed by the same principles. Courts of law cannot give the party relief in such a case, as he cannot bring ejectment, being himself in possession; and no other form of action is provided by the common law for such a case. And where the officers have proceeded to sale and conveyance, even though the defects in the title are apparent of record, and the deed is not *prima facie* evidence of title, it may perhaps be possible to distinguish the case from one in which the void proceedings are only impending. While they are in progress, it may be assumed that the officers will pause in their illegal action before any sale is reached; but when sale is actually made, and a con-

to add a formal party and giving incidental relief as to personalty. *Folkerts v. Power*, 42 Mich., 283.

¹ See *Peckham v. Millikan*, 99 Ind., 352, citing *Harrison v. Haas*, 25 Ind., 281; *McWhinney v. Brinker*, 64 Ind., 360. Also *Peacock v. Carnes*, 110 Ill., 99.

A judgment in an action between individuals involving the validity of a tax levy and sale does not estop the state. *Olmsted Co. v. Barber*, 81 Minn., 256.

² *Guidry v. Broussard*, 32 La. An., 924. See, on this general subject, *Barrow v. Lapene*, 30 La. An., 310; *Stafford v. Twitchell*, 33 La. An., 520; *Hopkins v. Succession of Daunoy*, 33 La. An., 1423; *Oil Works Case*, 34 La. An., 255. Where one has become the owner of the title to land with knowledge of an outstanding tax title, he cannot have such title set aside because, by a mistake of the treasurer, he was unable to buy the title himself at the sale. *Gow v. Tidrick*, 48 Ia., 284.

In Louisiana it is held that a purchaser from the state of a void tax title may be proceeded against to set it aside without making the state a party. *Denègre v. Gerac*, 35 La. An., 952; *Budd v. Houston*, 36 La. An., 959. A *cestui que trust* who is equitable owner may be complainant. *Flint, etc., R. Co. v. Auditor-General*, 41 Mich., 635.

veyance has been given, which, though void, may affect the market value of the land, there would seem to be no very conclusive reason why equity should not interfere and decree a cancelment of the void claim.¹ If the tax purchaser has entered into possession of the land, the original owner has an adequate remedy by suit at law in ejectment; and to this he must resort.² When neither party has actual possession, if the statute has authorized the action of ejectment to be brought on the constructive possession, which either may claim by virtue of the conveyances which he holds, the suit at law would appear to be the adequate remedy in such a case also.³

Fraud. A tax founded on a fraudulent assessment will be enjoined. An assessment is not fraudulent merely because of being excessive, if the assessors have not acted from improper

¹See *Yancey v. Hopkins*, 1 Munf., 419; *Holland v. Baltimore*, 11 Md., 186; *Polk v. Rose*, 25 Md., 153; *Almony v. Hicks*, 3 Head, 39; *Head v. Fordyce*, 17 Cal., 149; *Hartford v. Chipman*, 21 Conn., 488; *Fonda v. Sage*, 48 N. Y., 173; *Brownell v. Storm Lake Bank*, 63 Ia., 754. If complainant by his bill makes out a case for relief, it is not necessary for him to aver that he has paid the taxes. *Polk v. Rose*, 25 Md., 153. In Mississippi an owner out of possession may file a bill to have a tax title held by a party in possession set aside as a cloud on title, though the court of chancery cannot award possession. *Wofford v. Bailey*, 57 Miss., 239. The same rule prevails in Indiana; and if the party out of possession succeeds in his suit, the decree will be evidence in his favor in a suit to recover possession. *Farrar v. Clark*, 97 Ind., 447. In the same state the holder of the tax title may file a bill to quiet his title or to have the lien of the tax established if the title proves defective. *Locke v. Cattell*, 96 Ind., 291.

²The court of chancery is not the proper tribunal for settling titles to land generally. *Munson v. Munson*, 28 Conn., 582; *Thayer v. Smith*, 9 Met., 469; *Sanderlin v. Thompson*, 2 Dev. Ch., 539; *Devaux v. Detroit*, Har. Ch., 96; *Blackwood v. Van Fleet*, 11 Mich., 252.

³*Parish v. Eager*, 15 Wis., 532; *Bonnell v. Roane*, 20 Ark., 114; *Scott v. Watkins*, 22 Ark., 556. It is not competent to give relief in equity against the party in actual possession; he having a constitutional right to a trial by jury. *Tabor v. Cook*, 15 Mich., 322. See *Springer v. Rosette*, 47 Ill., 223; *Locke v. Cattell*, 96 Ind., 291. As to bill by tax purchaser, and what he must aver, see *Belcher v. Mhoon*, 47 Miss., 613. A suit to quiet title as against tax claims held by the state will not lie without a statute providing for it. *Burrill v. Auditor-General*, 46 Mich., 256. In Kansas, if a bill to quiet title is dismissed, the complainant may have compensation for improvements. *Millbank v. Ostertag*, 24 Kan., 462. See *Coe v. Farwell*, 24 Kan., 566. As to when a tender should be made in filing bill, see *Cartwright v. McFadden*, 24 Kan., 662.

motive;¹ but if it is purposely made too high through prejudice or a reckless disregard of duty in opposition to what must necessarily be the judgment of all competent persons,² or through the adoption of a rule which is designed to operate unequally upon a class and to violate the constitutional rule of uniformity,³ the case is a plain one for the equitable remedy by injunction. So is any case in which a tax is rendered unequal or unfair by fraudulent or reckless conduct of officers,⁴ or in which the party is deprived by like practices of important rights which the law intends to secure to him; such, for instance, as the right of appeal from an assessment, or to be heard by the board of review before his assessment should be raised.⁵ But mere irregularities in the proceedings of tax officers do not make out fraud, or even give evidence of it.⁶ And fraud must be alleged and proved: all presumptions are against it.⁷

¹ *Pacific, etc., Co. v. Lieb*, 83 Ill., 602; *Hamilton v. Rosenblatt*, 8 Mo. Ap., 237. Even though irregularly made. *Gage v. Evans*, 90 Ill., 569.

² *Chicago, etc., R. Co. v. Cöle*, 75 Ill., 591; *Albany, etc., R. Co. v. Canaan*, 16 Barb., 244; *Lefferts v. Calumet*, 21 Wis., 686; *Milwaukee Iron Co. v. Hubbard*, 29 Wis., 51; *Merrill v. Humphrey*, 24 Mich., 170; *Republic Life Ins. Co. v. Pollak*, 75 Ill., 292; *Ottawa, etc., Co. v. McCaleb*, 81 Ill., 556; *Wright v. Railroad Co.*, 64 Ga., 738.

³ *Cummings v. National Bank*, 101 U. S., 153; *Pelton v. National Bank*, 101 U. S., 143.

⁴ Only so much as appears to be unreasonable should be enjoined. *Chattanooga v. Railroad Co.*, 7 Lea, 561; *Trustees v. Guenther*, 19 Fed. Rep., 395; *Merrill v. Humphrey*, 24 Mich., 170. If, in spite of valid legislation compromising the tax with the tax payer, the officer attempts to proceed to sale, he will be enjoined. *Tallassee Mfg. Co. v. Glenn*, 50 Ala., 489. If a municipality sells lands with a representation that there are no taxes against them, it will be enjoined from enforcing back taxes. *County v. Am. Emigrant Co.*, 93 U. S., 124.

⁵ See *Cleghorn v. Postlewaite*, 43 Ill., 428; *Darling v. Gunn*, 50 Ill., 424. Each of these was a case in which an assessment was increased without notice to the person assessed, and the collection was enjoined. The case is not distinctly put on the ground of fraud, it being sufficient, under the Illinois decisions, that the party had been illegally deprived of his right to be heard before his assessment should be increased.

⁶ *Wagoner v. Loomis*, 37 Ohio St., 571; *Perley v. Dolloff*, 60 N. H., 504.

⁷ *Pacific, etc., Co. v. Lieb*, 83 Ill., 602. As to sufficiency of allegations, see *Delphi v. Bowen*, 61 Ind., 29. Failure to collect taxes no proof of fraud. *Mitchell v. Craven Co.*, 74 N. C., 487.

Bills of Interpleader. It is possible for cases to arise in which the same sum of money is demanded as a tax under conflicting claims by different officers—or, in city cases under peculiar ordinances, by a contractor and an officer. Conflicting claims may also arise where one is taxed as representing another, in the capacity of agent, trustee or otherwise, or as officer of a corporation representing the shareholders, and where the person beneficially interested contests the tax. Such cases may possibly justify a bill of interpleader, as the most ready method of determining to whom the custodian of the fund is under obligation to make payment.¹

Action at law against assessors. The wrong which results in injury to the tax payer is very likely to originate with the assessor. The action of that officer, when property is taxed by value, determines the proportion which shall be levied on each individual tax payer; and the taxation is equal or unequal according as the assessor performs his duty well or ill. When wrong results, therefore, it is natural to inquire whether there may not be a remedy therefor against the assessor; and this inquiry must be answered on a consideration of the nature of assessors' duties, and of the reasons, both public and personal, that bear upon the policy and justice of individual responsibility.

It has long been considered of the very highest importance, that when questions, either of law or fact, are referred to the judgment of an officer selected for the purpose of passing upon them, he should be guarded by such rules of protection that in acting he should be under no concern regarding personal consequences, so that the free exercise of an unbiased judgment may be expected from him. To ensure to him the necessary feeling of security, it is necessary that he be altogether exempt from responsibility to such interested parties as may be dissatisfied with his conclusions, and who might be inclined, if the law permitted it, to call him to personal account for his mistakes or faults of judgment, and endeavor to recover from

¹ See *Thomson v. Ebbets*, Hopk. Ch., 272; *Mohawk & H. R. R. Co. v. Clute*, 4 Paige, 384.

A bill of interpleader will not lie at the suit of an executor to compel two towns to determine in which he is taxable. His remedy is at law after payment to one of the towns. *Macy v. Nantucket*, 121 Mass., 351.

him a compensation for any loss that they may have suffered as a result of his action. The policy and justice of this exemption are so plain and reasonable that the rule meets with universal assent, and is applied in all cases where functions of a judicial nature are exercised. "They who are intrusted to judge ought to be free from vexation, that they may determine without fear; the law requires courage in a judge, and therefore provides security for the support of that courage."¹ "Judges have not been invested with this privilege for their own protection merely; it is calculated for the protection of the people by insuring to them a calm, steady and impartial administration of justice."² And this principle of protection is not limited in its application to the judges of courts, but extends to all officers who have duties to perform which in their nature are judicial, and which are to be performed according to the dictates of their judgment. Instances of this nature are the decisions of highway officers, that a person claiming exemption from a road assessment is not exempt in fact,³ or that one assessed is in default for not working out the assessment,⁴ or that a road should or should not be laid out on a prescribed line;⁵ and the rule applies to the appraisal of damages when property is taken under the eminent domain;⁶ to action of inspectors of elections who are to decide questions of fact which determine the qualifications of voters;⁷ of school directors in

¹ *Barnardiston v. Soane*, 6 How. St. Tr., 1096, per *North*, Ch. J.

² *Taafe v. Downes*, 3 Moore, P. C., 36, n. See *Floyd v. Barker*, 12 Rep., 23; *Mostyn v. Fabrigas*, Cowper, 161; *Garnett v. Farrand*, 6 B. & C., 611; *Mills v. Collett*, 6 Bing., 85; *Holroyd v. Bean*, 2 B. & Ald., 473; *Pike v. Carter*, 3 Bing., 78; *Dicas v. Lord Brougham*, 6 C. & P., 249; *Lowther v. Earl of Radnor*, 8 East, 113; *Basten v. Carew*, 3 B. & C., 653; *Yates v. Lansing*, 5 Johns., 282, 291; S. C., 9 Johns., 395; *Stewart v. Hawley*, 21 Wend., 552; *Weaver v. Devendorf*, 3 Denio, 117; *Vail v. Owen*, 19 Barb., 22; *Hill v. Sellick*, 21 Barb., 207; *Wilkes v. Dinsman*, 7 How., 89; *Hoggatt v. Bigley*, 6 Humph., 236; *Walker v. Hallock*, 32 Md., 239; *Gordon v. Farrar*, 2 Doug. (Mich.), 411; *Wall v. Trumbull*, 16 Mich., 228; *Gregory v. Brooks*, 37 Conn., 365; *Bradley v. Fisher*, 13 Wall., 335; *Fuller v. Gould*, 20 Vt., 648; *Wilson v. Marsh*, 34 Vt., 352.

³ *Harrington v. Commissioners, etc.*, 2 McCord, 400.

⁴ *Freeman v. Cornwall*, 10 Johns., 470.

⁵ *Sage v. Laurain*, 19 Mich., 137.

⁶ *Van Steenburgh v. Bigelow*, 3 Wend., 42.

⁷ *Gordon v. Farrar*, 2 Doug. (Mich.), 511; *Jenkins v. Waldron*, 11 Johns., 114; *Miller v. Rucker*, 1 Bush, 135; *Carter v. Harrison*, 5 Blackf., 188; *Rail*

deciding upon the removal of a teacher;¹ of corporate authorities in passing upon questions of suspension of members;² of members of a township board in deciding upon the allowance of claims;³ and the like. In many of these cases it will be perceived that the officer who is held exempt is one who, in the main, performs ministerial functions only; but this is unimportant, if in the particular case complained of he was exercising a discretionary authority, or one which, by law, was confided to his deliberate judgment.⁴

If the duties of assessors are in their nature judicial, then this principle applies, and they are entitled to rely upon it for their protection. The proper remedy for erroneous decisions on their part will then be seen to be, not a suit at law to hold them to personal responsibility, but some direct proceeding to correct the error, and prevent the injurious consequences likely to flow from it.

"In the imperfection of human nature," it has been said by an eminent judge, "it is better that an individual should occasionally suffer a wrong than that the course of justice should be impeded and fettered by constant and perpetual restraints and apprehensions on the part of those who are to administer it."⁵ But the law does not intend that wrong shall result in any case; it gives remedies which are supposed to be adequate for all wrongs, and we are to see now whether the particular remedy of a personal action at law is given against assessors.

That the duty of these officers calls into action the judicial function is unquestionable. They are called upon to value estates, and they must do so on their best judgment under all the circumstances which go to affect the value. They should do this impartially as between the several persons whose estates they are to value, and for the same reasons as apply in the

v. Potts, 8 Humph, 225; *Peavey v. Robbins*, 3 Jones' L., 339; *Caulfield v. Bullock*, 18 B. Monr., 494; *Elbin v. Wilson*, 33 Md., 135; *Friend v. Hamill*, 34 Md., 298; *Geotchens v. Mathewson*, 5 Lans., 214.

¹ *Burton v. Fulton*, 49 Pa. St., 151.

² *Harman v. Tappenden*, 1 East, 555.

³ *Wall v. Trumbull*, 16 Mich., 228.

⁴ *Jenkins v. Waldron*, 11 Johns., 114; *Weaver v. Devendorf*, 3 Denio, 117; *Wall v. Trumbull*, 16 Mich., 228.

⁵ *Lord Tenterden*, Ch. J., in *Garnett v. Ferrand*, 6 B. & C., 611.

case of judges of courts, they should fear no one and have motive for favoring no one. If, therefore, it shall be found that one of these officers has made an excessive assessment, he cannot be held personally responsible for the error,¹ whether it result from an erroneous view of the facts or of the law.²

But even a judge, if he claims immunity, must be careful not to assume a jurisdiction which the law does not confer upon him. If persons assume to be assessors when they are not, they may justly be held responsible as trespassers;³ and the lawful assessor, if he assumes an authority to decide upon the rights of others in cases which the law has not confided to his judgment, is in general responsible to the same extent as if he possessed no official character whatever. The office protects him only when he keeps within the limits which have been prescribed for his official action; when he exceeds those he lays aside his official character, and must rely for his protection on the same principles behind which citizens in private life must defend themselves. A case in illustration is that of the assessment of a personal tax upon persons who are not resident within the district, and consequently not subject to the jurisdiction of the assessors.⁴ Others are where, in extending the

¹ *Dillingham v. Snow*, 5 Mass., 547; *Easton v. Calendar*, 11 Wend., 90; *Weaver v. Devendorf*, 3 Denio, 117; *Vail v. Owen*, 19 Barb., 22; *Brown v. Smith*, 24 Barb., 419; *People v. Reddy*, 48 Barb., 539; *Vose v. Willard*, 47 Barb., 320; *Bell v. Pierce*, 48 Barb., 51; *Barhyte v. Shepherd*, 35 N. Y., 238; *Western R. R. Co. v. Nolan*, 48 N. Y., 513; *Pentland v. Stewart*, 4 Dev. & Bat., 386; *Steam Navigation Co. v. Wasco County*, 2 Or., 206; *Macklot v. Davenport*, 17 Ia., 379; *Muscatine Western R. R. Co. v. Horton*, 38 Ia., 33; *Walker v. Hallock*, 32 Ind., 239; *Lilienthal v. Campbell*, 23 La. An., 600; *Wall v. Trumbull*, 16 Mich., 238; *Wilson v. Marsh*, 34 Vt., 352; *San Jose Gas Co. v. January*, 57 Cal., 614; *McDaniel v. Tebbetts*, 60 N. H., 497.

² See *Williams v. Weaver*, 75 N. Y., 30. An assessor held not liable for committing the tax warrant to himself as collector, under an erroneous view of the law. *Lincoln v. Chapin*, 132 Mass., 470.

³ *Allen v. Archer*, 49 Me., 346. A tax levied without an assessment is of course void. *Shewalter v. Brown*, 35 Miss., 423.

⁴ *Mygatt v. Washburn*, 15 N. Y., 316; *Wade v. Matterson*, 4 Lans., 159; *Hennan v. Stevens*, 43 Me., 437; *Martin v. Mansfield*, 3 Mass., 419; *Ware v. Percival*, 61 Me., 391; *Agry v. Young*, 11 Mass., 220; *Gage v. Currier*, 4 Pick., 899; *Sumner v. Dorchester*, 4 Pick., 361; *Inglee v. Bosworth*, 5 Pick., 498; *Freeman v. Kenney*, 15 Pick., 44; *Lyman v. Fiske*, 17 Pick., 231; *Henry v. Edson*, 2 Vt., 499; *Fairbanks v. Kittridge*, 24 Vt., 9; *Bailey v. Buell*, 59 Barb., 158, and 50 N. Y., 662; *Bennett v. Buffalo*, 17 N. Y., 383; *Clark v.*

tax after the assessment is made, they spread upon the roll a sum never lawfully voted,¹ or a sum in excess of that which by law is to be levied for the year, or in excess of that which has been lawfully voted;² or a sum which has been voted for an unlawful purpose.³

It is not an excess of jurisdiction, however, if the officer

Norton, 49 N. Y., 248; *Westfall v. Preston*, 49 Barb., 349; *Dorwin v. Strickland*, 57 N. Y., 492. In New York, where a farm is situate in two towns, it is assessable only in the one in which the owner resides, and an assessment in the other would render the assessor liable. *Dorn v. Backer*, 61 N. Y., 261, reversing 61 Barb., 597. But where one is assessed in the wrong town by his own request, he cannot maintain an action against the assessors for so assessing him. *Pease v. Whitney*, 8 Mass., 93.

An assessor is personally liable if he commits to a collector a tax warrant which is void for defects apparent on its face. *Atwell v. Zeluff*, 26 Mich., 118. Or a warrant for a tax purporting to be voted by a school district which has no existence. *Dickinson v. Billings*, 4 Gray, 42; *Judd v. Thompson*, 125 Mass., 553.

¹ As where a school tax is levied which was voted at a meeting not legally called. *Bussey v. Leavitt*, 12 Me., 378; *Baldwin v. McClinch*, 1 Me., 102; *Colby v. Russell*, 3 Me., 227; *Mussy v. White*, 3 Me., 290; *Gardiner v. Gardiner*, 5 Me., 133; *Paine v. Ross*, 5 Me., 400; *Johnson v. Goodridge*, 15 Me., 29; *Barnard v. Argyle*, 20 Me., 296; *Kellar v. Savage*, 20 Me., 199; *Withington v. Eveleth*, 7 Pick., 106; *Little v. Merrill*, 10 Pick., 543. A tax list made out before a tax is voted is void. *Mead v. Gale*, 2 Denio, 232; *Gale v. Mead*, 4 Hill, 109. This was a case in which a tax had been voted and the vote afterwards repealed, and at a later meeting the repealing vote itself repealed. *Held*, that the tax was to be regarded as voted at the date of the last meeting. But assessors are not bound to go behind the records to see that a meeting was properly called. *Saxton v. Nimms*, 14 Mass., 315; *Libby v. Burnham*, 15 Mass., 144.

² *Libby v. Burnham*, 15 Mass., 144; *Joyner v. School District*, 3 Cush., 567; *Drew v. Davis*, 10 Vt., 506; *Grafton Bank v. Kimball*, 20 N. H., 107.

³ *Stetson v. Kempton*, 13 Mass., 271; *Drew v. Davis*, 10 Vt., 506. The liability in such cases, however, would probably depend upon the position the assessor occupies under the statutes of his state relative to the vote. If the assessor is himself to take from the township records the sums voted, and spread them upon the roll, or if they are certified to him in detail, so that he is necessarily informed before he is required to act officially what sums are legal and what illegal, it seems clear that he cannot fall back upon the vote for his protection. But if, on the other hand, some other officer is required to certify to him in gross the sums voted, and he is then to spread the amount on the roll, this certificate, if in due form, like process fair on its face, should constitute his sufficient protection, and he cannot be held bound to inquire for illegalities behind it. See *Wall v. Trumbull*, 16 Mich., 223; *Parish v. Golden*, 35 N. Y., 462. And compare *Judd v. Thompson*, 125 Mass., 553.

erroneously includes in his estimate property not belonging to the person assessed or not within the district, the party himself being subject to the jurisdiction;¹ nor where, in listing for taxation persons and property within the jurisdiction, a resident is erroneously listed for taxation who is not liable;² nor where through error in judgment he omits from his roll persons or property which ought to be taxed, thereby increasing the tax upon others;³ nor where he extends on his roll a

¹ *Stickney v. Bangor*, 30 Me., 404; *Hemingway v. Machias*, 33 Me., 445; *Brown v. Smith*, 24 Barb., 419; *Williams v. Saginaw*, 51 Mich., 120.

² *Huggins v. Hinson*, 1 Phil. N. C., 126; *Vail v. Owen*, 19 Barb., 22; *Easton v. Calendar*, 11 Wend., 90; *Weaver v. Devendorf*, 3 Denio, 117; *Brown v. Smith*, 24 Barb., 419; *Bell v. Pierce*, 48 Barb., 51; *Barhyte v. Shepherd*, 85 N. Y., 283, 255. Compare *National Bank of Chemung v. Elmira*, 53 N. Y., 49; *Odiorne v. Rand*, 59 N. H., 504. A contrary decision was made in *Gridley v. Clark*, 2 Pick., 408, but the point was not discussed. Afterwards statutes were passed in that state to protect assessors in some cases. As, where through mere error and while acting with integrity and fidelity, they assessed a person not taxable. See *Baker v. Allen*, 21 Pick., 382; *Durant v. Eaton*, 98 Mass., 469. So the statute of 1823 provided that assessors shall not be responsible for the assessment of any tax upon the inhabitants of any city, town, district, parish or religious society of which they are assessors, when thereto required by the constituted authorities thereof, but the liability, if any, shall rest solely with such city, etc. *Held*, under this, that assessors were not liable for errors of law committed without fraud or intentional wrong. *Ingraham v. Doggett*, 5 Pick., 451; *Dwinnels v. Parsons*, 98 Mass., 470. But where the regular assessment has been made for the year, and without authority of law they make another, they are liable. *Inglee v. Bosworth*, 5 Pick., 498. And see further, *Gage v. Currier*, 4 Pick., 899; *Freeman v. Kenney*, 15 Pick., 44; *Suydam v. Keys*, 13 Johns., 444; *People v. Supervisors of Chenango*, 11 N. Y., 573; *Lyman v. Fiske*, 17 Pick., 281; *Baker v. Allen*, 21 Pick., 382; *Griffin v. Rising*, 11 Met., 339. The above statute held not to apply to school districts. *Little v. Merrill*, 10 Pick., 548; *Taft v. Wood*, 14 Pick., 362. An act exempting assessors from responsibility except "only for the want of integrity and fidelity on their own part," held not to protect them for assessing a school tax for a district having no legal existence. *Bassett v. Porter*, 4 Cush., 487; *S. C.*, 10 Cush., 418; *Dickinson v. Billings*, 4 Gray, 42; *Judd v. Thompson*, 125 Mass., 553. But in such a suit it does not devolve on the assessors to prove a legal organization. The organization in fact, and action as a district, are sufficient *prima facie*. *Stevens v. Newcomb*, 4 Denio, 437.

³ *Dillingham v. Snow*, 5 Mass., 559. Where taxes were irregularly assessed and paid over to the county and town, and the assessors, to avoid suit, refunded it to the tax payers, and the town voted to refund to them, this was held a good promise as to the town tax, but not as to the others. *Nelson v. Milford*, 7 Pick., 18. As to the liability of assessors for refusing to assess

tax levied under an unconstitutional law.¹ The imperfection of human judgment is such that cases falling within this principle are unfortunately of frequent occurrence.²

Possibly, assessors should be held liable if, by neglect of duty, they deprive the tax payer of the opportunity of being heard before the board of review.³ The distinction which runs through the cases is between an unlawful assumption of authority which has not been conferred, and a mistaken, erroneous or irregular exercise of authority actually possessed; the former will render any officer liable irrespective of the good

the plaintiff, whereby he lost his right to vote, see *Griffin v. Rising*, 11 Met., 339. Where an assessment roll is void because not made in time, the assessor is held not estopped from objecting to a tax levied against himself upon it. *Fletcher v. Trewalla*, 60 Miss., 963.

¹ *Edes v. Boardman*, 58 N. H., 580.

² *McDaniel v. Tebbetts*, 60 N. H., 497; *Parkinson v. Parker*, 48 Ia., 667. Assessors are not liable personally for error in judgment in deciding whether upon the facts one is liable to a dog tax. *Robinson v. Rowland*, 33 Hun, 501. Nor for overvaluation of bank stock. *Williams v. Weaver*, 75 N. Y., 80. See *Barhyte v. Shepherd*, 35 N. Y., 238; *Woodman v. Auditor-General*, 52 Mich., 28; *Perley v. Dolloff*, 60 N. H., 504. That an irregular assessment affords no cause of action against assessors, see *Sanford v. Dick*, 15 Conn., 447; *Sprague v. Bailey*, 19 Pick., 436.

³ See *Thames Manuf. Co. v. Lathrop*, 7 Conn., 550. In this case it appeared that the law required the assessment list to be filed for inspection by the 1st of December. It was not filed until the 20th of that month, but this was ten days before the meeting of the board of relief. Held, that the selectmen who took out a tax warrant on this list, by virtue of which the property of a person taxed was seized, were liable in trespass. See note on this case in 25 Vt., 27. In New York, where, by statute, the last assessment roll of the township was to govern in levying a school tax, except as changes were made, of which notice was to be given to the parties affected before the assessment was completed, it was held that the omission of this notice did not render the assessors liable as trespassers. *Randall v. Smith*, 1 Denio, 214, citing with approval *Eaton v. Callendar*, 11 Wend., 90, where trustees of a school district were held not liable, though they had erroneously added collection fees to the amount to be raised, and omitted to assess three individuals; the court holding that the apportionment of the tax was to a certain extent a judicial act, and that, "though the trustees may err in point of law or in judgment, they should not be either civilly or criminally answerable, if their motives are pure." The court distinguish *Alexander v. Hoyt*, 7 Wend., 89, in which the school assessment was made from a town assessment not finished and afterwards changed, and where the trustees were held to be trespassers. But *Randall v. Smith* is overruled by *Jewell v. Van Steenburgh*, 58 N. Y., 85, where the failure to give notice is held a fatal defect in jurisdiction.

faith of his action; for the latter he is, in general, not liable at all.¹ The law which governs the whole subject is summed up in few words in a leading case decided in Massachusetts: "When judicial officers, deriving their authority from the law, mistake or err in the execution of their authority, in a case clearly within their jurisdiction, which they have not exceeded, we know of no law declaring them trespassers *vi et armis*. If the law were otherwise respecting assessors, who, when chosen, are compellable to serve or pay a fine, hard indeed would be their case. But the same law must apply to them as to inferior judicial officers. If, therefore, the persons acting as assessors have been duly chosen and qualified to execute that office, if the sum assessed has been legally ordered to be assessed, if the assessment be made and the warrant of collection be issued by them or a major part of them, in due form of law, if the poll and estate of the party complaining of the assessment be legally taxable, he cannot, in our opinion, maintain an action against them as trespassers *vi et armis* for any error or mistake of theirs in the exercise of their discretion."²

It has been made a question whether these principles should apply to a case in which these officers are accused of having been actuated by malice, and when the impelling motive has been to inflict injury upon the parties assessed. It has already

¹ In many cases, jurisdiction depends on questions of fact; as where, for instance, the question is one of residence. But these questions the assessor must decide correctly at his peril; he cannot, by his own error, obtain a jurisdiction which the law has not conferred. *Dorwin v. Strickland*, 57 N. Y., 492; *Whitney v. Thomas*, 28 N. Y., 281; *Mygatt v. Washburn*, 15 N. Y., 316. Where the assessor increased the valuation of a person's property, after the list had passed beyond his control, he was held liable. *Bristol Manufacturing Co. v. Gridley*, 28 Conn., 201. Where corporations chartered by congress are made non-taxable by the states, they are not within the jurisdiction of assessors, who are liable if they assess them. *National Bank of Chemung v. Elmira*, 53 N. Y., 49, citing many cases. See *Dorn v. Backer*, 61 N. Y., 261. If assessors whose only power by law, when the person assessed furnishes no list, is to double the value of the apparent taxable property, proceed instead to fix on rumor a value on property not visible, they act without jurisdiction and are liable. *Howes v. Bassett*, 56 Vt., 141.

² *Parsons*, Ch. J., in *Dillingham v. Snow*, 5 Mass., 559. If assessors assess non-resident real estate as resident, but the owner, knowing the course prescribed by law, so acts as to appear to acquiesce, he will be awarded no damages for the error. *Hilton v. Fonda*, 86 N. Y., 339.

been seen that assessments, purposely made excessive through evil motive, may be reached and corrected in equity. But to subject every tax officer to the necessity of explaining and justifying his motives to the satisfaction of others, under a penalty of personal responsibility, is perhaps to go beyond what is necessary to the protection of tax payers; and in matters depending on judgment of values would be so dangerous to the officers that it is doubtful if sound policy could sanction it. In a leading case in New York it is declared that the question of motive is not to be raised in a suit against assessors who have kept within their jurisdiction. The assessors, it was said, were judges acting clearly within the scope and limit of their authority. They were not volunteers, but the duty was imperative and compulsory; and acting, as they did, in the performance of a public duty, in its nature judicial, they were not liable to an action, however erroneous or wrongful their determination may have been or however malicious the motive which produced it. Such acts, when corrupt, may be punished criminally, but the law will not allow malice and corruption to be charged in a civil suit against such an officer for what he does in the performance of a judicial duty. The rule extends to judges from the highest to the lowest; to jurors, and to all public officers, whatever name they may bear, in the exercise of judicial power. It of course applies only where the judge or officer had jurisdiction of the particular case, and was authorized to determine it. If he transcends the limits of his authority, he necessarily ceases, in the particular case, to act as a judge, and is responsible for all consequences. But with these limitations, the principle of irresponsibility, it was said, so far as respects a civil remedy, is as old as the common law itself.¹ There is some apparent dissent from this doctrine, but it can hardly be said that there is opposing authority.²

¹ *Beardsley, J.*, in *Weaver v. Devendorf*, 8 Denio, 117, 120. Compare *Baker v. State*, 27 Ind., 485; *Walker v. Hallock*, 32 Ind., 239; *Gregory v. Brooks*, 37 Conn., 365; *Burton v. Fulton*, 49 Pa. St., 151; *Pike v. Megoun*, 44 Mo., 491, 497; *Auditor v. Atchison, etc.*, R. R. Co., 6 Kan., 500. A collector of customs is not liable to a private action for the manner in which he exercises his authority to make sale of perishable property. *Gould v. Hammond*, 1 McAllis., 235.

² See *Stearns v. Miller*, 25 Vt., 20; *Parkinson v. Parker*, 48 Ia., 667; *Dillingham v. Snow*, 5 Mass., 547. And compare *Babcock v. Granville*, 44 Vt., 325.

The same reasons which exempt assessors from responsibility to tax payers exempt them also when the injury from erroneous action results to the public instead of to individuals. Assessors are not therefore liable to a parish in failing to levy a tax equal to the amount voted, where they have acted under an honest belief that they were carrying out the views of the parish.¹ Nor for neglect to commit the tax list to the proper collector, when by an honest mistake of duty it has been committed to another.²

For malfeasance in office assessors as well as other officers are liable to criminal penalties.³

Action against supervisors. The supervisors of townships in some states act in several capacities. They are members of the township board, and as such pass upon claims against the township; they meet in convention and constitute the county board which audits the county claims and votes the county taxes, and perhaps they act as assessors also, and issue process for the collection of the taxes after they have been properly spread upon the roll. Thus their action in each of these capacities may affect the tax payer; but the cases must be rare in which the party aggrieved could look beyond the supervisor's action as assessor, if that was not in itself illegal, and maintain an action against him as supervisor for something done in another capacity. Thus, it has been held in New York that supervisors who issue a tax warrant, having jurisdiction to do so, are not liable in trespass for having included in the levy a sum improperly allowed by them to a county officer.⁴ The like decision has been made in Michigan, where a supervisor was sued for placing upon the roll allowances unlawfully made by the township board of which he was a member.⁵ But in Michigan, the supervisor who undertakes to justify the issuing of a tax warrant does not make out his justification by proving his official character merely; he must show that the sums

¹ *First Parish v. Fiske*, 8 Cush., 264. Nor are they liable for failure to take the official oath. *Ibid.*

² *Lincoln v. Chapin*, 132 Mass., 470.

³ *Dillingham v. Snow*, 5 Mass., 547.

⁴ *Parish v. Golden*, 35 N. Y., 462.

⁵ *Wall v. Trumbull*, 16 Mich., 228. See *Smith v. Crittenden*, 16 Mich., 153; *Cunningham v. Mitchell*, 67 Pa. St., 78.

seem to be impolitic in a very high degree to compel such an officer to ascertain, at his peril, the illegalities that might lie back of a process apparently legal, and it might be justly expected to force prudent men to decline the office altogether, or to proceed with such hesitation and circumspection as sometimes to render the process of little or no avail.¹ The general rule is, that such an officer is legally protected against any illegalities, except those committed by himself,² and it is not illegal for him to execute process which comes to him as a ministerial officer, from other officers whose action he has no authority to revise or review.³ Indeed, if we are to judge by the weight of authority, it is more than doubtful if he has any right to do otherwise than to proceed with its execution, even though he may be satisfied that lying back of it are illegalities which would defeat the tax and entitle one who should pay it to reimbursement. There are cases which hold that if he knows of such illegalities, the officer will be liable if he proceeds to execute the process;⁴ but there are many more to the

fact that one has been taxed by mistake for property belonging to another does not make the tax warrant invalid. The collector is not bound to inquire into such matters. *Woolsey v. Morris*, 96 N. Y., 311, citing *Webber v. Gay*, 24 Wend., 486; *People v. Warren*, 5 Hill, 440. If a collector has several processes, some of which are valid and others either not fair on their face, or otherwise invalid to the officer's knowledge, a levy by virtue of all does not make him a trespasser. *Woolsey v. Morris*, 96 N. Y., 311.

¹ In Vermont the ruling is different, and a treasurer sued in trespass, for taking goods on a warrant of distress, for taxes, cannot rely on a valid warrant, but must show that all the previous proceedings were legal. *Redfield, J.*, in *Collamer v. Drury*, 16 Vt., 574, 578. To the same point are *Downing v. Roberts*, 21 Vt., 441; *Hathaway v. Goodrich*, 5 Vt., 65; *Spear v. Tilson*, 24 Vt., 420; *Shaw v. Peckett*, 25 Vt., 423. See, also, *Downer v. Woodbury*, 19 Vt., 329; *Wheelock v. Archer*, 26 Vt., 380. But the rule seems to be the reverse of this in that state, when suit is brought for taxes, for then it is held the burden is upon the defendant to impeach the regularity and validity of the list. *Macomber v. Center*, 44 Vt., 235, citing *Willson v. Seavey*, 38 Vt., 221.

² *Carville v. Additon*, 62 Me., 459.

³ *Erskine v. Hohnbach*, 14 Wall., 613; *Nowell v. Tripp*, 61 Me., 426; *S. C.*, 14 Am. Rep., 572; *Moore v. Allegheny City*, 18 Pa. St., 55. Though a levy of school taxes is illegal, the collector is protected if his warrant is fair on its face, unless he was one of the assessors. *Peckham v. Bicknell*, 11 R. I., 596.

⁴ *Leachman v. Dougherty*, 81 Ill., 324; *Grace v. Mitchell*, 81 Wis., 533.

contrary,¹ and some go so far as to intimate that under such circumstances he is not at liberty to decline service.² This, however, is going farther than seems called for by any rule of public policy, and there are authoritative rulings the other way.³ As the officer would be liable on his bond for a breach of public duty if he should refuse to act in a proper case, it may be assumed he will not expose himself to the risk unless the case is very clear, so that the probability of his declining to enforce a legal tax is very slight. The rule of protection goes so far that he is not liable to one who is unlawfully taxed, by reason of not residing within the district for which the tax is levied;⁴ nor does the fact that sums are included in the warrant, which were never lawfully voted, render him liable.⁵ And he is protected in executing his warrant by arrest, notwithstanding the person taxed has been discharged in bankruptcy.⁶

¹ *Webber v. Gay*, 24 Wend., 485; *Wilmarth v. Burt*, 7 Met., 257; *Watson v. Watson*, 9 Conn., 140; *Brainerd v. Head*, 15 La. An., 489; *Wall v. Trumbull*, 16 Mich., 228; *Bird v. Perkins*, 33 Mich., 28. See *Cunningham v. Mitchell*, 67 Pa. St., 78; *Twitchell v. Shaw*, 10 Cush., 46.

² *Watson v. Watson*, 9 Conn., 140; *Gove v. Newton*, 58 N. H., 359.

That while the assessors are protected, the collector who collects the tax is protected also, as well as the town, county, etc., to which the money is paid over, see *Holton v. Bangor*, 23 Me., 264; *Gilpatrick v. Saco*, 57 Me., 277; *Wharton v. Birmingham*, 37 Pa. St., 371; *Ontario Bank v. Bunnell*, 10 Wend., 186; *Little v. Greenleaf*, 7 Mass., 236; *Osborn v. Danvers*, 6 Pick., 98; *Bates v. Boston*, 6 Cush., 93; *Howe v. Boston*, 7 Cush., 273; *Lincoln v. Worcester*, 8 Cush., 55; *Greene v. Mumford*, 4 R. I., 313; *People v. Arguello*, 37 Cal., 524; *Glasgow v. Rowse*, 43 Mo., 479.

³ *Davis v. Wilson*, 61 Ill., 527; *Earl v. Camp*, 16 Wend., 562; *Horton v. Hendershot*, 1 Hill, 118; *Cornell v. Barnes*, 7 Hill, 35; *Dunlap v. Hunting*, 2 Denio, 643. See *Hill v. Wait*, 5 Vt., 124; *Cunningham v. Mitchell*, 67 Pa. St., 78; *Newberg v. Munshower*, 29 Ohio St., 617.

⁴ *Savacool v. Boughton*, 5 Wend., 171; *Nowell v. Tripp*, 61 Me., 426; *S. C.*, 14 Am. Rep., 572; *Holden v. Eaton*, 8 Pick., 436. See *Phelps v. Thurston*, 47 Conn., 477.

⁵ *Lincoln v. Worcester*, 8 Cush., 55; *Abbott v. Yost*, 2 Denio, 86.

⁶ *Aldrich v. Aldrich*, 8 Met., 102; *Wilmarth v. Burt*, 7 Met., 257. The collector, having a warrant from an authority of competent jurisdiction to issue it, cannot inquire into the precedent steps. *Cunningham v. Mitchell*, 67 Pa. St., 78. He may even officially receive voluntary payments where his authority is defective. *State v. Woodside*, 8 Ired., 104; *Same v. Same*, 9 Ired., 496; *Johnson v. Goodridge*, 15 Me., 29; *Orono v. Wedgewood*, 44 Me., 49; *Trescott v. Moan*, 50 Me., 347; *Sandwich v. Fish*, 2 Gray, 298; *Cheshire v. Howland*, 13 Gray, 821; *Williamstown v. Willis*, 15 Gray, 427. Compare *Waters v. State*, 1 Gill, 302; *O'Neal v. School Commissioners*, 27 Md., 227;

What Process is Apparently Legal. Process may be said to be fair on its face which proceeds from a court, officer or body having authority of law to issue process of that nature, and which is legal in form, and on its face contains nothing to notify or fairly apprise any one that it is issued without authority.¹ It is not easy to lay down any general rule as to what will constitute a defect in the process which should put the collector on his guard. Where the law required the assessment roll to be attached to the warrant, and the certificate attached thereto was not in accordance with the law, it was held that the warrant could not be said to be fair on its face, and the collector was liable for executing it.² The same ruling was made where the warrant showed on its face that a certain tax included in it could not lawfully have been placed in the list for that year.³ And so where the affidavit, which was required to be attached to the roll after the time for reviewing the assessments had expired, appeared to be made prematurely.⁴ So where the warrant was issued by a justice of the peace, when, by law, it should have been issued by the supervisors.⁵ So where an unauthorized and material alteration was made in it after it came to the hands of the collector.⁶ So where, in the case of a special assessment only collectible from lands, the warrant directed the collection as a personal charge.⁷ So where that which is put into the collector's hands as a warrant is not

Commonwealth v. Philadelphia, 27 Pa. St., 497; *Moore v. Allegheny City*, 18 Pa. St., 55. If the collector's warrant was sufficient when property was seized under it, a subsequent alteration, by the magistrate who signed it, for the purpose of making it a warrant for another tax, will not invalidate the collector's action. *Goodwin v. Perkins*, 39 Vt., 598.

¹ Cooley on Torts, 460, 464. See *Bradley v. Ward*, 58 N. Y., 401.

² *Van Rensselaer v. Witbeck*, 7 N. Y., 517.

³ *Eames v. Johnson*, 4 Allen, 882. So the collector was held liable in collecting a personal tax from a bank which, by law, was taxable on its realty only. *American Bank v. Mumford*, 4 R. I., 478. Compare *National Bank of Chemung v. Elmira*, 53 N. Y., 49, and cases cited. That, however, was a suit against the town after the money had been paid over.

⁴ *Westfall v. Preston*, 49 N. Y., 349. See, also, *National Bank of Chemung v. Elmira*, 53 N. Y., 49; *Gale v. Mead*, 4 Hill, 109; *Yelverton v. Steele*, 36 Mich., 62.

⁵ *Chalker v. Ives*, 55 Pa. St., 81. And see *Hilbish v. Hower*, 58 Pa. St., 93.

⁶ *Henry v. Bell*, 75 Mo., 194.

⁷ *Higgins v. Ausmuss*, 77 Mo., 351.

in substance what the statute provides for.¹ But mere clerical errors may be overlooked in any case, and a departure from a statutory form may be disregarded where the use of the specific form is not made mandatory.²

But though a valid process will protect an officer against personal responsibility, it will not enable him to build up a title to property seized by virtue of it, either general or special. While, therefore, he might have a perfect defense to a suit brought against him in trespass, for seizing property, he might not successfully defend an action of replevin, or any other action in which the legal title to the property, or the legal right to possession, was the question at issue. In any such action it would not be sufficient for him that the process under which he acted appeared to be valid on its face, but it should be valid in fact.³ This is an important distinction, which, however, is not recognized by all the cases.⁴

Accounting for Illegal Taxes. If a collector succeeds in securing payment of a sum levied as a tax, under a warrant which would not protect him for a reason going to the foun-

¹Warrensburg v. Miller, 77 Mo., 56.

²See Wilcox v. Gladwin, 50 Conn., 77. Process issued to one as "constable and collector" will be sufficient, if in fact he was authorized to act as collector when it was issued to him. Hays v. Drake, 6 Gray, 387. And a collector is not a trespasser in seizing property by virtue of two warrants, if either of them is sufficient. *Ibid.* A warrant attached to a tax list, and signed by the supervisors, was held to be fair on its face, though they failed to add the official title to their names. Sheldon v. Van Buskirk, 2 N. Y., 473. A warrant issued in pursuance of law for the collection of a tax from one who has removed from the township is sufficient, though it fails to recite the fact of removal. Cheever v. Merritt, 5 Allen, 563. And see Sherman v. Torrey, 99 Mass., 472; Hubbard v. Garfield, 102 Mass., 72. So it will protect the officer where the only defect is a failure to insert the direction to sell distrained goods within seven days, according to law. King v. Whitcomb, 1 Met., 328. And for other cases, where questions of validity of process have been raised, see Mussey v. White, 8 Me., 290; Bachelder v. Thompson, 41 Me., 539; Stephens v. Wilkins, 6 Pa. St., 260; Bank of Chango v. Brown, 26 N. Y., 467; Barnard v. Graves, 13 Met., 85; Arnett v. Griffin, 60 Ga., 349.

³Earl v. Camp, 16 Wend., 562; Beach v. Botsford, 2 Doug. (Mich.), 199; Le Roy v. East Saginaw, 18 Mich., 233; McCoy v. Anderson, 47 Mich., 502.

⁴See Troy, etc., R. Co. v. Kane, 72 N. Y., 614. Replevin will lie for property taken on a valid warrant if the seizure was made out of the jurisdiction. McKay v. Batchellor, 2 Col., 591.

lation of the levy, he can have no just claim whatever to retain it, and would be liable to refund it on demand. But in general, if the money, though actually collected by compulsion, is paid over to the proper receiving officer before suit brought, the treasurer is protected,¹ and this principle has been applied to cases in which the officer's authority was void for unconstitutionality or other reason.²

If the collector levies distress for a tax and afterwards abuses his authority, the warrant becomes no protection to him, and he is held to be a trespasser *ab initio*. This rule has been applied in one case where the collector sold the property at half its value within two hours after seizure, and without giving public notice of the time and place of sale.³ It has been applied also where the collector, after a sale on which he had received a surplus, failed to render to the owner an account in writing of the sale and charges, as required by the statute under which the sale was made.⁴ And the collector is liable as a trespasser *ab initio*, if he keeps the distress until after the time limited by law for making sale, and then sells it;⁵ or

¹ Hardesty v. Fleming, 57 Tex., 395. See Burlington, etc., R. Co. v. Buffalo Co., 14 Neb., 51. But see Kimball v. Corn Exch. Bank, 1 Ill. Ap., 209. A collector of federal internal revenue may be sued in a state court to recover back money paid as taxes which were illegal. But in such case the conditions prescribed by acts of congress to such suits must be observed to the same extent as if the suit were in a federal court. Hubbard v. Kelley, 8 W. Va., 46.

² Dickens v. Jones, 6 Yerg., 483; Crutchfield v. Wood, 16 Ala., 702; Lewis County v. Tate, 10 Mo., 650. In North Carolina it is said that a tax, if collected by virtue of a tax list, though paid under protest, cannot be recovered from the collector. The tax list has the same force as an execution. Mulford v. Sutton, 79 N. C., 276. In Wood v. Stirman, 37 Tex., 584, it was decided that where a county treasurer collects taxes without authority of law, he alone is liable, and not his sureties or the county, though the money may have been actually paid into the county treasury, and disbursed as other county funds.

³ Blake v. Johnson, 1 N. H., 91.

⁴ Blanchard v. Dow, 32 Me., 557.

⁵ Pierce v. Benjamin, 14 Pick., 356, 360, citing Purrington v. Loring, 7 Mass., 388; Nelson v. Merriam, 4 Pick., 249. See to the same effect, Brackett v. Vining, 49 Me., 356; Farnsworth Co. v. Rand, 65 Me., 19. *Contra*, Ordway v. Ferrin, 3 N. H., 69. And see Bird v. Perkins, 33 Mich., 28. Where a collector of taxes, after seizing property as a distress and advertising it for sale, neglected to sell it at the time appointed, but afterwards again advertised it the requisite period, and sold it upon such new advertisement: *Held*, that

if, having sold enough to satisfy the tax, he proceeds to sell more.¹

Where several taxes appear on the same list, the tax payer has a right to pay any one of them the legality of which he concedes, leaving the others to take the regular course; and the tax collector who refuses a tender of one unless all are paid will be liable for any compulsory proceedings in respect to such tax.²

Federal Collectors. The rules which have been given apply to collectors under the internal revenue laws of the United States, who are protected in like manner in the collection of taxes committed to them by lists fair on their face.³ The case

neither the neglect to sell at the appointed time, nor the subsequent sale, could make him a trespasser *ab initio*. *Souhegan Nail, etc., Factory v. McConihe*, 7 N. H., 309.

¹ *Williamson v. Dow*, 32 Me., 559. But in such a case he is trespasser only as to the excess. *Seekins v. Goodale*, 61 Me., 400; *Cone v. Forest*, 126 Mass., 97. Compare *Polk v. Rose*, 25 Md., 153. If an officer under two rate bills, one valid and the other invalid, seizes no more property than he is authorized to by virtue of the valid process, and sells the same for more than enough to satisfy the valid process, and then appropriates the excess to satisfy the invalid process, such misapplication does not render the officer a trespasser *ab initio*. To make him a trespasser *ab initio*, the wrongful act must be done to the property taken, not to the fund realized from a legal sale. *Wilson v. Seavey*, 38 Vt., 221, 230. For the law as to what will render one a trespasser *ab initio*, see the *Six Carpenters' Case*, 8 Coke, 290; S. C., 1 Smith's Leading Cases, 162 and notes; *Van Brundt v. Schenck*, 11 Johns., 377; S. C., 13 Johns., 414. If one whose property is unlawfully seized and sold by the collector causes it to be bid in for himself and appropriates it to his own use, he can recover in an action against the collector only what he paid for the property on the sale; as that was the extent of his injury. *Hurlburt v. Green*, 41 Vt., 490.

² *Bank of Mendocino v. Chalfant*, 51 Cal., 369.

³ *Erskine v. Hohnbach*, 14 Wall., 613, 616. In this case Mr. Justice *Field* states the rule of protection very clearly and concisely as follows: "Whatever may have been the conflict at one time, in the adjudged cases, as to the extent of protection afforded to ministerial officers, acting in obedience to process or orders issued to them by tribunals or officers invested by law with authority to pass upon and determine particular facts, and render judgment thereon, it is well settled now that if the officer or tribunal possesses jurisdiction over the subject-matter upon which judgment is passed, with power to issue an order or process for the enforcement of such judgment, and the order issued thereon to the ministerial officer is regular on its face, showing no departure from the law, or defect of jurisdiction over the person or prop-

of the collector of customs duties is different. He has no tax warrant or other process to protect him, and he proceeds at his peril in demanding and receiving what he claims to be demandable as duties. If he collects illegal or excessive duties, and they are paid under protest, he is liable to the party paying for the amount;¹ but he is excused if he pays over the moneys before protest is made.²

Liability of municipal corporations. If a state collects illegal taxes for its own purposes, the several persons from whom the collection is made have claims against it for the repayment of the sums collected from them respectively. The state is trustee of the money for the use of the persons paying it;³ but whether they can bring suit against the state therefor must depend upon the provision of law which it may have made for the purpose. They cannot sue the state except as by law it may have provided therefor; and though this is sometimes done, it is more usual to give to some auditing board authority in the premises. If an action is given it will be governed by the same rules as apply in actions against municipal corporations, except as the statute may have otherwise provided.

In some states provision is made by law for the refunding by the state, through the counties, of sums illegally collected as state taxes, and under such a provision the county may be

erty affected, then, and in such case, the order or process will give full and entire protection to the ministerial officer in its regular enforcement against any prosecution which the party aggrieved thereby may institute against him, although serious errors may have been committed by the officer or tribunal in reaching the conclusion or judgment upon which the order or process is issued." Citing *Savacool v. Boughton*, 5 Wend., 170; *Earl v. Camp*, 16 Wend., 562; *Chegaray v. Jenkins*, 5 N. Y., 376; *Sprague v. Burchard*, 1 Wis., 457. To the same effect is *Haffin v. Mason*, 15 Wall., 671. And see *Cutting v. Gilbert*, 5 Blatch., 259; *Nelson v. Carman*, 5 Blatch., 511; *Braun v. Sauerwein*, 10 Wall., 218; *The Collector v. Hubbard*, 12 Wall., 1; *Coblens v. Abel*, 1 Woolw., 293; *First Nat. Bank v. Waters*, 19 Blatch., 242.

¹ *Elliott v. Swartwout*, 10 Pet., 137; *Maxwell v. Griswold*, 10 How., 243.

² *Elliott v. Swartwout*, 10 Pet., 137.

Where a statute provides for suit against a collector within a given time after an appeal, the provision must be strictly observed. *Cheatham v. United States*, 92 U. S., 85. See *James v. Hicks*, 110 U. S., 272.

³ *Shoemaker v. Grant Co.*, 36 Ind., 175.

sued on a presumption that the state has performed its duty in supplying the means.¹

The town, village, city or county for which a tax has been levied and collected may, under some circumstances, be liable to an action at the suit of parties from whom the tax has been exacted. The case, however, must be exceptional, and the circumstances such as to render repayment equitable. If payment was made under a mistake of fact that a tax appeared on the list when it did not, the sum paid may be recovered back;² as it may also when one pays a city tax under an erroneous belief that his land on which the tax is laid is within the city.³ But, in general, an action can only be maintained when the following conditions are found to concur:

1. The tax must have been illegal and void, and not merely irregular.

2. It must have been paid under compulsion or the legal equivalent.

3. It must have been paid over by the collecting officer, and have been received to the use of the municipality.⁴

And to these should perhaps be added:

4. The party must not have elected to proceed in any remedy he may have had against the assessor or collector.⁵

¹ *Mills v. Hendricks Co.*, 50 Ind., 436. In Michigan illegal taxes are charged back by the state to the counties. But before this can be done the tax must be set aside as illegal; it is not enough that a suit has been brought and injunction obtained to restrain collection. *Auditor-General v. Supervisors*, 36 Mich., 70.

² *Woolley v. Staley*, 39 Ohio St., 354.

³ *Indianapolis v. McAvoy*, 86 Ind., 587. It is said in the case that it might be otherwise if the party was negligent in not ascertaining the facts. The general rule is that a payment voluntarily made cannot be recovered back because of the party having been in error as to the right to require it. *Tupelo v. Beard*, 56 Miss., 532. If, after one has for several years voluntarily paid city taxes upon lands supposed to be within the city, it turns out on survey that they were not, he will have no legal claim to reimbursement. *Jackson v. Atlanta*, 61 Ga., 228. And see *Commonwealth v. Philadelphia*, 27 Pa. St., 497. It has been held that a tax imposed by city ordinance, without authority of law, may be recovered back, even though paid without protest. *Galveston v. Sydnor*, 39 Tex., 236, citing *Marshall v. Snediker*, 25 Tex., 460; *Baker v. Panola County*, 30 Tex., 86.

⁴ See *First National Bank v. Americus*, 68 Ga., 119; *Winter v. Montgomery*, 65 Ala., 403; *Lyons v. Cook*, 9 Ill. Ap., 543. There must be actual payment, and not a mere bargain or arrangement for payment. *Savannah v. Feeley*, 66 Ga., 31.

⁵ In *Ware v. Percival*, 61 Me., 391, the person illegally assessed sued the

Where the statute gives an action, it may not be necessary that all these conditions should concur, since the statute may dispense with one or more of them. Thus, it has been held in New York that where the statute provides for the repayment of a tax illegally levied, it is no answer to a claim therefor that the payment was voluntarily made;¹ and in Iowa it has been decided that where a statute allows recovery of taxes erroneously or illegally exacted or paid, the failure of the tax payer to stay the collection of such tax does not prevent his suit after payment.²

The sum for which any municipality is liable must in general be what has been collected for itself; and therefore when the town collector collects a state, county and town tax levied on property not taxable, if the town is sued, the recovery will be limited to what was paid over to it for its own use, and will

town and recovered satisfaction. Afterwards he sued the assessors, but his first recovery and satisfaction were held conclusive. See Same Case, 14 Am. Rep., 565.

The following are decisions under special points not noticed in the text: The value of highway labor in which a tax has been paid cannot be recovered. *Tufts v. Lexington*, 72 Me., 516. When a lessee pays a tax which is afterwards set aside in proceedings instituted by the lessor, the lessee is entitled to recover what he paid. *Purcell v. New York*, 85 N. Y., 330. If one buys land after a tax is assessed on it against his grantor, and pays it before the tax has become a lien under the statute without making objections to it before the board of review, he is concluded by the payment. *Louden v. East Saginaw*, 41 Mich., 18. While, in general, one cannot, by voluntarily paying taxes on the land of another, get any right of recovery against him, circumstances may arise where the opposite rule may obtain, as where one has paid taxes under a *bona fide* claim of title which is only decided against him after long litigation. *Goodnow v. Moulton*, 51 Ia., 555; *Am. Emig. Co. v. Land Co.*, 52 Ia., 323; *Goodnow v. Wells*, 54 Ia., 326.

¹ *People v. Supervisors of Madison*, 51 N. Y., 442.

² *Dickey v. Polk Co.*, 58 Ia., 287.

A statute required taxes wrongfully assessed to be refunded though paid voluntarily. Held that "wrongfully" was not equivalent to "illegally;" that to entitle one to repayment it must appear that not only were the taxes irregularly assessed, but that they were not legally or equitably due from him. *Howard Co. v. Armstrong*, 91 Ind., 528. See *Durham v. Board, etc.*, 95 Ind., 182; *Henry Co. v. Murphy*, 100 Ind., 570.

Under a statute allowing the refunding of an illegal tax a voluntary payment of a tax which was never legally levied may be recovered. *Isbell v. Crawford Co.*, 40 Ia., 102. An action held to lie where the proper board had refused to pay, though an appeal was given from its decision. *Richards v. Wapello Co.*, 48 Ia., 507. See *McWhinney v. Indianapolis*, 101 Ind., 150.

not embrace the state and county taxes.¹ It may be different, however, in the case of taxes collected for the subordinate municipalities. A township is held liable for school and road taxes received into its treasury, even though they have been paid out before suit is brought;² but it would be otherwise if the moneys in the hands of its treasurer constituted a special fund over which by law the corporation had no control.³

It is immaterial to the liability of a municipal corporation that the officers through whom the illegal tax was enforced were not of its appointment and not under its control.⁴

A cause of action for taxes illegally paid accrues at the time of the payment, even though the illegality may not have been then known; and the statute of limitations begins to run from that time.⁵

¹ *Vermont Central R. R. Co. v. Burlington*, 28 Vt., 193. See, also, *Spear v. Braintree*, 24 Vt., 414; *Slack v. Norwich*, 32 Vt., 818; *Matheson v. Mazomanie*, 20 Wis., 191. For illegal interest collected and paid to the county and by the county to a city, the city is liable. *Loring v. St. Louis*, 10 Mo. Ap., 414.

² *Byles v. Golden*, 52 Mich., 613; *Matteson v. Rosendale*, 37 Wis., 254. Compare *Pawnee Co. v. Railroad Co.*, 21 Kan., 748; *Saline Co. v. Geis*, 23 Kan., 381. So a tax laid without authority and paid over to a city may be recovered back though the city has paid it out to a contractor. *Tallant v. Burlington*, 39 Ia., 543; *Louden v. East Saginaw*, 41 Mich., 18. See *Grand Rapids v. Blakely*, 40 Mich., 367.

³ *Dawson v. Aurelius*, 49 Mich., 479; *Camp v. Algansee*, 50 Mich., 4. A railroad aid tax was levied in several towns, and in some it turned out invalid. The county collected the tax, and that from the latter towns was paid over to the railroad company. Held that they were not entitled to recover back from the county. *Des Moines, etc., R. Co. v. Lowry*, 51 Ia., 486. A township cannot recover from the county the amount of a special but invalid township road tax collected by the county and turned over by it to the town clerk. *Stone v. Woodbury Co.*, 51 Ia., 523.

⁴ *Bank of Commonwealth v. New York*, 43 N. Y., 184. See, also, *Chapman v. Brooklyn*, 40 N. Y., 372; *Newman v. Supervisors of Livingston*, 45 N. Y., 676. Compare *Swift v. Poughkeepsie*, 37 N. Y., 511. But it is said in the first above case that no action will lie while the assessment remains in force, if the assessors had jurisdiction to lay it. If, however, the assessment was void on its face, it is not necessary to have it so judicially declared before bringing suit. *Horn v. New Lots*, 83 N. Y., 100. It would be otherwise, if the invalidity depended on facts which would not appear in proceedings to enforce the assessment. *Ibid.*, citing *Peyser v. Mayor*, 70 N. Y., 497; *In re Lima*, 77 N. Y., 170; *Wilkes v. Mayor*, 79 N. Y., 621; *Marsh v. Brooklyn*, 59 N. Y., 280.

⁵ *Beecher v. Clay Co.*, 52 Ia., 140; *Scott v. Chickasaw Co.*, 53 Ia., 47. It does not arise on contract; and it is held in Iowa that it may be brought against

Irregular Taxes. When a municipal corporation is sued for money collected and paid over to it as a tax, the idea on which the suit is predicated is, that the corporation has received that which, in justice, it ought not to retain. A suit will not, therefore, lie to recover back taxes paid, when the only complaint that can be made of them is that the proceedings in their levy and collection have been irregular. The fact of irregularity does not establish injustice; there must be something further in the case which either exempts the party from the tax altogether, or which, because of illegality or inequality, deprived the officers of jurisdiction. Municipalities do not guaranty to their people correct action on the part of their officers,¹ and if they did no one would be entitled to rely upon the guaranty until he was injured. Irregular action does not necessarily injure the parties concerned; and where it does, the remedies given by review or repeal are supposed to afford full redress. Any further remedy must proceed upon the idea that the tax is void; a mere nullity.²

a city without first presenting the same to the city council, though the charter forbids actions on any "claim or demand" until after it has been so presented. *Bradley v. Eau Claire*, 56 Wis., 168. Compare *Wright v. Merimack*, 52 Wis., 466; *Kellogg v. Supervisors*, 42 Wis., 97. A contrary ruling has been made in Michigan. *Mead v. Lansing*, 56 Mich., 600. In a suit against a town to recover back an illegal tax the town cannot defend by showing that the assessors were not legally elected. *Sudbury v. Heard*, 105 Mass., 543.

¹*Logansport v. Humphrey*, 84 Ind., 467; *McWhinney v. Indianapolis*, 98 Ind., 182.

²*Wright v. Boston*, 9 Cush., 233, 241, per *Shaw*, Ch. J., citing *Preston v. Boston*, 12 Pick., 7; *Boston, etc., Glass Co. v. Boston*, 4 Met., 181; *Howe v. Boston*, 7 Cush., 273; *Lincoln v. Worcester*, 8 Cush., 55, approved in *Rogers v. Greenbush*, 58 Me., 390; *Moore v. Albany*, 98 N. Y., 396; *Wabash, etc., R. Co. v. Johnson*, 108 Ill., 11. That lots are described by wrong numbers in the assessment is no ground for recovering back. *Hanson v. Haverhill*, 60 N. H., 218. In Massachusetts it is held that where a party is taxable, but in the assessment are included non-taxable items, a suit will not lie. *Oliver v. Lynn*, 130 Mass., 143; *Hicks v. Westport*, 130 Mass., 478. See *Williams v. Saginaw*, 51 Mich., 120. If the tax has been judicially set aside an action will lie, even though payment was made voluntarily. *Riker v. Jersey City*, 38 N. J., 225. See *Peyser v. New York*, 70 N. Y., 497. Where one failed to list property for taxation, and the collector failed to proceed according to the statute in such case, but the assessment was made, and, at the instance of the tax payer, was afterwards reduced by the collector, it was held that the former could not escape payment because of the collector's irregularity. *Bailey v. Railroad Co.*, 22 Wall., 604. And see, as to waiving

Voluntary Payments. That a tax voluntarily paid cannot be recovered back, the authorities are generally agreed.¹ And it is immaterial in such a case that the tax has been illegally laid, or even that the law under which it was laid was unconstitutional.² The principle is an ancient one in the common law, and is of general application. Every man is supposed to know the law, and if he voluntarily makes a payment which the law would not compel him to make, he cannot afterwards assign his ignorance of the law as the reason why the state should furnish him with legal remedies to recover it back. Especially is this the case when the officer receiving the money, who is chargeable with no more knowledge of the law than the party making payment, is not put on his guard by any warning or protest, and the money is paid over to the use of the public in apparent acquiescence in the justice of the exaction. Mistake of fact can scarcely exist in such a case except

irregularities, *Louden v. East Saginaw*, 41 Mich., 18. As to special action against the assessors by a party who is injured by them, see *Hayford v. Belfast*, 69 Me., 63.

¹ *Smith v. Readfield*, 27 Me., 145; *New York, etc., R. R. Co. v. Marsh*, 12 N. Y., 306; *Walker v. St. Louis*, 15 Mo., 563; *Christy's Administrators v. St. Louis*, 20 Mo., 143; *Hospital v. Philadelphia County*, 24 Pa. St., 229; *Phillips v. Jefferson County*, 5 Kan., 412; *Wabaunsee County v. Walker*, 8 Kan., 431; *Corkle v. Maxwell*, 3 Blatch., 413; *Elliott v. Swartwout*, 10 Pet., 137; *Mills v. Hendricks Co.*, 50 Ind., 436; *Smith v. Schroeder*, 15 Minn., 35; *Chicago v. Fidelity Bank*, 11 Ill. Ap., 165; *Turner v. Althaus*, 6 Neb., 54; *McGehee v. Columbus*, 69 Ga., 531. The rule applies to interest wrongfully extorted when the tax is legal. *Maguire v. State Sav. Inst.*, 62 Mo., 344.

If one pays a tax on chattels which he has purchased when the tax was not a lien, his payment is voluntary. *Gaar v. Hurd*, 92 Ill., 315.

² *Taylor v. Board of Health*, 81 Pa. St., 73; *Barrett v. Cambridge*, 10 Allen, 48; *New Orleans Canal, etc., Co. v. New Orleans*, 30 La. An., 1371; *Thomson v. Norris*, 62 Ga., 538; *Georgetown College v. Dist. of Col.*, 4 MacA., 43; *Moore v. Sweetwater Co.*, 2 Wy., 8. Money paid to secure a license, issued on the petition of the party, is voluntarily paid, and cannot be recovered back, even though no power existed to require it. *Mays v. Cincinnati*, 1 Ohio St., 268, citing *Brisbane v. Dacres*, 5 Taunt., 148; *Elliott v. Swartwout*, 10 Pet., 137; *Clarke v. Dutcher*, 9 Cow., 674; *Robinson v. Charleston*, 4 Rich., 317; *Smith v. Readfield*, 27 Me., 145. To the same effect is *Ligonier v. Ackerman*, 46 Ind., 552. The mere fact that the lands taxed were unpatented is no ground for recovering back. *Welton v. Merrick Co.*, 16 Neb., 83. And see *Foster v. Pierce Co.*, 15 Neb., 48; *Bates v. York Co.*, 15 Neb., 284. A penalty wrongfully added to the tax but paid without protest cannot be recovered. *Russell v. New Haven*, 51 Conn., 259.

in connection with negligence; as the illegalities which render such a demand a nullity must appear from the records, and the tax payer is just as much bound to inform himself what the records show, or do not show, as are the public authorities. The rule of law is a rule of sound public policy also; it is a rule of quiet as well as of good faith, and precludes the courts being occupied in undoing the arrangements of parties which they have voluntarily made, and into which they have not been drawn by fraud, or accident, or by any excusable ignorance of their legal rights and liabilities.¹

All payments are supposed to be voluntary until the contrary is made to appear.² Nor is the mere fact that a tax is paid unwillingly, or with complaint, of any legal importance, but there must be in the case some degree of compulsion to which the tax payer submits at the time but with notification of some sort equivalent to reservation of rights.³ It has been said in one case that "taxes illegally recovered may always be recovered back if the collector understands from the payer that the tax is regarded as illegal, and that suit will be instituted to compel the refunding;"⁴ but it has been repeatedly held that a mere protest, when payment was not made to save arrest or the seizure or sale of goods, or in submission to process that might immediately have been enforced, would not relieve the payment of its presumed voluntary character.⁵ In some cases

¹In Kentucky it has been held that where a party pays taxes illegally assessed without knowledge of the illegality, he may recover back, though he made no protest. *Underwood v. Brockman*, 4 Dana, 309; *Ray v. Bank of Kentucky*, 8 B. Monr., 510; *Louisville v. Zanone*, 1 Met. (Ky.), 151; *Covington v. Powell*, 2 Met. (Ky.), 226. But in Iowa it has been held that a tax, paid in ignorance that the law under which it was levied was invalid, could not on that ground be recovered back. *Kraft v. Keokuk*, 14 Ia., 86; *Espy v. Fort Madison*, 14 Ia., 226. And see *Lester v. Baltimore*, 29 Md., 415.

²See *N. W. Packet Co. v. St. Louis*, 4 Dill., 10. The mere fact that the collector might have enforced payment will not make a payment involuntary when he was taking no steps to collect and making no threats. *Wilson v. Pelton*, 40 Ohio St., 306.

³*Jackson v. Newman*, 59 Miss., 385. See *Preston v. Boston*, 12 Pick., 7; *Tuttle v. Everett*, 51 Miss., 27; *Clafin v. McDonough*, 33 Mo., 412.

⁴*Chase*, Ch. J., in *Erskine v. Van Arsdale*, 15 Wall., 75, 77. See *Raisler v. Athens*, 66 Ala., 194.

⁵See *Hospital v. Philadelphia Co.*, 24 Pa. St., 229; *Commissioners v. Walker*, 8 Kan., 431; *Forbes v. Appleton*, 5 Cush., 115; *Jenks v. Lima*, 17

it is held that a payment made only to release lands from the lien of a tax, or to prevent a sale of lands, or to redeem lands from a sale actually made, will not be held a payment under compulsion, and the party paying cannot reclaim it;¹ but this is not universally assented to;² and it seems reasonable that the rule should be restricted to cases in which, if sale were made, fatal defects would appear on the face of the proceedings. A party ought not to be exposed to any more risks of loss in relieving his lands of an apparent cloud upon title than in protecting his goods against an illegal sale.

When a voluntary payment is spoken of, the qualifying word is not used in its ordinary sense, and many payments are held to be voluntary which are made unwillingly and only as a choice of evils or of risks. Thus, a payment has been held to be voluntary which the owner made to save his property from being sold, as he supposed, when the collector was actually assuming to proceed to sale, but with an authority void on its face, and without possession or control of the property.³ A

Ind., 326; *Patterson v. Cox*, 25 Ind., 261; *Durham v. Commissioners*, 95 Ind., 182; *Peebles v. Pittsburgh*, 101 Pa. St., 804; *Railroad Co. v. Commissioners*, 98 U. S., 541; *Muscatine v. Packet Co.*, 45 Ia., 185.

¹ *Russell v. Mayor*, 35 Hun, 848; *Shane v. St. Paul*, 26 Minn., 543; *Detroit v. Martin*, 84 Mich., 171; *Wills v. Austin*, 53 Cal., 152; *De Baker v. Carillo*, 52 Cal., 473, citing *Bicknell v. Story*, 46 Cal., 595.

² In *Seeley v. Westport*, 47 Conn., 294, explaining *Sheldon v. School District*, 24 Conn., 88, it was held that a payment of tax on realty might be recovered back as well as one on personalty. If one voluntarily pays a legal tax on lands which he claims to own, he has no claim to recover back when it is decided that he has no title. *Dubuque, etc., R. Co. v. Webster Co.*, 40 Ia., 16. If in proceedings to vacate an assessment a party pays a portion, it will be vacated only as to the remainder. *Petition of Hughes*, 93 N. Y., 512. Where in a suit on a tax deed to foreclose, the defendant, without being required to do so, pays the amount of the void tax into court, he will be held concluded by his payment. *Powell v. Supervisors*, 46 Wis., 210.

³ *The Sonoma Co. Tax Case*, 13 Fed. Rep., 789.

A competent authority, having jurisdiction, assessed the plaintiffs for personal property. They complained, and appealed to the courts. Before the court of appeals rendered a final decision, the officer having charge of the collection of taxes gave notice to the plaintiffs, requiring payment, and stating that if the tax was not paid, a warrant would issue to collect the same. Thereupon the plaintiffs paid the tax. There being no warrant, seizure, or threatened seizure, payment of money to free the property from the possession of another, or ignorance of facts, it was held that it was a purely voluntary payment, and no action would lie to recover back the same. *Union Bank v. New York*, 51 Barb., 159.

like ruling has been made where the officer threatened to sell property for a tax not then delinquent; having at the time no power to carry out his threat.¹ So where a court without authority made an order for the payment of a tax, and payment was made accordingly — the party under such circumstances being under no legal compulsion — the payment was held voluntary.² So where one on the day fixed for the sale of his property for the illegal tax proposed to make payment on the next day if the sale should be postponed, and postponement was had and payment made as proposed, this was held a voluntary payment.³ And it has been said in some cases, that when it is sought to recover back a payment as having been made under compulsion, it should be made to appear that payment was made to release either person or property from the power of the officer.⁴ And this may be said to express the general sense of the authorities.⁵

¹ *Bank of Santa Rosa v. Chalfant*, 52 Cal., 170; *Merrill v. Austin*, 53 Cal., 379; *Bank of Woodland v. Webber*, 52 Cal., 73. It would be otherwise if payment were made after delinquency. *Smith v. Farrelly*, 52 Cal., 77; *De Fremery v. Austin*, 53 Cal., 380.

² *Drake v. Shurtliff*, 24 Hun, 422; *Bailey v. Buell*, 50 N. Y., 663.

A state supreme court sustained a tax and a party then paid it and took a tax certificate. The federal supreme court afterwards held the tax void. *Held*, that the payment must be deemed voluntary. *Lamborn v. Commissioners*, 97 U. S., 181; *Commissioners v. Land Co.*, 23 Kan., 196.

The fact that the collector's warrant is a lien on goods after it comes to his hands is not enough to make a payment to him compulsory. *Chicago v. Fidelity Bank*, 11 Ill. Ap., 165. Where a payment is made without protest, the fact that a bill is brought by others to have the tax declared void is not enough to entitle the parties paying to recover back. *McCrickart v. Pittsburgh*, 88 Pa. St., 133.

³ *Gatchet v. McCall*, 50 Ala., 307.

⁴ *Brazil v. Kress*, 55 Ind., 14; *Edinburg v. Hackney*, 54 Ind., 83. Where a town offers a discount to those who make payment promptly, a payment made to obtain this discount has been held to be voluntary, though made under protest. *Lee v. Templeton*, 13 Gray, 476. In *Busby v. Noland*, 39 Ind., 234, it is said that one who pays without protest is estopped from disputing the legality of the tax.

⁵ Upon the right to maintain this action in general, see *Henry v. Chester*, 15 Vt., 460; *Allen v. Burlington*, 45 Vt., 202; *Richards v. Stogsdel*, 31 Ind., 74; *Hubbard v. Brainard*, 35 Conn., 563; *Goddard v. Seymour*, 30 Conn., 394; *Callaway v. Milledgeville*, 48 Ga., 309; *Wilkey v. Pekin*, 19 Ill., 160; *Allentown v. Saeger*, 20 Pa. St., 421. The question what constitutes a voluntary payment was quite fully discussed, and the English authorities cited, in *Baker v. Cincinnati*, 11 Ohio St., 534, and *Taylor v. Board of Health*, 31 Pa. St., 73. The Ohio case quotes particularly *Fullam v. Down*, 6 Esp.,

Statutes in some states have changed the rule somewhat, and have allowed a recovery in all cases of illegal tax, provided that at the time of payment formal protest was made as the statute prescribed. In respect to such statutes it is only necessary to say that a party relying upon them must be careful to bring his case within their provisions.¹

26; *Valpy v. Manly*, 1 C. B., 594; *Parker v. G. W. Railway Co.*, 7 M. & G., 253; *Morgan v. Palmer*, 2 B. & C., 729. In *Carleton v. Ashburnham*, 102 Mass., 348, the maxim that where two acts are done at the same time, the one shall take effect first which ought in strictness to have been done first, in order to give it effect (*Clafin v. Thayer*, 13 Gray, 459), was applied to a simultaneous payment of tax and delivery of a protest against its exaction. In *Muscatine v. Packet Co.*, 45 Ia., 185, it is said that a payment made under protest cannot be recovered back unless there was power to enforce payment in some other way than by suit at law. A payment is voluntary if made before any demand, and when nothing has been done except to charge the property upon the list to the tax payer, though the officer has a warrant in his hands which he has not attempted or threatened to serve. *Railroad Co. v. Commissioners*, 98 U. S., 541. So is a payment made where the tax could only be enforced in judicial proceedings in which the party would have a right to be heard, but which are not yet taken. *Oceanic, etc., Co. v. Tappan*, 16 Blatch., 296.

If one takes an assignment of a void tax deed made upon a valid sale, with full knowledge of all the facts, and pays subsequent taxes, he cannot, when his deed is set aside, recover these taxes from the county, notwithstanding a statute that "if, upon conveyance of any land sold for taxes, it shall be discovered or adjudged that the sale was invalid," the purchaser shall be reimbursed for subsequent taxes paid. *Sapp v. Brown Co.*, 20 Kan., 243.

¹ If suit is given only in cases where payment was made after notice of sale by advertisement and posting, a written notice to the tax payer, that sale would be made unless he paid, is not sufficient notice of sale. *Knowles v. Boston*, 129 Mass., 551. Where the statute requires a written notice of protest, an oral protest, with an entry by the receiving clerk in his book that the tax was paid under protest, is not sufficient. *Ibid.* But it is sufficient for the tax payer to write his protest across the face of the tax bill, sign it and deliver it to the collector. *Borland v. Boston*, 132 Mass., 89. In California a protest is not good unless it specifies the grounds of invalidity relied upon. *Meek v. McClure*, 49 Cal., 623. But this is to put the officer upon inquiry, and if he is proceeding to enforce the tax against property outside of his district, the protest need not specify grounds. *Mason v. Johnson*, 51 Cal., 612. So if a county collector is assuming to act in a district formed for a special taxing purpose, though within the county. *Smith v. Farrelly*, 52 Cal., 77.

For recovery against a county under a statute when a suit would otherwise be barred by lapse of time, see *Merriam v. Otoe Co.*, 15 Neb., 408.

Compulsory Payments. A payment made to relieve the person from arrest or the goods from seizure is a payment on compulsion;¹ and so is the payment made to prevent a seizure when it is threatened.² So with still greater reason is the payment which the officer secures by making sale of goods seized.³ But it is not necessary for the tax payer to wait for his goods to be sold or even to be seized. If the officer calls upon the person taxed, and "demands a sum of money under a warrant directing him to enforce it, the party of whom he demands it may fairly assume that if he seeks to act under the warrant at all, he will make it effectual. The demand itself is equivalent to a service of the writ on the person. Any payment is to be regarded as involuntary, which is made under a claim involving the use of force as an alternative; as the party of whom it is demanded cannot be compelled or expected to await actual force, and cannot be held to expect that an officer will desist after making a demand. The exhibition of a warrant directing forcible proceedings, and the receipt of money thereon, will be in such case equivalent to actual compulsion."⁴ As is said in another case, a person is not bound to wait until his property is actually taken by a legal process; one which he cannot properly resist; and cost made before he pays a claim upon it. It is sufficient if the circumstances are such as fairly lead to the conclusion that the waste and expense can be avoided only by payment.⁵ So payment of a water tax under

¹ *Briggs v. Lewiston*, 29 Me., 472. But it was held in this case that the costs paid were not recoverable back. And see *Dow v. Sudbury*, 5 Met., 73; *Shaw v. Becket*, 7 Cush., 442; though if the suit were brought against the officers in a proper case, it would be otherwise. *Shaw v. Becket*, *supra*.

² *Grimm v. School District*, 57 Pa. St., 433, citing *Henry v. Horstick*, 9 Watts, 414; *Caldwell v. Moore*, 11 Pa. St., 60; *Allentown v. Saeger*, 20 Pa. St., 421. And see *Guy v. Washburn*, 23 Cal., 111; *Vicksburg v. Butler*, 56 Miss., 72. A payment is not voluntary where the payer lays down money, but forbids the collector to take it. *Bellinger v. Gray*, 51 N. Y., 610. And see *Greenabaum v. King*, 4 Kan., 332; *Stephan v. Daniels*, 27 Ohio St., 527.

³ *Hurley v. Texas*, 20 Wis., 634.

⁴ *Campbell, J.*, in *Atwell v. Zeluff*, 26 Mich., 118, citing *Boston, etc., Glass Co. v. Boston*, 4 Met., 181. And see *Amesbury, etc., Manufg Co. v. Amesbury*, 17 Mass., 461; *Preston v. Boston*, 12 Pick., 7; *George v. School District*, 6 Met., 497; *Joyner v. School District*, 3 Cush., 567; *Lincoln v. Worcester*, 8 Cush., 55.

⁵ *Howard v. Augusta*, 74 Me., 79. To the same effect are *Ruggles v. Fond du Lac*, 53 Wis., 436; *Parcher v. Marathon Co.*, 52 Wis., 888.

threat of cutting off the water is a payment under compulsion.¹ And it is held in some cases that a payment is to be regarded as compulsory even though it is not shown that the collector had a warrant, if it is actually made to avoid an expected levy on property which would have followed in due course of law.²

Form of Action. The proper action against a corporation, in these cases, is *assumpsit* for money had and received; the liability not attaching until the money is paid over, and being then based upon the receipt of the money, and not upon the illegalities which preceded it.³ The recovery must be limited to the money received; while in an action of trespass against the assessors, or trespass or trover against the collector, the party might recover such actual damages as he could show he had sustained.⁴

A demand is not necessary before bringing suit to recover back illegal taxes unless made so by statute.⁵ Interest is recoverable from the date of demand, but not before.⁶ If only

¹ *Westlake v. St. Louis*, 77 Mo., 47. If a liquor tax, the payment of which is a condition to doing business, is made under an unconstitutional law, with protest, it may be recovered back. *Catoir v. Watterson*, 38 Ohio St., 319, citing *Baker v. Cincinnati*, 11 Ohio St., 534; *Stephan v. Daniels*, 27 Ohio St., 527.

² *Babcock v. Granville*, 44 Vt., 325; *Peyser v. New York*, 70 N. Y., 497; *Kansas, etc., R. Co. v. Wyandotte Co.*, 16 Kan., 587.

³ *Grand Rapids v. Blakeley*, 40 Mich., 367; *Raisler v. Athens*, 66 Ala., 194.

If the tax is charged to the collector in a general settlement with him, this is equivalent to a payment into the treasury. *County Commissioners v. Parker*, 7 Minn., 267; *Slack v. Norwich*, 32 Vt., 818; *Babcock v. Granville*, 44 Vt., 325.

It is no ground for recovering back a tax, that it was collected by one who was not collector *de jure* where he was such *de facto*. *Williams v. School District*, 21 Pick., 75.

⁴ *Dow v. Sudbury*, 5 Met., 73; *Shaw v. Becket*, 7 Cush., 442. And see *Inglee v. Bosworth*, 5 Pick., 498, per *Morton, J.*; *Ware v. Percival*, 61 Me., 391, per *Appleton, Ch. J.* If the proceedings in the collection of a tax are wholly void, and the person taxed neither has been nor can be disturbed in his possession, there is no ground for an action against the town, as the plaintiff has lost nothing. Such would be the case of a void sale of shares in a corporation. *Noyes v. Haverhill*, 11 Cush., 338.

⁵ *Look v. Industry*, 51 Me., 375; *Arapahoe Co. v. Cutter*, 8 Col., 349. See *Pierce v. Benjamin*, 14 Pick., 356.

⁶ *Boston, etc., Glass Co. v. Boston*, 4 Met., 181. See *Atwell v. Zeluff*, 26 Mich., 118, 120.

a part of the tax was illegal, the recovery will be limited to that part, if capable of being distinguished.¹ The burden of showing illegalities is on the party who counts upon them.²

Torts by Officers. Where a collector is guilty of a distinct tort which his warrant if valid would not justify, the municipal

¹ *Torrey v. Millbury*, 21 Pick., 64. See this case commented on in *Lincoln v. Worcester*, 8 Cush., 55. And see, as supporting it, *Avery v. East Saginaw*, 44 Mich., 587. Whether cost of the proceedings to collect the tax can be recovered from the town, see *Briggs v. Lewiston*, 29 Me., 472; *Dow v. Sudbury*, 5 Met., 73; *Shaw v. Becket*, 7 Cush., 442. The following illustrations of illegal taxes recovered back may be cited: One who pays a personal and poll tax in a town of which he is not a resident may recover it back, if paid under the threat of a warrant, notwithstanding he was properly taxed for real estate in that town. This would not be regarded as a case of excessive taxation from which the party should appeal; the tax on the personalty and poll being wholly unauthorized. *Preston v. Boston*, 12 Pick., 7. Further, as to the recovery of a town, etc., by non-residents unlawfully taxed within it, see *Hathaway v. Addison*, 48 Me., 440; *Sumner v. Dorchester*, 4 Pick., 361; *Inglee v. Bosworth*, 5 Pick., 498; *Dow v. Sudbury*, 5 Met., 73; *Lee v. Boston*, 2 Gray, 484; *Dickinson v. Billings*, 4 Gray, 42; *People v. Supervisors of Chenango*, 11 N. Y., 563. It has been held that if school taxes are levied unlawfully in a district by vote of the town, they may be recovered back of the town. *Powers v. Sanford*, 39 Me., 183. If a non-resident is taxed on personalty in a town where he does not reside, his right to recover it back cannot be affected by the fact of his having real estate in the town which was omitted from the list. *Hathaway v. Addison*, 48 Me., 440. Where an inhabitant is wrongfully taxed on property held in trust for him abroad, and has no property taxable to him, he may recover back of the town a tax assessed to and paid by him in respect of the property so held in trust. *Dorr v. Boston*, 6 Gray, 131, relying upon *Preston v. Boston*, 12 Pick., 7. When by law the personal estate of corporations is assessed in the shares of the company, but the assessors tax to the corporation both their personal and real estate, and they pay the taxes, they may recover back the tax on the personalty. *Dunneil Manuf. Co. v. Pawtucket*, 7 Gray, 277. For further cases, see *Perry v. Dover*, 12 Pick., 206; *Joyner v. School District*, 3 Cush., 567; *Huckins v. Boston*, 4 Cush., 543; *Bacon v. School District*, 97 Mass., 421; *Matheson v. Mazomanie*, 20 Wis., 191; *Hurley v. Texas*, 20 Wis., 634; *James v. New Orleans*, 19 La. An., 109; *Hill v. Supervisors of Livingston*, 12 N. Y., 52; *Atwater v. Woodbridge*, 6 Conn., 223; *Adam v. Litchfield*, 10 Conn., 127; *Gillette v. Hartford*, 31 Conn., 351; *Nicodemus v. East Saginaw*, 35 Mich., 456; *Supervisors of Stephenson v. Manny*, 56 Ill., 160; *Lauman v. Des Moines County*, 29 Ia., 310; *Allen v. Burlington*, 45 Vt., 202; *Judd v. Fox Lake*, 28 Wis., 583; *First Ecclesiastical Society v. Hartford*, 38 Conn., 274; *Foster v. County Commissioners*, 7 Minn., 140; *Lake Shore, etc., R. Co. v. Roach*, 80 N. Y., 339.

² *Douglasville v. Johns*, 62 Ga., 423.

corporation for which he assumes to act cannot be held responsible therefor. Illustrations are where he seizes the goods of a tax payer, or arrests him to compel a second payment of the tax which has already been fully paid,¹ and where on a warrant against one man he seizes the goods of another.² In New York a town is not liable for any mistake or misfeasance of the assessors or collector by means whereof one has been compelled to pay a tax wrongfully levied, the money not having been paid into the treasury of the town. These officers are not, in a legal sense, the agents of the town in its corporate capacity, in performing duties under the tax laws of that state.³ In Massachusetts an action lies against a town for the acts of its assessors in causing the arrest of one for a tax for which he was not liable by reason of his non-residence; the assessors having acted in good faith and not being themselves by law liable.⁴ And probably municipal corporations in New York and other states, which exist under special charters, would be held liable for the wrongs of their officers in some cases where towns would not be, on the ground that by accepting the charter they had undertaken with the public for the proper performance of the municipal duties created thereby.⁵

¹ *Liberty v. Hurd*, 74 Me., 101. If land is sold after payment of the tax the sale is void, and the owner, if he redeems, pays money voluntarily and cannot recover it from the county. *Morris v. Sioux Co.*, 43 Ia., 416; *Sears v. Marshall Co.*, 59 Ia., 603.

² *Wallace v. Menasha*, 48 Wis., 79. When one is illegally assessed a tax afterwards abated, and is arrested by the collector, the payment by the town to the collector of the cost of the arrest is not such a ratification of the act as to render the town liable. *Perley v. Georgetown*, 7 Gray, 464.

³ *Lorillard v. Monroe*, 12 Barb., 161, and 11 N. Y., 392. And see *People v. Supervisors of Chenango*, 11 N. Y., 563; *Preston v. Boston*, 12 Pick., 7; *Chapman v. Brooklyn*, 40 N. Y., 372; *Newman v. Supervisors of Livingston*, 45 N. Y., 676; *Rochester v. Rush*, 80 N. Y., 302. Compare *Dawson v. Aurelius*, 49 Mich., 479. The case of *Rochester v. Rush*, *supra*, holds that as towns in New York have no treasury as cities and counties have, they are not liable for illegal taxes collected by the town officers. But the board of supervisors may refund such taxes and require the sums to be raised by the town as shall be just.

⁴ *Alger v. Eaton*, 119 Mass., 77, distinguishing *Durant v. Eaton*, 98 Mass., 469.

⁵ *Howell v. Buffalo*, 15 N. Y., 512. See *Conrad v. Ithaca*, 16 N. Y., 158; *Weet v. Brockport*, 16 N. Y., 161, note; *Bennett v. Buffalo*, 17 N. Y., 383; *Sheldon v. Kalamazoo*, 24 Mich., 383.

Implied Warranty. A municipal corporation or body, for whose benefit taxes are enforced, does not warrant to the purchaser the title to property sold for their satisfaction, or the legality of the proceedings on which the sale was based. The purchaser in such a case buys at his own risk, and at his peril investigates the proceedings. This is a general rule in tax sales.¹

Misappropriations. A misapplication by a corporation, actual or threatened, of moneys collected by taxation, will give no right of action to an individual to recover his proportion of the tax. The money, when collected and paid to the corporation, belongs to it, and not to those from whom it has been collected. For misapplication there may be remedies on behalf of the public, and of individual tax payers; but a suit to recover the moneys must be based upon an individual right to it, which could not exist in the case.²

Federal Liability. The United States is liable for taxes illegally levied and collected, by suit in the court of claims, but only under the conditions prescribed in the acts of congress providing for such suits.³

Remedy by replevin. In some cases, one whose goods have been seized for the satisfaction of a tax may recover them by writ of replevin. But to justify this process the tax must be absolutely void, and not merely unjust, excessive or irregular. The case must consequently be brought within the rules already laid down, regarding the invalidity of tax levies, or the suit in replevin must fail.⁴ The liability of this process to vexatious use is so considerable, that it has been deemed proper in some

¹ *Lynde v. Melrose*, 10 Allen, 49; *Packard v. New Limerick*, 84 Me., 266; *Logansport v. Humphrey*, 84 Ind., 467; *Lyon Co. v. Goddard*, 22 Kan., 339. In some states it is otherwise by statute. See *Saulters v. Victory*, 35 Vt., 351; and compare *School District v. Allen Co.*, 22 Kan., 568.

² *Withington v. Harvard*, 8 Cush., 66; *Moore v. School Directors*, 59 Pa. St., 232; *Wright v. Dunham*, 18 Mich., 414. A tax on corporate dividends cannot be disputed by creditors of the corporation on the ground of its having been declared when the corporation was insolvent. *Pennsylvania Bank Assignees' Account*, 39 Pa. St., 103.

³ See *United States v. Savings Bank*, 104 U. S., 728.

⁴ *Hill v. Wright*, 49 Mich., 229. If the tax list and warrant are regular and only the tax erroneous, and an opportunity for correction has been given, replevin will not lie. *Buell v. Schaale*, 39 Ia., 293.

of the states, on grounds of public policy, to provide that replevin shall not lie for property distrained for taxes. Taking away this remedy would still leave to the party all the other remedies which are applicable to the case; and he may therefore still contest the validity of the tax in a suit to recover the money after it has been paid, or in an action to recover the value of his goods, if the tax was collected by distress and sale.¹ And it has been held that a statute taking away the remedy by replevin is not to be held applicable to a third person whose goods are seized for a tax for which he is no way liable;² nor to one who was not liable to be assessed for taxation.³

Where replevin is allowed, it cannot be maintained by the party taxed unless the whole tax is illegal; as it must assume that the seizure of the goods is without warrant of law.⁴

Estoppel. It sometimes happens that a party who complains of illegal taxation has been so connected with the proceedings in voting, laying or collecting the same, that it would be unjust and inequitable to others or to the public that any remedy should be given him in respect to the illegality. Such a case would exist if one in respect of some interest of his own should petition for or otherwise actively encourage the levy of the tax of which he subsequently makes complaint.⁵ Some of the cases

¹ *Dudley v. Ross*, 27 Wis., 679; *Macklot v. Davenport*, 17 Ia., 379.

² *Traverse v. Inslee*, 19 Mich., 98. Compare *Atlantic, etc., R. R. Co. v. Cleino*, 2 Dillon, 175; *Cardinel v. Smith*, Deady, 197. The contrary is held in Illinois, where trespass or trover is held to be the proper remedy. *Vocht v. Reed*, 70 Ill., 491; or injunction. *Deming v. James*, 72 Ill., 78.

³ *Stockwell v. Vietch*, 15 Ab. Pr., 412. See *Ross v. East Saginaw*, 18 Mich., 233. As to such statutes in general, see *O'Reiley v. Good*, 42 Barb., 521; *McClaghry v. Cratzenburgh*, 39 Ill., 117; *Mt. Carbon, etc., R. R. Co. v. Andrews*, 58 Ill., 176; *Yancey v. New Manchester, etc., Manuf. Co.*, 33 Ga., 622; *Cody v. Lennard*, 45 Ga., 85. Where mere irregularities are complained of, replevin will not be the appropriate remedy. *Buell v. Ball*, 20 Ia., 282; *Bilbo v. Henderson*, 21 Ia., 56, and cases cited.

⁴ *Brackett v. Whidden*, 3 N. H., 17; *Emerick v. Sloan*, 18 Ia., 139. See as to this remedy in tax cases, *Enos v. Bemis*, 61 Wis., 656. The affidavit in replevin that the property is not taken for a tax is not conclusive. *Kaehler v. Dobberpuhl*, 60 Wis., 256.

⁵ *Weber v. San Francisco*, 1 Cal., 455; *Kellogg v. Ely*, 15 Ohio St., 64; *Tash v. Adams*, 10 Cush., 252; *Motz v. Detroit*, 18 Mich., 495; *Warren v. Grand Haven*, 80 Mich., 24; *Peoria v. Kidder*, 26 Ill., 351; *Sleeper v. Bullen*, 6 Kan., 800; *Pease v. Whitney*, 8 Mass., 93; *La Fayette v. Fowler*, 34 Ind.,

cited in the margin go very far in the direction of holding that a mere failure to give notice of objections to one who, with the knowledge of the person taxed, as contractor or otherwise, is expending money in reliance upon payment from the taxes, may have the same effect.¹ But the technical doctrine of estoppel is one to be applied with great caution, for it sets aside general rules on supposed equities, and the danger is always imminent that wrong may be done. The following decisions have been made. One is not estopped from seeking to enjoin a street assessment by the fact that he had before paid a similar assessment.² The mere fact that one knows a levee is being constructed for which an unconstitutional tax is to be laid will not estop him from objecting after the work is done.³ That a tax payer requires work to be done in accordance with the contract made with the city is no ground of estoppel from disputing the validity of the ordinance under which the work is done.⁴ The receipt by one whose property

140; *Rickets v. Spraker*, 77 Ind., 371; *Patterson v. Baumer*, 43 Ia., 477; *State v. Mitchell*, 31 Ohio St., 592; *Harwood v. Huntoon*, 51 Mich., 639; *Byram v. Detroit*, 50 Mich., 56; *Carroll Co. v. Graham*, 98 Ind., 279.

One contesting a drainage proceeding, but admitting before the supervisors that the land is swamp and overflowed, is estopped from disputing that fact on *certiorari*. *Hagar v. Supervisors of Yolo*, 47 Cal., 223.

¹ In Indiana it is held that one who has seen a public improvement go on without objection, until it is accepted as completed by the city, cannot afterwards enjoin the collection of the assessment on the ground that the work was not done according to contract. *Evansville v. Pfisterer*, 34 Ind., 36. Or that the whole proceeding was invalid. *La Fayette v. Fowler*, 34 Ind., 140, citing *Hellenkamp v. La Fayette*, 30 Ind., 192; *Palmer v. Stumph*, 29 Ind., 329. And see *Robinson v. Burlington*, 50 Ia., 240; *Sleeper v. Bullen*, 6 Kan., 300. *Contra*, *Starr v. Burlington*, 45 Ia., 87; *Wright v. Thomas*, 26 Ohio St., 346. If one is present at a tax payers' meeting held in pursuance of a defective notice, and seconds a motion to bind the district, he is estopped from questioning the regularity of the meeting when a tax is levied to pay the bonds. *Thatcher v. People*, 98 Ill., 632. One cannot maintain *assumpsit* to recover taxes paid, which, as a member of the board of supervisors, he voted to impose. *Wood v. Norwood*, 52 Mich., 32. If a lot owner makes no objection while an improvement is being made in front of his lot, he will be required to do equity by paying what the value of the improvement is to the lot. *Barker v. Omaha*, 16 Neb., 269.

² *Tallant v. Burlington*, 39 Ia., 543. See *Robinson v. Burlington*, 50 Ia., 240.

³ *Wright v. Thomas*, 26 Ohio St., 346.

⁴ *Perkinson v. McGrath*, 9 Mo. Ap., 26.

is sold under a void warrant or for an illegal tax of the surplus moneys on the sale is not a condonation of the trespass.¹ If a part of the tenants in common of land which a collector is selling are present and waive certain defects in the proceedings, this will not estop others not present from insisting upon the illegality of the sale.² Other cases are referred to in the margin.³

The doctrine of estoppel applies against municipalities as well as against individuals. Where a county has taxed land as belonging to a person, it cannot, in a suit brought by him to enjoin the tax, deny his ownership.⁴ If a town has voted railroad aid, it cannot, two years afterwards, during which time the railroad has gone on to complete its road, raise the question of the sufficiency of the notice of meeting at which the aid was voted.⁵ If a county assesses taxes on lands and sells them for delinquency, it will be estopped from asserting title to them in itself.⁶

¹ *Westfall v. Preston*, 49 N. Y., 349.

² *Reed v. Crapo*, 127 Mass., 39.

³ For cases raising questions of estoppel in tax proceedings, see *Cameron v. Stephenson*, 69 Mo., 372; *Mulligan v. Smith*, 59 Cal., 206; *Matter of Woolsey*, 95 N. Y., 135. Where a person has waived all error and informality in proceedings for making a drain, and has stood by and seen the drain constructed, promising to pay what the work was worth, he cannot resist payment on the ground that the proceedings to establish the drain were void. *Flora v. Cline*, 89 Ind., 208. To resist payment of an assessment for improving a street, one cannot set up title in himself in the street after the work is done, when he was aware that the prior owner had undertaken to dedicate the land to street purposes, and with that knowledge suffered the work to go on without objection. *Neff v. Bates*, 25 Ohio St., 169.

⁴ *Brandirff v. Harrison Co.*, 50 Ia., 164.

⁵ *Burlington, etc., R. Co. v. Stewart*, 39 Ia., 267; *Lamb v. Railroad Co.*, 39 Ia., 333. But where city property is assessed by city officers and sold as individual property, this does not estop the city from setting up its title. *St. Louis v. Gorman*, 29 Mo., 593. Taxing lots as private property whose boundaries include part of what is actually used as a street does not estop the city from claiming it as a street. *Ellsworth v. Grand Rapids*, 27 Mich., 250.

⁶ *Austin v. Bremar Co.*, 44 Ia., 155. But a mere levy of taxes is not enough. *Page County v. Railroad Co.*, 40 Ia., 520. A receipt of a certain sum in compromise of the taxes might be. *Adams Co. v. Railroad Co.*, 39 Ia., 507. See the doctrine limited in *Buena Vista Co. v. Railroad Co.*, 46 Ia., 226.

A county is not estopped from levying a tax on land by the fact that at the time it is bringing an action against the owner to set aside for fraud its

Remedy by mandamus. A summary remedy by the writ of *mandamus* may be had by parties illegally assessed in a few cases, which are more particularly referred to in another chapter.¹ They embrace cases in which the property or subject taxed is not taxable by law, and the remedy is given by compelling the proper officer to strike off the assessment or to discharge the tax.² But an excessive assessment is not to be corrected by means of the writ, it not lying to correct mere errors of judgment in the exercise of judicial or discretionary powers.³

Remedy by prohibition. The common law writ of prohibition lies to keep inferior courts within their jurisdiction, and is inapplicable to tax cases, except, perhaps, under very peculiar statutes. A statutory remedy has been given in some states under this name.⁴

Quo warranto. This is the process by means of which usurpations of corporate franchises may be inquired into. It may doubtless be made available on behalf of the state in some cases where powers of taxation are unlawfully claimed, but is not adapted to the redress of individual wrongs under the revenue laws. It has been held not to be the proper process to correct corporate action, where a city, instead of establishing remunerative water rates to pay the interest and part of the principal of the water loan — which it was claimed was its duty to

conveyance of the land to him. *American Emigrant Co. v. Railroad Co.*, 53 Ia., 323.

One may be estopped by long acquiescence from disputing the legality of an annexation to a city. *Logansport v. La Rose*, 99 Ind., 117. The legal validity of a corporation *de facto* will not be inquired into in a tax case. *Coe v. Gregory*, 53 Mich., 19. Nor of a town plat which has long been acted upon. *Bryant v. Estabrook*, 16 Neb., 217.

¹ See pp. 730, 741, 743.

² See *People v. Barton*, 44 Barb., 148; *People v. Olmsted*, 45 Barb., 644; *People v. Supervisors of Otsego*, 51 N. Y., 401; *People v. Auditor-General*, 9 Mich., 134.

³ *Howland v. Eldredge*, 43 N. Y., 457; *School Directors v. Anderson*, 45 Pa. St., 388; *Gibbs v. Hampden Co. Commissioners*, 19 Pick., 298; *Miltnerberger v. St. Louis County Court*, 50 Mo., 172.

⁴ See *People v. Supervisors of Queens*, 1 Hill, 195; *Talbot v. Dent*, 9 B. Monr., 526; *State v. Gary*, 33 Wis., 93.

do annually — established nominal rates only, and levied a tax on the city at large to pay the debt and interest.¹

Conclusion. It will be apparent from what has appeared in this chapter, that many serious errors may be committed and many wrongs done in the exercise of the power to tax, which the parties wronged must submit to, because the law can afford them no redress whatever. All injuries which result from an exercise of political or legislative authority are to be included in this category; and these are often the most serious which, in matters of taxation, the people are visited with. In all such cases, the authority of the judiciary is confined to an inquiry into the jurisdictional question, and if it appears that the political or legislative body has kept within the limits of its authority, the judiciary must pause there, and admit its incompetency to inquire into wrongs which, within those limits, may have been committed. The wrongs which spring from errors on the part of assessors are, in a large proportion of all the cases, as little susceptible of correction, unless the legislature shall have provided a remedy by statute. Courts of equity have but a limited jurisdiction, extending to few cases besides those in which the impelling motive on the part of the assessors has been to do injustice and inflict injury. The chief protection of the citizen must at last be sought in the intelligence and integrity of public officers, and where these fail, as too often they do, the injury must frequently prove irreparable.

¹ *Attorney-General v. Salem*, 108 Mass., 138. Neither is a bill in equity the proper remedy for such a case. *Carleton v. Salem*, 108 Mass., 141.

INDEX.

A.

ABANDONMENT —

of seated lands, what is, 894.

ABATEMENT —

of tax, when not admissible, 177, 180.

no ground for, that property has decreased in value, 773.

by assessor while roll is still in his hands, 747.

by the legislature, 747.

right to apply for, sometimes taken away if property not listed, 858-861.

of one tax cannot be made by levying another, 127.

cannot be compelled by *mandamus*, 781.

is the appropriate remedy in cases of unequal taxation, 747, 748.

can only be had as the statute provides, 747-753, 764.

cannot be had in equity, 748.

party failing to apply for is generally concluded, 748.

decision on application for, is final, 749.

interest in cases of, 860.

ABBREVIATIONS —

in descriptions of land for taxation, when sufficient, 406.

ABUSE —

liability of a power to, no argument against its existence, 105, 280.

of legislative power to tax, remedy for is in responsibility to constituents, 5, 45.

why this an unsafe reliance, 724.

of power to tax may be corrected when it exceeds limits, 44, 45.

(See JURISDICTION.)

of power to levy special assessments, 623.

of authority of collector, may make him trespasser *ab initio*, 442, 802.

of power, derives no sanction from time, 129.

(See REMEDIES FOR ILLEGAL TAXATION.)

of political power in general, 764, 769.

by misappropriating moneys, 765-768.

by incurring municipal debts, 767, 772.

ABUTTING LOTS —

(See ASSESSMENT FOR LOCAL IMPROVEMENTS.)

ACCEPTANCE —

of work is conclusive on persons assessed, 671.

ACCIDENT —

remedy in equity in cases of, 761, 764.

ACCIDENTAL OMISSIONS —

of property from assessment roll, effect of, 216, 217.

(See OMISSIONS.)

ACCOUNTING —

direction for, in tax warrant, 290.

suits against collector for failure in, 704-712.

against sureties for collector's failure in, 712-723.

failure to call collector to, by auditing board, 716.

by auditing officer sometimes made conclusive on collector, 717-720.

by collector to state, etc., 801.

(See COLLECTOR OF TAXES.)

ACCUMULATIONS —

unnecessary, in public treasury, impolicy of, 11.

ACQUIESCENCE —

in municipal organization, effect of, 754, 761, 768, 822.

in official action by one assuming to be an officer,

(See DE FACTO OFFICERS.)

in illegal taxation,

(See ESTOPPEL; VOLUNTARY PAYMENTS.)

ACRE —

assessments by the, in levee cases, 648.

ACTION —

preliminary, when may be enjoined, 764-769.

of assessors is judicial, 786-795.

judicial, cannot be set aside on *mandamus*, 780-785.

(See MANDAMUS.)

judicial, liability in case of,

(See JUDICIAL ACTION; JUDICIAL OFFICER.)

political,

(See POLITICAL ACTION.)

ultra vires,

(See ULTRA VIRES.)

discretionary,

(See DISCRETIONARY ACTION.)

ACTION AT LAW —

does not usually lie for collection of taxes, 15-19, 435.

may in some cases, 16, 435.

by collector who has advanced taxes, 436.

to recover lands sold for taxes, 549-569.

condition that betterments shall be paid for, 554.

that taxes shall be paid, 550-554.

short limitation to, 555-564.

"color" and "claim" of title, 567-569.

(See LANDS.)

pending when curative act passed, must be governed by it, 805.

(See CURATIVE LAWS.)

against collectors of taxes for moneys collected, 704.

for neglect to collect, 706.

ACTION AT LAW—continued.

- on collector's bond, 707-718.
- against assessors, 786-795.
- against supervisors, 795.
- against collectors of taxes for enforcing illegal taxes, 797-803.
- against town, county, etc., 804-818.
- against treasurer for abuse of authority, 442, 802.
- (See REMEDIES FOR EXCESSIVE AND ILLEGAL TAXATION.)
- will not lie where taxes merely irregular, 750.

ACTS OF THE LEGISLATURE—

(See STATUTES.)

ACTUAL BENEFITS—

- local assessments based upon, 606-608, 758.
- whether an assessment can exceed, 589, 640, 641.
- in case of cemetery, etc., 654, 663.

ADEQUATE REMEDY—

(See EQUITY; MANDAMUS.)

ADJACENT PROPRIETORS—

- assessment of, for local improvements, 606-677.
- (See ASSESSMENTS, LOCAL.)

ADJOINING—

- meaning of, 646.

ADJOURNMENT—

- of sale, presumption in regard to, 488.

ADJUDICATION—

- sometimes required before lands sold for taxes, 523.
- court must have jurisdiction, 523.
- showing of delinquency, 526-7.
- notice to parties, 527.
- proceedings to, are *in rem*, 527.
- what defects will avoid, 527-530.
- sales under, 363.
- irregularities will not defeat, 529.
- that taxes are not paid, when conclusive, 530.
- whether penalties may be imposed without, 457-459.
- (See PENALTIES.)
- whether lands may be forfeited for taxes without, 461-465.
- (See FORFEITURES.)
- not required before process may issue for taxes, 43-49.
- summary process against collectors without, 717-721.
- protection in making,
- (See JUDICIAL OFFICER.)

ADMINISTRATOR—

- assessment of tax against the estate to, 376.

AD VALOREM TAXES—

- what are, 238.

ADVANCEMENTS —

for public purposes, taxes may be laid to repay, 137.

ADVERSE CLAIMANT —

whether he may buy at tax sale, 506-509.

recovering in ejectment may be required to pay for betterments, 554.

other conditions to recovery, 549, 554.

short statutes of limitation against, 555-564.

"color" or "claim of title" by, 567-569.

ADVERSE POSSESSION —

extinguishment of title by, 565-567.

doctrine of, as applied to vacant tenements, 565-567.

improvements by one holding by, 554.

ADVERSE PROCEEDINGS —

general right to notice of,

(See HEARING; NOTICE.)

ADVERTISEMENT —

(See NOTICE.)

AFFIDAVIT —

by assessors, what cannot be compelled by *mandamus*, 781.

proof by, of giving notice,

(See NOTICE.)

to tax payer's list, failure to make, 857.

to roll, made prematurely, 800.

AGENCIES —

of government, not be taxed by state, 82-90.

of states, not to be taxed by United States, 82-90.

(See EXEMPTIONS.)

AGENTS —

of carriers, taxation of, 98.

not to buy land of principal at tax sale, 502.

municipal corporations act as, in making local assessments, 653-655.

whether officers are, in their official action, 817.

of non-resident, taxation of personalty to, 873.

AGREEMENTS —

(See CONTRACTS.)

ALABAMA —

constitutional provision for assessment of property by value, 176, 626.

short statute of limitations in, 563.

ALCOHOLIC DRINKS —

(See SPIRITUOUS LIQUORS.)

ALIENATION —

of lands, does not divest lien, 546, 547.

ALIENS —

taxation of, 19, 20.

ALLEGIANCE —

(See PERSONAL ALLEGIANCE.)

ALLOWANCE —

for debts in assessments, 174.

ALTERATION —

of bond, discharges sureties, 712.

of assessments, cannot be made without notice, 856-866, 778.

of tax warrant, does not invalidate previous action, 800.

ALTERING STREETS —

special assessments for, 610.

(See ASSESSMENTS, LOCAL.)

AMBASSADORS —

are not taxable, 19.

AMENDMENTS —

of merely clerical errors, when unnecessary, 814.

of proceedings in court, must be by order of court, 814.

showing of facts necessary, 814.

notice to parties concerned, 814.

of proceedings by statutory board, 816.

by ministerial officers, of their own motion, 816-823.

where the omission is merely to make a record, 816.

cannot be made by one who has gone out of office, 823.

cannot be made to prejudice of right of redemption, 823.

what defects cannot be cured by, 823.

of tax deed, only to be made in equity, 823.

of returns, cannot be made by officer to whom they are made, 823.

AMUSEMENTS —

taxation for, is not admissible, 128.

taxation of, 89, 581.

taxation under police power, 598, 600.

private, whether taxable, 601.

ANCESTRAL ESTATES —

(See SUCCESSIONS.)

ANNIHILATION —

taxation may be carried to extent of, 12, 18, 88.

(See FRANCHISE.)

ANNUAL MEETINGS —

(See MEETINGS.)

APPEAL —

right to take, sometimes made to depend on list being furnished, 857-861.

alteration of assessment, when tax payer does not take, 420.

officers depriving party of right of, 785.

compelling hearing on, 780, 784.

(See MANDAMUS.)

when given by statute, usually the sole remedy for unequal or unjust assessments, 747.

cannot in general be taken to the courts, 748.

is supposed to furnish a complete remedy, 748.

party failing to avail himself of, is concluded, 748, 759.

APPEAL — continued.

right to, does not exist unless given by statute, 748.
is not essential if tax is void, 748.
by a city, from an assessment, 750.
where given, *certiorari* will not be allowed, 755.
grounds of abating taxes on, 751-753.
to courts sometimes given, 752.

APPELLATE BOARD —

may be compelled by *mandamus* to proceed to hearing, 750, 754.
action by, is in general conclusive, 747, 748.
when action may be reviewed on *certiorari*, 753, 753, 759.

APPOINTMENT —

without authority, officer *de facto* in case of, 249.
(See *DE FACTO OFFICER*.)
of township meetings, etc.,
(See *NOTICE*.)

APPORTIONMENT OF ASSESSMENTS —

general principles, 634-650.
by benefits, 630.
by foot front, 644.
by the area, 648.
by value of lots, 649.
districts for, 639-644.
(See *ASSESSMENTS, LOCAL*.)

APPORTIONMENT OF DEBTS —

on division of municipality, may be made by legislature, 183, 239, 635
637.

APPORTIONMENT OF TAXES —

must be districts for, 140-163.
equality the purpose of, 222, 236.
involves the right to make exemptions, 171.
what it consists in, 237.
methods of, 237.
 specific taxes, 238.
 ad valorem taxes, 238.
 taxes with reference to special benefits, 239, 606-609.
general principles of, 240-247.
by legislature is presumptively just, 242.
is imperative, 243.
burdens levied without, are arbitrary, 244.
diversity in methods of, may be just, 245, 606.
failure to do justice in, does not render levy void, 245.
 nor failure in strict enforcement of, 245.
must be confined to the district, 245.
does not admit of invidious exemptions, 246.
in case of highways passing through or into two towns, etc., 153-159,
 610, 683.
in case of privilege taxes, 179, 186-7, 238.

APPRAISAL —

(See VALUATION.)

APPRAISERS —

(See ASSESSORS.)

APPROPRIATION —

under eminent domain, how it differs from taxation, 237, 624.

(See EMINENT DOMAIN.)

unlawful,

(See MISAPPROPRIATION.)

ARBITRARY EXACTIONS —

how they differ from taxes, 2, 242.

levies without apportionment are, 242, 244.

ARBITRARY POWER —

to tax, does not exist, 104.

(See LIMITATIONS ON THE TAXING POWER.)

ARBITRARY RULES —

of apportionment, 242, 644, 648.

of assessment, 749.

(See APPORTIONMENT.)

AREA —

local assessments by, 648.

ARKANSAS —

short statute of limitations in, 568.

constitutional provision to secure equality of taxation in, 176, 627.

ARMY —

taxation for, 110.

(See BOUNTIES.)

ARREARAGES —

of taxes, compromise of, 185.

ARREST —

strict construction of authority for, 264.

after discharge in bankruptcy, 699.

for non-payment of taxes, 437, 574.

ARTIFICIAL RULES —

of construction, 263.

ASSENT —

of owners sometimes required before special assessment can be laid, 657.

of people to the imposition of taxes, 59, 332-344.

in case of local taxation, 679-699.

of municipal corporations to contracts, cannot be dispensed with by legislature, 690-699.

to payment of illegal taxes,

(See VOLUNTARY PAYMENT.)

to illegal taxation,

(See ESTOPPEL.)

ASSESSMENT—

- invidious or fraudulent, 3, 169, 297-299, 310.
 - meaning of, 351.
- necessity for, 351, 352.
- statutory requirements of, 353.
- from what time it dates, 354, 355.
- to be made periodically, 355.
- supplying defects in, 356.
- by several assessors, 356.
- lists for, 356-361.
- right to notice of, 361-366.
- meetings for review of, 364.
- change of, without notice, 361, 490.
- classification of property for, 366-369.
- personal, how made, 20-23, 369-379.
- of water craft, 373.
- of tangible personalty, 373.
- of property in business, 374.
- of trust property, 375.
- of property of decedent estates, 376.
- of property of wards, 377.
- of corporations in general, 377.
 - on franchises, 377.
 - on dividends, 381.
 - on income, 382.
 - on franchises as property, 383.
- of railroad corporations, 383-386.
- of insurance companies, 386, 387.
- of miscellaneous corporations, 388, 389.
- of national banks, 389-392.
- of corporate shares, 388.
- of real property, 392.
 - seated and unseated lands, 393.
 - what are seated, 394.
 - how assessed, 396-400.
 - tracts to be separately valued, 400.
 - when owner or occupant to be named, 397-399, 411.
 - what are separate parcels, 402.
 - what a sufficient description, 404-406.
 - valuation, necessity for, 400.
 - is a judicial act, 409-412.
 - legislature cannot make, 410.
- how authenticated, 412.
- of distinct interests separately, 411.
- return of, 414.
- review of, 418-421, 747.
- equalization of, 421-423.
- evidences of, in special cases, 430.
- review of, on *certiorari*, 753.

(See CERTIORARI.)

ASSESSMENT — continued.

for the purposes of special levies, 637-649.

by benefits, 638-644.

by other standards, 644-649.

duplicate,

(See **DUPLICATE TAXATION**.)

fraud in,

(See **FRAUD**.)

relief against,

(See **REMEDIES FOR EXCESSIVE AND ILLEGAL TAXATION**.)

action in making, is judicial, 788-792.

ASSESSMENTS, LOCAL —

rules of, in general, 143-151, 177, 606.

statutory provisions respecting, when mandatory, 286, 287, 290.

exemptions from taxation do not apply to, 207-209.

are not taxes in the ordinary sense of that term, 207, 606, 607.

general subject considered, 606-677.

principles which underlie them, 606.

are based upon supposed benefits, 606-608.

must be special authority of law for, 609.

cases for, 609.

court-houses and other public buildings, 145, 610.

streets and highways, 610-615.

sidewalks, 588, 615.

parks, 615.

land for opening streets, 612.

grading streets, 613.

paving, planking and improving streets, 613.

altering, widening and extending streets, 613.

repaving or repairing streets, 613, 614.

drains, sewers, etc., 259, 590, 591, 616-619.

culverts, etc., in cities, 618.

levees and embankments, 427, 590, 620.

water pipes in streets, 620.

lighting streets with gas, 621.

fencing townships, 621.

other special cases, 621.

objections to, in point of policy and justice, 622.

objections under constitutional principles and provisions, 623.

1. that they take property without due process of law, 623.

2. that they take property for public use without compensation, 624.

3. that they violate express constitutional provisions, 626-634.

objections not sustained by the authorities, 634-637.

general principles of apportionment, 637.

methods of apportionment, 637.

1. by an estimate of benefits, 638.

2. by a standard fixed by the legislature, 177, 639.

fixing the district for assessment, 143-151, 639-644.

one district for several improvements, 645.

ASSESSMENTS, LOCAL—continued.

- assessment by frontage, 644-648.
 - is really an assessment by benefits, 646.
- assessment by the acre, 648.
- assessment by value of lots, 649.
- property subject to assessment, 650.
 - case of railroad property, 650.
 - case of personal property, 651.
 - case of property devoted to special use, 652.
 - case of public property, 653.
- proceedings in levying and collecting, 653.
 - right to be heard, 655.
 - district is conclusively fixed by legislative authority, 654-659.
 - assessment is conclusive upon benefits, 660-664.
 - courts powerless to relieve against hardships, 661.
 - proceedings in case of street occupied by plankroad, etc., 664.
 - assessment must be limited to cost of work, 664.
 - may be made before work done, 665.
 - excess in estimate will not defeat, 665.
 - must be distributed through the district, 665.
 - must not go outside the district, 666.
 - may be against the land or against separate interests, 666.
 - statute must be strictly followed in making, 665.
 - appeal from, 667.
 - collection of assessments, 668.
 - by contractor, 668-670.
 - by enforcing lien against land, 668.
 - no defense that work not done according to contract, 671.
 - sale of lands for, 672.
 - personal liability for assessments, 674-677.
 - enjoining, when illegal, 774.
 - (See INJUNCTION.)
 - review of, on *certiorari*, 755.
 - (See CERTIORARI.)

ASSESSORS—

- election of, 853.
- action of, in matters of local assessment, 632-644.
- enforcing official duties by, 724-734.
- cannot be coerced in the exercise of their judgment, 730.
- may be compelled by *mandamus* to strike off exempt property, 732, 743.
 - and to put on roll omitted property, 733.
 - and to perform any ministerial duty, 733.
- act judicially in making assessment, 736-795.
- joint action by, 257-259.
- not liable for excessive assessment, 789.
 - even though it was made so by including property not taxable, 791.
 - nor for errors of judgment, 789.
- are liable for exceeding their jurisdiction, 789.
 - as where personal tax is assessed upon non-resident, 789.

ASSESSORS—continued.

- are liable for exceeding their jurisdiction, or where tax was levied which was never voted, 790.
- or an excessive tax, 790.
- or one voted for an illegal purpose, 790.
- or for neglect of duty in some cases, 795.
- whether liable for fraud or malice, 792-795.
- liability of supervisor as, 795.
- form of action against, 817.

ASSUMPSIT—

- action of, for taxes, 15-19.
- against collector to recover illegal taxes paid, 797-802.
- against town, county, etc., 804-818.
- against collector of internal revenue, 808.
- actions against collector of customs, 808.
- (See ACTION AT LAW; REMEDIES FOR EXCESSIVE AND ILLEGAL TAXATION.)

ASSUMPTION OF POWERS—

- (See DE FACTO OFFICERS; JURISDICTION.)

ASYLUMS—

- taxation for, 168.
- exemption of, 187.

ATTORNEY-GENERAL—

- (See LAW OFFICER OF THE STATE.)

ATTORNEYS—

- (See LAWYERS.)

AUCTION—

- lands to be sold at, 498.

AUCTIONEERS—

- taxation of, 91, 577, 586, 602.

AUDITING BOARDS—

- allowances by, 390, 428.
- mandamus* to compel action by, 729.
- may be compelled to hear, and also allow legal demands, 729.
- reviewing action of, on *certiorari*, 757

AUDITING CLAIMS—

- is a judicial function, 687.
- by legislature against municipalities, 688.
- against collectors of taxes, 717.
- (See COLLECTOR OF TAXES.)

AUDITOR-GENERAL—

- may be required to reject illegal taxes, 733.
- discretionary action, not reviewable on *certiorari*, 756.
- action of, does not estop the state, 811.

AUTHENTICATION—

- of assessment, 412-414.
- of tax warrant, 427.
- of notice of tax sales, 484.

AUTHORITY —

- to tax, strict execution of, 350.
- (See TAXING POWERS.)
- to sell, must be express, 470.
 - must be strictly followed, 470-472.
 - whether special is necessary, 481.
 - is terminated by payment or tender, 450, 453, 469.
- for assessments, must be express, 609.
 - and be strictly pursued, 609.
- to tax, exhausting, 849.
- to collect tax, exhausting, 428.
- of boards of review, what does not exhaust, 419.
- of collector, defect in, no excuse for not paying over, 705.
- abuse of, by collector, may make him treasurer *ab initio*, 442, 802.

B.

BANK CHECKS —

- taxation of, 81.

BANK CIRCULATION —

- taxes on, 8.
- contract to receive for taxes, 81, 82.

BANK OF UNITED STATES —

- not taxable by the states, 84.
- restraining tax upon, 773.

BANKERS —

- taxation of, in general, 575.

BANKRUPTCY —

- arrest after discharge in, 799.

BANKS —

- may be taxed, though other corporations are not, 193.
- may be taxed for deposits, 221, 227, 230, 388.
- paying specific tax not taxable on stock as property, 223.
- duplicate taxation in case of, 221, 229, 234.
- not taxable on collaterals, 388.
- franchise taxes on, 231, 379-383.
- tax of, by dividends, 243.
- may be taxed, though enjoined from business, 383.
- shares are "personal property," 279.

BANKS, NATIONAL —

- may be taxed by states, 84.
- rules for the taxation of, 389-392.

BENEFITS —

- always flow from taxation, 3.
- of taxation, what are, 24.
- of local assessments, what are, 606, 661.

BENEFITS — continued.

- failure of, in particular case cannot defeat tax, 8.
- apportionment by, 145-152, 160-162, 239.
- special assessments must be based upon, 606-609, 622, 633.
 - not otherwise valid, 589, 640, 758.
- set-off of, against damages for land taken, 612.
- how estimated, 660-667.
 - must be governed by market value, 660.
 - what to be taken into account, 661-664.
 - must be limited to the cost, 661, 664.

BENEVOLENCES —

- distinguished from taxes, 2.

BEQUESTS —

- (See SUCCESSIONS.)

BETTERMENTS —

- recovery of value of, where title proves defective, 554.
- cannot be exempted from taxation without authority of law, 245, 649.
- excluding from assessments, 245, 649.

BEVERAGES —

- taxation on manufacture and sale of, 580, 588.
- taxation in regulation and restraint of sale of, 598-599, 602, 604.

BIDDER —

- who entitled to be at tax sales, 500-509.
- not the officer who makes sale, 492.
- not one whose duty it was to pay taxes, 500-509.
- whether adverse claimant may be, 506.

BIDDER, HIGHEST —

- tax sale must be made to, 493.
- tax deed must run to, 493.

BILL IN EQUITY —

- (See EQUITY.)

BILL OF LADING —

- tax on, 91.

BILL OF RIGHTS —

- (See CONSTITUTIONAL PRINCIPLES.)

BILLIARD TABLES —

- licensing, 861, 601.

BILLS OF EXCHANGE —

- taxes on, 81, 91.

BLENDING TAXES —

- effect of, 428.

BLOCKS —

- of lots, assessment of, 402, 403, 407.

BOARDS, LOCAL —

- decision of, as to amount, etc., of tax levy, not reviewable on certiorari, 755.

BOARDS OF EQUALIZATION —

- powers and duties of, 421-423.
- members must act jointly, 257-8.
- are assessors and act judicially, 423, 749.
- correction of errors of description by, 406.
- appeals to, 748, 749.
- action of, whether reviewable on *certiorari*, 757, 758.

BOARDS OF RELIEF —

(See **BOARDS OF REVIEW**.)

BOARDS OF REVIEW —

- statutory, 418-421.
- compelling hearing by, 730-734.
- conclusiveness of action of, 748-752.

BOARDS OF SUPERVISORS —

- may be compelled by *mandamus* to proceed to hear claims, 732.
- and to allow the legal claims, 730.
- and to assess state taxes, 735.

BOATS AND VESSELS —

- taxation of, 91-94, 97.
- (See **TONNAGE DUTIES**.)
- ferry, taxation of, 93.

BONA FIDE PURCHASERS —

- not to be affected by amendments, 819.
- purchasers at tax sales are not, 476.

BONDS —

- owned out of state not taxable within it, 23, 28, 160.
- taxable in general, 79.
- to be taxed where owner resides, 79, 371.
- tax on the interest upon, 231.
- irreparable injury in the issue of, 764-766.

BONDS, OFFICIAL —

- required to secure performance of public duty, 706.
- of collector, not according to statute, may be good at common law, 706.
- remedies upon, 707-722.

BOOM —

- when real estate, 368.

BOUNDARIES —

(See **DESCRIPTION**.)

BOUNTIES, MILITARY —

- taxation for, 111, 136-138.

BOUNTY BONDS —

- mandamus* to compel taxation for, 733.

BRIDGES —

- taxation for, 195, 662.
- (See **HIGHWAYS**.)

BROKERS —

taxation of, 281.

BUILDINGS —

sometimes excluded in taxing lands, 245.

and from local assessments, 649.

recovery of value of as betterments, 554.

assessment of, as personalty, 867.

exemption of,

(See CHURCHES.)

public, assessments upon, 610.

BULLION —

taxes on, 81.

BURDEN OF PROOF —

to show whether tax sale regular, 472-481, 551.

BURYING GROUNDS —

exemption of, from taxation, 208.

may be subjected to assessments, 207, 208, 652.

BUSINESS —

taxation of, in general, 179, 181, 182, 192, 193, 197, 198, 199.

of non-residents, taxable where carried on, 60, 374-5.

admissible, though property required to be taxed by value, 177, 179, 181,

182, 185, 186, 190, 191, 192, 194, 196, 197, 198.

duplicate taxation of, 87, 225, 231.

not admissible to build up monopolies, 235.

general right to tax, 570.

methods of taxing, 571.

taxation by United States, 570.

kinds usually taxed, 575-583.

construction of powers to tax, 574.

BUSINESS ENTERPRISES —

taxation not admissible in aid of, 115-117, 126.

BUTCHERS —

taxation of, 580, 597, 608.

BUYERS AT TAX SALES —

who may be, 500-509.

(See SALES OF LANDS FOR TAXES.)

BY-LAW —

effect of failure of corporation to observe, 758.

illegal taxation by, 805.

C.**CALIFORNIA —**

constitutional provisions to secure equality of taxation in, 177.

do not preclude special assessments, 626, 627.

liability to contractor in, 670.

CALAMITIES —

protection against, 188.

(And see LEVEES.)

CANALS—

- taxation of, 213.
- taxation for, 131-134, 697.
- special levy for special benefits from, 697.

CAPITAL—

- meaning of, in tax laws, 221, 279, 839.

CAPITAL STOCK—

- of corporations, taxation of, 212, 218, 221, 225, 226, 228, 231.

CAPITATION TAXES—

- levy of, 15, 25, 86, 87, 110.
- can only be assessed on residents, 369.

CARRIAGE OF PROPERTY—

- taxes on, 29, 576.
- when a tax on, is a tax on commerce, 90-97.

CARRIAGES—

- taxation of, 8, 29, 582.

CARRIERS, COMMON—

- taxation of, 29, 179, 576.

CARS—

- taxation of, 96, 97.

CAVEAT EMPTOR—

- rule of, applied to tax purchasers, 476, 553.

CELEBRATIONS—

- taxation for, by government, 128.
- towns no general authority to tax for, 129.

CEMETERIES—

- exemption of, from taxation, 208.
- (See EXEMPTIONS.)
- local assessments upon, 207, 208, 652, 664, 674.

CERTIFICATES OF DEPOSIT—

- what are, 372.

CERTIFICATE OF SALE—

- what it is, 511.
- is evidence of sale, but not conclusive, 511.
- does not convey title, 511.
- assignment of, 512.
- recording, to cut off redemption, 538.
- compelling delivery to purchaser, 742.

CERTIFICATES, OFFICIAL—

- conclusiveness of, 254, 260, 657.
- of local levies, 290.
- liability of officers for false, 261.
- to assessment, 412, 800.
- protection of officer by, 799-801.

CERTIORARI —

- remedy for illegal or irregular taxation, 753-759.
- forbidding other remedies, 813.
- general nature of the writ, 754, 755.
- is not of right, 753.
- will not be allowed where likely to do serious mischief, 754.
- will be dismissed if improvidently issued, 754.
- dismissing where defect has been cured, 305.
- political action not reviewable on, 755.
- not usually awarded where an appeal is given, 755.
- discretionary action not reviewable on, 755, 756, 758.
- proper office of, to inquire into jurisdiction, 756-758.
- will not be issued to collector, 757.
- nor in case of merely unequal assessments, 757.
- nor for mere errors or irregularities, 757.
- in drain cases, 754.
- in street cases, 758, 759.
- to review organization of school district, 754.
- not allowed merely to recover back taxes, 755.
- misjoinder of parties in, 756.
- to relieve non-taxable property, 757.
- to town auditing board, 757.
- in case of local assessments, 759.
- assessments erroneous in point of law reviewable on, 758.
- and cases where mandatory statutes are disregarded, 758.
- and cases of erroneous action by municipalities in laying assessments, 759.
- only the record can be reviewed on, 755, 759.

CHANCERY —

- (See EQUITY; INJUNCTION; REMEDIES FOR EXCESSIVE AND ILLEGAL TAXATION.)

CHARITABLE SOCIETIES —

- exemption of, from taxation, 202.
- are subject to special assessments, 207, 652.

CHARITY —

- taxation in aid of, 124, 129.

CHARTERS —

- are contracts between the state and the corporators, 71.
- stipulation in, for exemption from taxation, binding on state, 71, 100.
- presumption against exemption, 70.
- stipulation subject to legislative action where right to amend or repeal is reserved, 71.
- strict construction of exemptions from taxation by, 205-213, 377.
- grant of, may be subject to conditions as to taxation, 34.

CHARTERS, MUNICIPAL —

- are not contracts, 73.
- (See MUNICIPAL CORPORATIONS.)

CHATELS —

- of non-resident not taxable in state, 21, 55.
- unless having an actual *situs* within it, 22, 373.
- taxed to owner at his place of domicile, 56, 361-371.
- property in, accompanies owner wherever he goes, 370.
- held by trustee, where taxed, 375.
- of partnership, where taxed, 374.
- taxation of in bulk, and by separate articles, 371.
- of decedent estates, how taxed, 376.
- of persons under guardianship, 377.
- distraint for taxes, 438-442.
- property not belonging to tax payer, 439.
- exhausting before land can be sold, 454.
- whether tax sale may be defeated by showing of, 261.
- whether sale will be enjoined on showing of, 777, 781.
- enjoining illegal taxes upon, 760-778.
- (See EQUITY, COURT OF.)
- levy upon, presumptive satisfaction of tax, 781.

CHURCH PROPERTY —

- exemption of, from taxation, 119, 203
- liable for special assessments, 207, 652.

CITIES AND VILLAGES —

- (See MUNICIPAL CORPORATIONS.)

CITIZENS —

- privileges of, not to be abridged in taxation, 99.
- what does abridge, 99, 100.
- (See NON-RESIDENT.)
- corporations are not, 100.

CITY ORDINANCE —

- (See BY-LAW.)

CIVIL WAR —

- pendency of, does not enlarge right to redeem, 532.

CLAIM OF TITLE —

- what is, 567, 568.
- (See ADVERSE POSSESSION.)

CLAIMS —

- against municipalities, auditing of, 685, 687.
- compelling recognition of, 127, 688.
- allowance of, by *mandamus*,
- (See MANDAMUS.)
- certiorari* in cases of allowance, 757.

CLASSIFICATION —

- of taxes, 6.
- of lands as seated and unseated, 394.
- of lands in case of levee assessments, 643.

CLERGYMEN —

- taxation of, 577.

CLERICAL ERRORS —

may be disregarded, 814, 801.

(See AMENDMENTS.)

CLOUD UPON TITLE —

what constitutes, in taxes, 779.

whether a void tax is, 779.

relief in equity in case of, 778.

illegality alone no ground of relief, 783.

(See EQUITY.)

COAL COMPANIES —

taxation of, 189, 196.

COERCION —

(See VOLUNTARY PAYMENT.)

COLLECTION OF SPECIAL ASSESSMENTS —

must be made as statute provides, 668.

by enforcing a lien, 678.

by the contractor, 668-671.

from special fund, 668-671.

defenses to, 671.

by sale of lands, 672.

by proceedings against the owner, 678-677.

COLLECTION OF TAXES —

after repeal of law, 19.

summary process for, 47-53, 432.

by intruders, estoppel in case of, 256.

warrant for, 424-431.

exhausting authority under, 428.

excess in, makes void, 429-431.

direct and indirect methods of, 432-434.

by suit, 15-19, 435.

by arrest of person taxed, 437.

by distress of goods, 438-443.

by detention of goods, 444.

by sale of lands, 444-448, 454.

by enforcement of lien, 448-450.

by imposition of penalties, 456-459.

by forfeiture of property taxed, 461-465.

(See FORFEITURES.)

by conditions to the exercise of a right, 459-461.

through municipalities, 468.

by stamps, 31, 460.

in license fees, 572, 604.

of special assessments, 668-677.

by state from the collector, 704-723.

enjoining, not in general admissible, 760.

may be if irreparable injury threatened, 761, 766, 771, 773.

or if assessment fraudulent, 784, 785.

(See INJUNCTION.)

COLLECTION OF TAXES — continued.

- resisting, when proper, 796.
- different regulations for in different municipalities, 178.

COLLECTOR OF CUSTOMS —

- liability of, for exacting illegal duties, 594, 804.

COLLECTOR OF INTERNAL REVENUE —

- liability of, for illegal collections, 802, 804.

COLLECTOR OF TAXES —

- sale of office of, 257.
- warrant of, for collection, 424.
 - a trespasser if he acts without, 424.
 - statutory requisites of, 425-428.
 - what defects in do not vitiate, 425-427, 800.
 - extension of, 428.
 - exhausting authority in issuing, 428.
 - effect of blending taxes in, 428.
 - excessive taxes, effect of, 429-431.
- demand by, before levying distress, 441.
- notice by, of distress and sale, 442.
- when may become trespasser *ab initio*, 442, 802.
- return by, of tax uncollected, 859, 458.
- remedies of state against, 704.
 - suit at the common law, 704.
 - defect of authority no defense to, 705.
 - suit in case for neglect of duty, 706.
 - bond of, valid though not in statutory form, 706.
 - liability upon, 707.
 - liable on, though tax illegal, 708, 709.
 - may refuse to collect illegal tax, 709.
 - must receive money only, 710.
 - must not speculate in his office, 711.
 - liable for failure to keep moneys safely, 711.
 - must account without demand, 711.
 - sureties of, only liable on their bond, 712.
 - alteration in bond discharges, 712.
 - whether extension of time to principal does, 713.
 - not released by repeal of law under which the bond was given, 716.
 - cannot question collector's appointment, 714.
 - liability where collector is re-elected, 714.
 - not bound by collector's admissions, 714.
 - not discharged by a new bond, 718.
 - rights as between each other, 714.
 - how far bound in case of new taxes, 715.
 - liability where collector fails to give new bond as required, 715, 716.
 - liability where collector not accounted with, 716.
 - concluding, by auditor's statement of account, 717, 718.
- summary remedies against, 717.
 - judgment on notice, 717.

COLLECTOR OF TAXES — continued.

- summary remedies against; distress warrant, 717, 719.
 - statute for, must be strictly complied with, 720-722.
 - principles governing, 720-723.
 - right to a hearing on, 721.
 - must be proper evidence of right to, 722.
- not entitled to jury trial of delinquency, 720.
- summary removal of, 721.
- compelling issue of distress warrant against, 741.
- is protected by his process if fair on its face, 797.
 - but not against his own illegalities, 801.
 - what is process fair on its face, 800.
 - not where tax appears to be illegal, 800.
 - nor where process issued by wrong officer, 800.
 - the protection does not give him title, 801.
- not liable where taxes actually paid over, 802.
- estopped from disputing authority, 285-289.
- when errors of others will relieve him from collecting, 709.
- payment by, to wrong officer, no protection, 711, 715.
- liability for license fees, 715.

COLLECTOR'S BOND —

- is for security of the public only, 712.
- effect of failure to give, 285.
- (See COLLECTOR OF TAXES.)

COLLECTOR'S WARRANT —

- (See COLLECTOR OF TAXES.)

COLLEGES —

- taxation for,
- (See EDUCATION.)

COLOR OF LAW —

- taxes collected by and paid over, cannot be recovered back from collector, 802.

COLOR OF TITLE —

- what is, 567, 568.
- (See ADVERSE POSSESSION.)

COLORABLE TAXATION —

- is void, 46, 111, 641.

COLORADO —

- constitutional provisions to secure equal taxation in, 176, 628.
- short statute of limitations in, 564.

COLORED PERSONS —

- discrimination in taxation of, 53, 185.

COMBINATIONS —

- of bidders at tax sales, are fraudulent, 489-491.

COMMERCE, TAXES ON —

- on exports, 83.
- on imports, 83, 98.

COMMERCE, TAXES ON — continued.

- by states, what forbidden, 90.
 - on imports and exports, 90.
 - on tonnage, 91.
 - on trade with Indian tribes, 94.
 - on travel, 96, 97, 99.
 - on importers as such, 94-96.
 - on freight passing from state to state, 96.
 - on masters of vessels, 97.
- what not a tax upon, 97.
- duties on, for protection, 12.

COMMISSION DEALERS —

- taxation of, 577.

COMMISSIONERS —

- for making special assessments, 633-644, 654.
- certiorari* to, 759.

COMMON BURDENS —

- should be sustained by common contributions, 215.
- (See APPORTIONMENT.)

COMMON CARRIERS —

- taxes on business of, 29, 179, 576.
- when they become taxes on commerce, 96, 97, 99.

COMMON COUNCIL —

- certiorari* to, 759.
- failure of, to observe by-laws, 758.
- (See MUNICIPAL CORPORATIONS.)

COMMON LAW —

- protection of, in tax cases, 47-58.
- (See CONSTITUTIONAL PRINCIPLES.)

COMMON LAW BOND —

- liability of collector on, 706-708.

COMMON LAW REMEDIES —

- of state against collector of taxes, 704.
- (See COLLECTOR OF TAXES.)
- to compel performance of official duty under tax laws, 726-744.
- (See MANDAMUS.)
- general right to, in tax cases, 47-58, 746.

COMMUTATION MONEYS —

- taxation to refund, 698.

COMMUTING —

- for taxes, admissible, 175, 234.
- forbidden in some states, 187, 195.
- for labor tax, 15, 180, 234.

COMPENSATION —

- for taxation, what is, 2, 19, 572.
- for special assessments are benefits received, 607.

COMPENSATION — continued.

- in case of exercise of eminent domain, 624.
- for loss by riots, 686.
- (See RIOTS.)
- for betterments in ejectment, 554.

COMPETITION —

- at tax sale must be allowed, 489-491.

COMPLAINTS —

- (See REMEDIES FOR EXCESSIVE AND ILLEGAL TAXATION.)

COMPULSION —

- what payments are deemed to be made under, 811.
- (See VOLUNTARY PAYMENTS.)

COMPULSORY TAXATION —

- (See MANDAMUS.)

COMPULSORY LOCAL TAXATION —

- general right of people to vote taxes they are to pay, 678.
- but state must grant powers to tax, 678.
- and may modify them at will, 678.
- local power to tax, value of, 679.
- meaning and extent of, 679.
- is not inherent, 679.
- is not discretionary in matters of state concern, 680.
- what are matters of state concern, 681.
- preservation of order, 681.
- support of courts, erection of court-houses, etc., 681.
- construction and repair of highways, 682.
- public health, 684.
- maintenance of schools, etc., 683.
- payment of corporate debts, 685.
- apportionment of debts, etc., when municipality is divided, 686.
- making compensation for destruction by rioters, 686.
- indemnifying officers, 686.
- whether the legislature may audit claims against municipalities, 687.
- municipal corporations, twofold nature of, 688.
- subjection of, to state in their political capacity, 688.
- corporate rights in their private capacity, 688-702.
- right to protection in these, 689-702.

CONCLUSIVENESS —

- of assessment in general, 747, 752, 788-794.
- in case of local assessments, 640, 645, 662.
- of action of appellate boards, 748-752.
- (See JUDGMENT.)

CONDEMNING LANDS —

- (See EMINENT DOMAIN.)

CONDITIONS —

- imposed on power to tax must be observed, 348.
- imposed to compel payment of taxes, 459.

CONDITIONS — continued.

- to render tax chargeable, must be observed, 285.
- to redemption, must be complied with, 533-536.
 - cannot be added to by officer or purchaser, 542.
- imposed on recovery of land sold for taxes, 549-554.
- imposed on the privilege of doing business, 572, 573.
- to special assessments, must be observed, 659.
- imposed on tax purchaser, 536.

CONFEDERATING —

- to prevent collection of debt from municipality, 737.

CONFIRMATION —

- of defective proceedings,
 - (See CURATIVE LAWS.)
- of tax sale, who may oppose, 527.

CONFLICTING CLAIMS —

- bills of interpleader in cases of, 786.

CONGRESS —

- taxation by,
 - (See FEDERAL TAXATION.)

CONSENT —

- cannot give jurisdiction to tax, 371.
- cannot pass title to land, 486.
 - (See ESTOPPEL.)

CONSIDERATION.

- for taxation, what is, 24.
- for special assessments, 606-608, 646, 675.
- state may relinquish right to tax for a, 66-82.
- gifts to public purposes may support taxation, 187
- but not gifts to private purposes, 691.

CONSOLIDATION —

- effect of on taxation of railroad companies, 211, 212.

CONSTITUTIONS OF THE STATES —

- are laws, 73.
- levy of specific taxes under, 324.
- provisions in, regarding introduction of revenue bills, 42, 325-327.
- regarding statement of object of bill, 325.
- may restrain legislative powers of taxation, 327-331, 344-350.
- municipal taxation subject to, 344.
- protection of minorities by, 345.
- admit of summary remedies to collect taxes, 432, 437, 438.
 - of recovery of betterments, 554.
 - of summary remedies against collectors of taxes, 704, 717.
- provisions in, to secure equality in taxation, 175-199.
- right to levy special assessments, how affected by, 626-634.
- provisions in, affecting local assessments, 626-634, 668-670.
- are framed in contemplation of existence of local powers, 678-9.
- provisions in, for taking land for private ways, 113.

CONSTITUTIONS OF THE STATES — continued.

- provisions for the taxation of legal process in certain, 31.
- laws which violate spirit of, not necessarily void, 698.
- assume the existence of fundamental principles, 54.
- whether violated by penalties for not handing in tax list, 358.

CONSTITUTION OF UNITED STATES —

- forbids states passing laws which impair obligations of contracts, 67.
- instances of such laws, 66-73.
- stipulations by states not to tax, sometimes contracts, 66-73.
- charters of private corporations are contracts under, 71.
- forbids state imposts, or duties on imports and exports, 90.
- what are exports under this provision, 90, 96.
- forbids duty of tonnage by states without consent of congress, 91.
- what are duties of tonnage, 91-94.
- state taxes on foreign and interstate commerce are in violation of, 94.
- but not taxes on property as such, 94, 98.
- taxes on importers are, 95.
- taxes on dealers in goods of other states, 95.
- taxes on bills of exchange, etc., 95.
- taxes on freight, when are, 96.
- taxes on cars and vessels, when are, 96.
- taxes on immigrants are, 97.
- taxes on travel, 99.
- illustrations of what are not, 97.
- is violated by taxes which abridge the privilege and immunities of citizens, 99, 100.
- by taxes in violation of treaties, 100.
- does not admit of federal taxation of the state, or its agencies, 83.
- or of state taxation of the agencies of the federal government, 82.
- illustrations of what are government agencies, 83-90.
- when a tax on passengers out of the state is in violation of, 86, 87.
- requires duties, imposts and excises to be uniform throughout the United States, 110.
- provision in, regarding direct taxes, 110.
- forbids duties on exports, 110.
- limitations in, are applicable to local taxation, 844.

CONSTITUTIONAL PRINCIPLES —

- that taxation and protection are reciprocal, 19-25.
- that taxation and representation go together, 58-61.
- original meaning of the maxim, 58.
- meaning of in America, 58-61.
- can only be understood in territorial sense, 59.
- does not entitle all persons taxed to suffrage, 59.
- application of to territories and District of Columbia, 60, 61.
- that life, liberty and property are protected by the law of the land.
- 47-53.
- this not a guaranty of judicial proceedings, 47.
- is not violated by healing statutes, 301.
- exceptions, 52, 53, 297-8, 302, 310.

CONSTITUTIONAL PRINCIPLES — continued.

- that life, liberty and property are protected by the law of the land.
 - admits of distress for taxes, 438.
 - whether legislative forfeitures violate, 461-465.
 - whether it admits of imposition of penalties without judicial hearing, 457-460.
 - not violated by enforcing valid tax, 49.
 - protection of municipal property by, 700.
- monopolies not admissible under, 235, 592.
- special assessments on basis of benefits not obnoxious to, 623.
- summary process against collectors and their sureties, admissible under, 717-722.
- influence of custom in understanding of, 49.
- giving jury trial, not applicable in tax cases, 47, 718, 722.
- (See JURY TRIAL.)
- whether will admit of extending or shortening time to redeem, 544-5.

CONSTITUTIONAL PROVISIONS —

- when are self-executing, 101, 102, 326, 329, 345.

CONSTITUTIONAL RIGHT —

- hearing is matter of, 305, 361-366.
- local government a matter of, 63, 678-9.

CONSTRUCTION —

- of contracts not to tax must be strict, 67.
- of exemptions must be strict, 67, 205-209.
- of township powers to tax, will admit of indemnifying officers, 127.
 - not of celebrations, 128.
- of township powers to tax, general observations upon, 108, 109, 132.
- of local powers to tax generally, 132, 276-285, 574.
 - reasons why this should be strict, 276.
 - the rule applied in case of assessments, 609.
 - rule where apparently modified or affected by general statutes, 294, 295.
- of constitutional provisions regarding equality and uniformity in taxation, 175-199.
- of local powers as to objects of taxation, 277.
 - as to what shall be taxable, 279.
 - when exercise of is imperative, 281-2, 680-688.
 - general limitations upon, 344-349.
 - exhausting authority under, 349.
- rules of, in construing statutes, 263-294.
- of revenue laws, 265.
 - whether to be strict or not, 265-275.
 - penal provisions in, 263-272, 275.
 - what provisions to be held mandatory, 280-283.
 - what to be considered only directory, 280, 289.
- of remedial laws, 263, 269-274.
- of laws permitting redemption, to be liberal, 533.
- of provisions apparently retrospective, 291-293.
- of powers to tax business, 574.

CONSTRUCTION — continued.

of power to levy license fees, 588-587.

where it warrants the levy of fees for revenue, 592-594.

influence of custom upon, in case of powers to tax, 129, 587.

in case of town votes, 836.

(See CUSTOM.)

CONSTRUCTIVE FRAUD —

whether illegal taxation is, 784-5.

in tax purchases,

(See BIDDER; COMBINATIONS.)

CONSTRUCTIVE POSSESSION —

under tax deed, 565-567.

CONSUMPTION —

indirect taxes on,

(See INDIRECT TAXES.)

of luxuries, taxation of, 82.

CONTINGENT EXPENSES —

taxation for, 138.

CONTRACT —

not to tax, states may make, 66-72, 102.

charters of private incorporation are, 71.

but not municipal charters, 78.

exemptions from taxation from motives of state policy are not, 69.

(See EXEMPTIONS.)

obligation of, not to be violated in taxation, 80-82, 545.

by corporations *ultra vires*,

(See ULTRA VIRES.)

tax laws are not, and state may repeal, 78.

tax purchases are, 545.

power of legislature over redemption from, 544-5.

state cannot make, for municipalities, 690-702.

taxation of money contracts, 78-80.

(See BONDS; CREDITS.)

in fraud of revenue laws, are illegal, 488-4.

compelling taxation for payment of municipal, 685-687.

CONTRACTING DEBTS —

the first step in taxation, 327.

enjoining, 767.

CONTRACTOR —

collection of assessments by, 668-671.

fraud of, will not defeat assessment where work is accepted, 671.

effect of failure of, to complete work, 658, 670-672.

CORPORATE AUTHORITIES —

meaning of term, 654, 692.

compelling performance of duties under tax laws,

(See MANDAMUS.)

CORPORATE ORGANIZATION —

questioning in tax cases, 754, 768, 790, 822.

CORPORATIONS —

are not citizens, 100.

charters of, are contracts, 71.

restrictions on taxation in, are binding, 71, 100.

property of, is represented by stock, 225.

exemptions of, from taxation, 71, 200-213.

are entitled to protection of law of the land, 82.

duplicate taxation in case of, 221-224.

whether to be classed as "persons," etc., 377.

taxation of, in general, 22, 23, 84, 377-383.

questions of equality in, 175-200, 225, 226.

effect of consolidation on, 211, 212.

capital and shares may both be taxed, 221, 225, 226, 228-231.

effect upon this of the presumption against duplicate taxation, 232, 233.

methods of, are in legislative discretion, 377, 378.

general methods of taxing, 377.

on the franchise, 22, 23, 379.

on the property by valuation, 225, 377, 383.

place for taxing personality, 378.

on the capital stock, 230, 232.

on the business done, 380, 383.

on dividends, profits or receipts, 381-383.

specific tax cannot be levied on, under a power to tax "taxable property," 379.

collection of taxes from, 437.

taxing bonds of,

(See BONDS.)

suits by, to restrain illegal taxation of stockholders, 761, 763.

recovery by, in case of excessive taxes, 816.

(See CHARTERS; FRANCHISES; MUNICIPAL CORPORATIONS; NATIONAL BANKS; RAILROADS.)

CORRECTIONS —

by judicial action, 813-823.

(See AMENDMENTS; CURATIVE LAWS; REASSESSMENTS.)

COSTS —

recovery of, in suits for illegal taxes paid, 814, 816.

COUNTIES —

apportionment of debts, etc., on division of, 185, 239, 635.

may be made debtors for state taxes, 483.

bids by, at tax sales, 509.

compelling to adjust proper demands, 687.

liability of, for illegal taxes, 804-807.

(See REMEDIES FOR ILLEGAL AND UNJUST TAXATION.)

COUNTY BUILDINGS —

local taxation for, 154, 610, 681.

COUNTY BOARDS —

(See **BOARDS OF EQUALIZATION**; **BOARDS OF REVIEW**.)

COUNTY COMMISSIONERS —

(See **BOARDS OF REVIEW**.)

COUNTY INDEBTEDNESS —

payment of taxes in, 710, 711.

COUNTY TREASURER —

default of, county to respond for, 468.

may be compelled to issue distress warrant against collector, 741.

cannot question an assessment as unjust, 741.

COURT-HOUSE —

special tax on county town for, 154, 166, 610.

municipalities may be compelled to tax for, 681.

COURTS —

support of, municipalities may be compelled to tax for, 681.

(See **JUDICIARY**.)

COURTS OF THE UNITED STATES —

jurisdiction of, under the fourteenth amendment, 51.

have limited jurisdiction in matters of state taxation, 744, 745.

mandamus by, to compel payment of their judgments, 744.

taxation by commissioners appointed by, 744.

CREDIT —

not to be given at tax sales, 498.

CREDITS —

are property, 220.

taxation of, 22, 52, 181.

taxation of, in hands of agent, 874.

(See **BONDS**.)

when secured by mortgage, 22.

(See **MORTGAGE**.)

CROPS, GROWING —

whether tax purchaser entitled to, 549.

CULVERTS —

special assessments for, 618.

CUMULATIVE TAXES —

(See **DUPLICATE TAXATION**.)

CURATIVE LAWS —

healing defects in tax proceedings by, 297-323.

cannot establish conclusive rules of evidence, 297.

must not take the form of legislative mandates, 297-8, 299.

may be special acts, 300.

limitation upon the right to pass such, 302-305, 310.

what defects cannot be cured by, 52, 53, 297-8, 310.

may be prospective, 308.

may be made applicable to pending suits, 307.

may provide for reassessment, 309.

(See **JUDICIAL CORRECTIONS**.)

CURB-STONES —

assessment for, 614.

(See **ASSESSMENTS, LOCAL**.)

CURTESY —

tenant in, may redeem, 539.

CUSTODIAN —

(See **INTERPLEADER**.)

CUSTOM —

effect on construction of power to tax, 129, 537.

effect in determining what are public purposes, 117.

influence of, in construction of public powers, 277, 278.

to be considered in construing town votes, 336.

CUSTOMS DUTIES —

what are, 4.

levied by the United States, 6, 82, 110, 571.

liability of collector of, 794, 804.

D.**DAMAGES —**

by local improvements, cannot be set off against assessment, 612.

by rioters, towns, etc., may be compelled to pay, 686.

to which one is entitled, not taxable as a debt until definitely fixed, 372.
assessment of, is a judicial act, 788.

party making, not personally liable for error in, 789.

recovery of, in actions against collector, etc., 786-795.

towns, etc., not liable for, in case of illegal action by officers, 816.

whether this rule applies under special charters, 817.

DAMS —

for water power, taking land for, under right of eminent domain, 114.

DEBT, PUBLIC —

taxation for payment of, 101, 138.

unlawful engagement does not create, 138.

of municipalities, state may compel payment of, 685.

including moral obligations, 685, 688.

not to be audited by the state, 687.

not to be created by the state, 688-703.

action in creating unlawfully, not a private wrong, 767.

enjoining, on application of tax payers, 767.

failure to provide for, cannot be remedied by means of the writ of
quo warranto, 822.

of the United States, not taxable, 84.

whether power to contract implies power to tax for payment, 101.

contracting the first step in taxation, 327.

DEBTS —

whether taxes are, 15-19.

allowance for, in assessment, 174-176, 195.

DEBTS — continued.

of municipalities, compulsory taxation for, 685, 697.

(See DEBT, PUBLIC.)

taxation of,

(See CREDITS; MORTGAGE.)

DECEASED PERSONS —

estates of, where and to whom taxable, 876, 897.

assessment to, is no debt against administrator, 899.

DECISIONS —

(See DISCRETIONARY ACTION; JUDGMENTS.)

DEDICATION —

of streets, authorizes opening at expense of owners, 613.

DEED —

(See ALIENATION; TAX DEED.)

DE FACTO GOVERNMENTS —

may levy taxes, 5.

DE FACTO OFFICERS —

who are, 249.

action of, how far binding, 253-256.

protection of, 251-253.

questioning title of, 253-256.

that taxes are collected by, is no ground for recovering them back, 815.

collector, cannot defend against an accounting by showing defect in his title, 256, 705.

(See OFFICERS.)

DEFAULT —

determination that one is in, is judicial action, 787.

(See FORFEITURES.)

must be, before distress levied, 442.

or before land can be sold, 450, 469.

in payment of municipal debts,

(See DEBT, PUBLIC.)

DEFAULTING COLLECTOR —

suits against, at common law, 704, 706.

suits on bond of, 707-717.

summary remedies against, 717-721.

(See COLLECTOR OF TAXES.)

DEFECTS —

in title of *de facto* officer, effect of, 249.

(See OFFICERS.)

in tax proceedings which render them void on their face, prevent their being a cloud on the title, 779.

in process, what will prevent it being fair on its face, 800.

(See PROCESS.)

DEFENSE —

of collector under his process,

(See PROCESS.)

to illegal taxes,

(See REMEDIES FOR EXCESSIVE AND ILLEGAL TAXATION.)

DEFICIENCY —

occasioned by misappropriation, may be provided for by tax, 766.

no private right of action for such wrong, 818.

DEFINITION —

of taxes, 1.

of tax legislation, 1.

of direct taxes, 6.

of indirect taxes, 6.

of law of the land, 49.

of taxable property, 171, 871.

of capital, 221.

of duplicate taxation, 225.

of "actual value" of capital stock, 236.

of office, 248.

of officer, 248.

of officer *de facto*, 249.

of officer *de jure*, 249.

of usurper, 251.

of revenue laws, 265.

of directory statutes, 281.

of mandatory statutes, 281.

of assessment, 351.

of domicile, 364.

of gross earnings, 221.

of income, 221, 382.

of "seated," "resident" and "occupied" lands, 394.

of levy, 324.

of farming out the revenues, 434.

of color of title, 567-8.

of claim of title, 567-8.

of merchant, 578.

of license, 596.

of "bounding or abutting," 646.

of "adjoining," 646.

of "in front," 646.

of cloud on title, 779.

DE JURE OFFICERS —

who are, 249.

distinguished from officers *de facto*, 249.

(See OFFICERS.)

DELAY —

in taking objections promptly, reason for denying a *certiorari*, 735.

in case of irregular organization of school district, may preclude objections, 754, 768.

DELAY — continued.

- in doing the work for which tax is levied, no defense to the tax, 671.
- of collector in selling goods distrained, effect of, 802.
(See ESTOPPEL.)

DELEGATION —

- of power to tax cannot be made to the judiciary, 43.
nor to any subordinate authority, 61-66.
- questions affecting amount of taxes may be referred, 62.
- power to decide upon licenses may be granted, 62.
- to municipal corporations, of power to tax, admissible, 62.
(See ASSESSMENTS, LOCAL; COMPULSORY LOCAL TAXATION.)

DELINQUENCY —

- must exist to authorize sale of goods for taxes, 442.
and before the power to sell land attaches, 450, 464.
- in case of highway labor, determination of, 787.

DELINQUENT TAXES —

- distress and sale for, 438-444.
(See DISTRESS.)
- sale of lands for, 444-454.
(See SALES OF LANDS FOR TAXES.)
- forfeiture of property for, 461-465.
(See FORFEITURE.)

DEMAND —

- for taxes, before distress, 441.
- not necessary before suit to recover illegal taxes paid, 815.
- for jury, the proper remedy where party entitled to it, 756.
- for tax, when it amounts to compulsion, 814.
- when necessary to entitle party to interest, 815.

DEMANDS —

- (See BONDS; CREDITS; DEBTS.)

DE MINIMIS LEX NON CURAT —

- maxim, application of, to excessive taxes, 490.

DEPARTMENTS OF GOVERNMENT —

- separate powers of, 41.

DEPOSIT —

- entry in pass book is certificate of, 372.
- taxation in respect of, 388.
- what tax on, is held invalid, 227.

DEPRECIATION OF PROPERTY —

- is no defense to a tax, 775.

DESCRIPTIONS OF LAND —

- separate, must be separately assessed, 400.
- what are separate, 402.
- must be separately sold, 498-495.
- in assessment, what is sufficient, 404-408.
correction of by county board, 406.
must not be divided in making sale, 402-3.

DESCRIPTIONS OF LAND — continued.

- in notice of sale, what sufficient, 486.
- if defective in tax roll, tax is void, 796.

DESTITUTION —

- taxation for relief of,
(See CHARITY.)

DESTRUCTION —

- taxation may be carried to extent of, 83.
- taxation for the purposes of, 18, 593.
- of franchise by taxation may be enjoined, 773.

DETENTION —

- of property for payment of taxes, 444.

DIFFICULTIES —

- in enforcement of tax laws, 724.

DILATORY PROCEEDINGS —

- statutes to prevent in tax cases, 719, 818.

DIRECT TAXES —

- what the term means, 6, 7.
- meaning of, as used in the federal constitution, 8.
- how laid by the United States, 110.

DIRECTORY STATUTES —

- what are, 280.
- instances of, 255, 289.
- (See CONSTRUCTION.)

DISABILITY —

- redemption in case of, 864, 865.

DISASTERS —

- (See CALAMITIES.)

DISCHARGE —

- in bankruptcy of person taxed, does not render officer liable for arresting him, 561.
- of lands illegally taxed, 733, 822.
(See ABATEMENT; MANDAMUS.)
- of tax by payment,
(See PAYMENT.)
- of lien by tender,
(See TENDER.)
- of sureties by change in their obligation,
(See SURETIES.)
- of tax by levy on goods, 781.
- of lands from tax sales by redemption,
(See REDEMPTION.)
- of municipal obligations by compulsory taxation,
(See COMPULSORY LOCAL TAXATION; MANDAMUS.)

DISCOUNTS —

- discriminations in making, may be enjoined, 775.
- payments made to obtain, are deemed voluntary, 812.

DISCOURAGEMENT —

of trades or occupation in taxation, 20, 593.
(See **POLICE POWER.**)

DISCRETIONARY ACTION —

cannot be reviewed on *certiorari*, 755.
instances of, 756.
cannot be enjoined, 769.
will not render the officer personally liable, 796.
(See **JUDICIAL OFFICER.**)
will not be controlled on *mandamus*,
(See **MANDAMUS.**)

DISCRETIONARY POWERS —

not to be interfered with, 218, 526-532.
(See **MANDAMUS.**)
effect of fraud upon exercise of, 218.
liability to abuse, no argument against, 280.
are vested in assessors, 550-553.

DISCRETIONARY WRITS —

(See **CERTIORARI; MANDAMUS.**)

DISCRIMINATIONS —

in taxation based on color, 53, 185.
in duties, sometimes made for purposes of protection, 12, 13, 84.
against articles of luxury, 32, 84.
unavoidable in taxation, 164-169.
taxes not void for, 166-169.
in taxation of business, 181, 186, 199.
in taxation of traders, 95-99.
what inadmissible, 214, 241.
between real and personal property in special assessments, 651.
against undesirable occupations, 593.
(See **POLICE POWER.**)
unlawful, may be enjoined, 778.
between residents and non-residents, not allowed in taxation, 99, 219.
in retrospective taxation, 302.
who may complain of, 185.

DISMISSAL OF WRIT —

(See **CERTIORARI.**)

DISTRESS —

taxation for relief of,
(See **CHARITY.**)

DISTRESS OF GOODS FOR TAXES —

warrant for, 438-443.
levy of on goods of another, 499.
demand before, 441.
statutes regarding notice to be strictly complied with, 442.
when action in, renders officer trespasser *ab initio*, 442, 802.
certiorari may be brought though tax has been collected by, 753.

DISTRESS OF GOODS FOR TAXES — continued.

what defects in process render collector liable, 800.
cannot generally be enjoined, 772-775.

(See INJUNCTION.)

for illegal tax is duress, 814.

when threat of, amounts to compulsion, 814.

replevin in case of, 439, 818.

DISTRESS WARRANT —

to enforce taxes, 438-443.

against collector of taxes, 718, 719.

(See COLLECTOR OF TAXES.)

compelling issue of, by *mandamus*, 741.

DISTRIBUTIONS —

(See SUCCESSIONS.)

DISTRICTS —

necessity for, in case of taxation, 140-163.

object of the tax must sometimes determine, 140, 141, 144.

for road taxes, 144, 176-7, 179, 181.

for local taxes generally, 144.

in case of special improvements, 145, 146-149, 634-637, 654.

must be established by legislative authority, 149.

judicial tribunals cannot control establishment of, 149-151.

legislative methods of establishing, 150, 151.

diversity in, 151, 235.

overlying, for public buildings, 153-155.

for improvement of streets, 156.

in case of general city taxes, 156-159.

taxation must be for purposes of, 140-146.

taxation beyond limits of, not admissible, 159-163.

exemptions of property in, 177, 245.

(See EXEMPTIONS.)

apportionment must be uniform within, 244, 245.

different, may be differently taxed, 183.

different methods of collection in, 178.

for levee taxes, 623.

for local improvements generally,

(See ASSESSMENTS, LOCAL.)

DISTRICTS FOR SCHOOLS —

(See SCHOOL DISTRICTS.)

DIVERSITY —

of taxes,

(See TAXES.)

of taxation in districts, 235.

in methods of collection, 246.

in case of residents and non-residents,

(See NON-RESIDENTS.)

DIVIDENDS —

- taxes on, 80.
- as a measure for taxation, 248, 279, 292.
- how evidence of, may be required, 744.
- tax on, cannot be disputed by creditors on the ground that they should not have been declared, 818.

DIVISION —

- of parcels of land in tax sales, 403.
- of municipalities, apportionment of debts and property on, 185, 239, 685, 687.
- of powers of government, 41.

DOGS —

- taxation of, for revenue, 29.
- for regulation, 190, 602.

DOLLAR MARK —

- omission of, in assessment, effect of, 411.
- omission of, in judgment, is fatal, 411.

DOMAIN —

- (See EMINENT DOMAIN.)
- public,
- (See PUBLIC LANDS.)

DOMICILE —

- right to tax when dependent upon, 55-58.
- residents must be taxed at place of, 869.
 - exceptions in case of tangible property, 20, 21, 373.
 - and of located business, 374.
- of trustee, determines place of taxation of the trust, 373.
- what constitutes, 869.
- collection on removal from, 436.
- (See NON-RESIDENTS.)

DOUBLE TAXATION —

- one complaining of, must show that he has paid once, 777.
- (See DUPLICATE TAXATION.)

DOWRESS —

- right of, to redeem, 539.

DRAINAGE —

- (See DRAINS.)

DRAINS —

- taxation for, to protect the public health, 52, 64.
- special assessments for, 259, 616-619, 654, 655.
- (See ASSESSMENTS, LOCAL.)
- whether health a necessary consideration in case of, 616.
- special benefits from, may be made the basis of assessment, 616.
- for purpose of reclaiming large tracts of land, 591.
- assessments for, under the police power, 591.
- cannot be made by taxation for private benefit solely, 616.
- questions on taxes for, 753, 754, 820, 821.

DRAINS — continued.

- assessors must meet to make, 257.
- illegal, cannot be enforced, 300.
- estoppel against disputing benefit of, 320.

DRAYMEN —

- taxation of, 582, 602.

DUE PROCESS OF LAW —

- (See **LAW OF THE LAND.**)

DUPLICATE —

- (See **COLLECTOR'S WARRANT.**)

DUPLICATE TAXATION —

- results from taxation of personalty, 37.
- impossibility of avoiding in some cases, 219.
- indirect taxation results in, 220.
- taxation of corporation and its stockholders sometimes is, 220.
- taxation of property and the debt owed for it, 220.
- taxation of mortgage and the property it covers, 220.
- injustice of, is not a legal question, 220.
- not necessarily invalid, 221.
- tax on sales which reaches property twice, 220.
- decisions upon the validity of such taxation, 222-224.
- is invalid if the same burden reaches twice the same subject, 225.
- taxation of a corporation and its franchise is not, 225, 226, 232.
- revenue statutes are to be construed so as to prevent, 227.
- instances in which this rule has been applied, 228-230.
- instances which have been held not within it, 230-234.
- instances of special corporation taxes, 234.
- tax on merchant's stock and his business is not, 573.

DUTIES —

- meaning of the term, 3.
- upon imports, 33.
- upon exports, 33.
- for what purposes levied, 33, 34.
- are required to be uniform, 110.
- frauds in the collection of, 456.
- contracts in fraud of, 433.
- illegal collection of,

(See **COLLECTOR OF CUSTOMS.**)

DUTY —

- to pay taxes, the correlative to protection, 19, 596, 607.
 - how this should be apportioned, 8.
- (See **APPORTIONMENT.**)
- of the government in laying and collecting taxes, 8-13.
 - official, how performance of compelled, 724-744.
- (See **MANDAMUS.**)
- of collector, how performance of secured,
- (See **COLLECTOR OF TAXES.**)
- of assessor to give notice, whether neglect of will render him liable, 792.

DUTY — continued.

- of municipality to pay judgments, etc., may be compelled by *mandamus*, 685-703.
- or by compulsory taxation by state,
(See **COMPULSORY LOCAL TAXATION**.)
- of municipality to levy water rates, cannot be coerced on *quo warranto*.
823.

E.**EDUCATION** —

- religious, not a proper purpose for taxation, 118.
- secular, taxation for, 119.
- extent of, a question for the legislature, 120.
- may be provided for by public schools, 121.
- or by assisting private schools, 122.
- local taxation to erect state buildings for, 122, 154, 155.
- municipalities may be compelled to provide for, 688.
- exemption of property used for purposes of, 202.
- provision for must be impartial, 121.

EJECTMENT —

- for lands sold for taxes, 549.
- condition to recovery that improvements shall be paid for, 554.
- condition that taxes shall be paid, 550-554.
- short statutes of limitations for, 555-564.
- how affected by constructive possession, 565-567.
(See **ADVERSE POSSESSION**.)
- cannot be brought by one in possession, 788.
- in case of vacant tenements, 554, 565-567.
(See **LAND TITLES**.)
- claim under color of title, 567-569.

ELECTION —

- of remedy where one has paid an illegal tax, 805.

ELECTION OFFICERS —

- not liable for errors in the exercise of their judgment, 787.

ELECTIONS —

- will not in general be enjoined, 765.
- voting taxes at, 333-343.

ELECTIVE FRANCHISE —

- payment of taxes may be made condition to, 359.
- action for depriving one of, by not taxing him, 359.

ELECTORS —

- submitting questions of taxation to, 333-343.

ELEVATED RAILROAD —

- structure of, is real property, 367.

EMBANKMENTS —

- to prevent inundations, special assessments for, 590, 620.
(See **LEVERS**.)

EMINENT DOMAIN —

principles governing its exercise, 113, 114.
meaning of public purposes in the law of, 113-118.
may be employed to obtain water power, 114.
distinction between exercise of, and taxation, 237.
special compensation to be made in case of, 113-118, 624.
special assessments not an exercise of the, 612, 624.
assessments for land taken for, 624.
appraisal of damages under, is judicial, 787.

EMPLOYMENTS —

taxes on privilege of following, 23, 570.
what usually taxed, 575-583.
taxation of, for regulation, 586-605.
(See BUSINESS.)

ENCOURAGEMENT —

to proceed with improvements, may operate as an estoppel, 619-621.
(See ESTOPPEL.)
of business, discriminations for purposes of,
(See PROTECTION.)

ENFORCING OFFICIAL DUTY —

customary provisions, 724.
official oath, 725.
official bond, 725.
penalties for neglect of duty, 725.
common law remedies, 726.
mandamus, general nature of, 726.
does not issue of right, 727.
case of discretionary authority, 727-730.
case of assessments, 730-734.
case of political duties, 734-740.
to compel levy of a tax, 738-740.
case of legislative duties, 740.
case of executive duties, 740.
ministerial duties in general, 743.
case of collectors and receivers of public moneys, 743.
general remarks, 743.
federal jurisdiction by *mandamus*, 744.
(See MANDAMUS.)

ENFORCING PAYMENT —

by collector,
(See COLLECTOR OF TAXES.)
by municipalities,
(See MANDAMUS; COMPULSORY LOCAL TAXATION.)

ENFORCING TAXES —

(See COLLECTION OF TAXES.)

ENGLAND —

taxation in, 26, 27, 35, 40.
sewer assessments in, 618.

ENGLAND — continued.

- land taxes in, 26, 27.
- monopolies in, 235, 598.
- the maxim in, that taxation and representation go together, 58.

ENUMERATION —

- of taxes, when exclusive of right to lay others, 829.

EQUALITY —

- taxation must aim at, 2, 140.
- impossibility of attaining, 164-171.
- may exist, though but few articles taxed, 164.
- but not, if exemptions made from the classes taxed, 171.
- exemptions admissible, 171-213.
- (See EXEMPTIONS.)
- invidious assessments inadmissible, 214.
- duplicate taxation not necessarily void, 219-226.
- when may be, 225.
- presumption against, 227-234.
- (See DUPLICATE TAXATION.)
- commuting taxes does not produce inequality, 234.
- nor diversity in rules, etc., 235.
- monopolies, inadmissible, 235.
- permanence in legislation essential to, 236.
- discriminating assessments cannot be cured, 305.
- (See CURATIVE LAWS.)
- assessment by benefits is supposed to be, 606, 637.
- apportionment essential to, 237-247.
- want of, in a tax does not render it void,
- (See EXCESSIVE ASSESSMENTS.)
- remedies where it is wanting,
- (See REMEDIES FOR EXCESSIVE AND ILLEGAL TAXATION.)

EQUALIZATION —

- boards for, and their duties, 421-423, 747-749.
- appeals from, 747-749.
- judgment on, is final if no appeal given, 747, 748, 752.
- errors in, do not invalidate, 730, 757.
- decisions on, not subject to review on *certiorari*, 758.

EQUITABLE DEMANDS —

- taxation for, 128, 688.

EQUITABLE ESTOPPEL —

- (See ESTOPPEL.)

EQUITY —

- of any particular exaction, cannot support it, unless it has the elements of taxation, 8.
- of demands against the public, legislature may require recognition of, 687, 688.
- of special assessments, 622.

EQUITY, COURT OF—

- relief in, against fraudulent assessments, 218, 784.
- cannot enjoin political action, 45, 765, 769.
- cannot abate taxes, 748.
- cannot give remedy to one who has neglected that given by statute, 749.
- will not interfere where remedy at law adequate, 760, 778.
- enjoining collection in, 760.
 - not allowed, unless the case comes under some head of equity jurisdiction, 760.
 - mischiefs flowing from, 762.
 - remedy refused where mischief serious, 762.
 - conditions on, 762, 763.
 - not generally allowed in case of personal taxes, 772-775.
 - allowed where injury irreparable, 761, 766, 771, 773.
- will not enjoin preliminary action in general, 764, 769.
 - nor merely excessive assessments, 775.
 - nor merely irregular taxation, 775-778, 785.
 - what are not mere irregularities, 776-778.
- may enjoin when discriminations are made, 775.
- will not enjoin a double tax unless once paid, 777.
- whether personal tax in respect to lands can be enjoined, 778.
- may relieve from cloud upon title, 778-783.
 - what is such, 779.
 - whether it is cloud where the proceedings are void on their face, 780.
- may quiet title after sale, 783.
- not the proper tribunal for trial of land titles generally, 784.
- relief by, in respect to possession, 783, 784.
- joint suit by several persons taxed, 769.
 - question must be same as to all, 769.
 - and be capable of being presented without confusion, 770.
- cannot quiet title as against party in possession, 783.
- saving of expense not a reason for complainants' joining where there is no other ground of equitable relief, 771.
- bills of interpleader in, 786.
- tax payers' bills in, to enjoin illegal corporate action, 765.
 - action *ultra vires* usually a public wrong, 765.
 - relief on ground of irreparable injury, 765.
- delay in proceedings may bar right in, 768, 820.
- cannot compel the levy of taxes, 44.
- will not enjoin an assessment where a party seeing the work go on has made no objections, 819-821.
- redemption cannot be had in, 534-536.
 - except in cases of accident or fraud, 540, 541.
- may enjoin threatened misappropriations, 764-768.
 - or incurring of illegal municipal debts, 764-766.
- will enjoin fraudulent assessments, 784, 785.
 - or those made excessive by erroneous rules, 785.
 - or where party wrongfully deprived of appeal, 785.
 - or when wrongful conduct of officers is injurious, 785.

EQUITY, COURT OF—continued.

- will enjoin fraudulent assessments when tax has been compromised, 785.
- or when municipality is collecting a tax of its vendee contrary to its representations, 785.
- will impose equitable condition to its remedies, 762, 763, 785.
- suit in, to protect value of securities, 772.

EQUIVALENT—

- benefits are, for special assessments, 606-608.
- for taxes, what is the, 19.
- when the eminent domain is employed, 118, 287.

ERRORS—

- in description of land, effect of, 404-408.
 - what may be rejected, 404.
- in assessment and in private conveyance, effect of, 408-408.
- in records, etc., amendment of,
 - (See AMENDMENTS.)
- in valuations, not to be corrected by the courts.
 - (See JUDICIARY.)
- correction of, by statute,
 - (See CURATIVE LAWS.)
- in tax proceedings, must usually be corrected by the statutory tribunal, 748, 750.
- cannot usually be corrected in equity, 748, 760, 775.
 - (See EQUITY, COURT OF; INJUNCTION.)
- of assessors, do not render them personally liable, 786-792.
 - (See ASSESSORS.)
- deprivation of a legal right, not a mere error, 789, 790.
- distinction between, and want of jurisdiction,
 - (See JURISDICTION.)
- resisting collection in case of, 796.
- what, on the part of the collector, will render him liable, 798, 802.
- what, in collector's warrant, renders it not fair on its face, 800.
- clerical, may be overlooked in any case, 814, 800.
- in tax deed, correction of in equity, 514.
- waiver of, by action of the party,
 - (See ESTOPPEL.)
- effect of, in general,
 - (See IRREGULARITIES.)

ERRORS OF JUDGMENT—

- not to be corrected by *mandamus*,
 - (See MANDAMUS.)
- in assessments, cannot be reviewed by the courts, 748.
- cannot be reviewed on *certiorari*,
 - (See CERTIORARI.)
- do not render an officer personally liable,
 - (See JUDICIAL OFFICER.)
- in legislative action, not subject to judicial correction,
 - (See LEGISLATIVE ACTION.)

ERRORS OF LAW —

- what may be corrected by *mandamus*,
(See MANDAMUS.)
- extending to jurisdiction, may be reviewed on *certiorari*,
(See CERTIORARI.)
- what will render proceedings void,
(See JURISDICTION; NULLITY.)

ERRORS IN POLITICAL ACTION —

- can not be corrected on *certiorari*, 755.
- can not be corrected on *mandamus*, 740.
nor on bill in equity, 43-47.
(See VOTING THE TAX.)

ESTATE —

- the whole, in lands, may be sold for taxes, 445.
and for special assessments, 673.
- in common, taxation of,
(See TENANTS IN COMMON.)
- redemption of separate, 539, 540.
- in dower, redemption of, 539.
- set apart as a homestead, 538.
(See HOMESTEAD.)
- wife's separate, taxation of, 396.

ESTATES —

- recovery of, at law,
(See EJECTMENT.)
- quieting title to,
(See QUIETING TITLE.)
- removal of cloud upon title to,
(See CLOUD UPON TITLE.)
- adverse possession, in case of,
(See ADVERSE POSSESSION.)

ESTATES OF DECEASED PERSONS —

- taxation of, 376, 396, 397, 435.

ESTIMATE —

- for purposes of general taxation,
(See VALUATION.)
- for the raising of taxes,
(See POLITICAL ACTION.)
- for local improvements, effect of excess in, 665.
- departure by assessors from statutory method of, 756.

ESTOPPEL —

- against intruders who have collected taxes, 256.
- against collectors *de facto*, 285, 289, 705.
- against one who has collected a void tax, 705.
- against the state in case of illegal organization of municipal corporations, 768.
- in case of tax payer neglecting to bring in list, 300.

ESTOPPEL — continued.

- of tax payer by giving in list of property not taxable, 360.
- state may be bound by, in case of officer *de facto*, 253-256.
- of tax payer by encouraging levy of a tax, 819.
 - or taking part in tax payers' meeting, 820.
 - or acting as supervisor in imposing a tax, 820.
- by failure to give notice of objections, 820, 821.
- by failure to take objections on hearing, 820.
- city not bound by, in consequence of taxing land covered by a street, 821.
- doctrine of, to be applied with caution, 820.
 - does not apply to one who insists on strict performance of public contract, 820.
 - nor to one who merely knows work is being done under unconstitutional law, 820.
 - nor because one has previously paid a similar levy, 820.
 - nor to one who receives a surplus on sale of his property for void tax, 821.
- waiver of one tenant in common does not estop another, 821.
- county cannot dispute title of one it has taxed for land, 821.
 - or question regularity of vote for a public work after the work is done, 821.
- not estopped from taxing land it disputes title to, 821.

EVADING TAXATION —

- shifts for, 415-417.

EVIDENCE —

- legislative control over rules of, 297.
 - does not authorize rules which preclude a party from showing his rights, 297-299.
- tax deed cannot be made conclusive, 521.
- must be put in by tax purchaser to show regularity of tax proceedings, 472.
 - strictness required in these cases, 472-477.
 - how he may be aided by presumptions, 477.
 - how far presumptions may depend on delays, 478.
 - how they may be affected by possession, 478.
 - presumption cannot supply want of record, 480, 481.
- secondary, where record is lost, 340, 481.
- of tax votes, must be of record, 339.
 - can only be shown by record, 340.
- of tax sale, by certificate, 511, 512.
- of patent title, 550.
- by tax deed, of the proceedings to a sale, 297-299, 517-522.
 - deed not evidence of the previous steps, 517.
 - statutes changing this rule, 518-522.
 - some statutes make it evidence of regularity of sale, 519.
 - necessity in such case to prove prior proceedings, 519.
 - other statutes make the deed evidence of title, 519.
 - cannot make deed conclusive, 297-299, 521.
 - do not apply to deeds on sales for assessments, 523.

EVIDENCE — continued.

- against the collector, by the accounting of the auditor, 717, 718.
- of giving notice of meetings of towns, etc., 836.
- on *certiorari*, is only gone into to determine jurisdiction, 759.
 - not to review case on the merits, 759.
 - extrinsic, cannot be received on, 759.
- necessity for to show defect in tax title, will render deed a cloud upon title, 780.
- for the purposes of amendments,
 - (See **AMENDMENTS**.)
- action by one as officer, evidence of official character,
 - (See **OFFICERS DE FACTO**.)
- official returns as, 260-262, 454.
 - are generally conclusive, 261.
 - except in action against the officer, 261.
 - against collector when proceedings are summary, 723.

EXACTIONS —

- equity of, will not support them as taxes, 3.

EXCESSIVE ASSESSMENTS —

- abatement of taxes in cases of, 88.
 - (See **ABATEMENT**.)
- reviews and appeals in cases of, 747.
- remedy must generally be the statutory remedy, 747-751.
- refunding tax in cases of, 753.
- jury trial in cases of, 756.
- cannot be corrected on *certiorari*, 757-759.
- assessors not personally liable for, 786-794.
- collector not liable in cases of, 797-802.
- equity cannot correct in general, 769.
 - may correct in cases of fraud, 784, 785.
 - conditions may be imposed in such cases, 763, 763, 785.

EXCESSIVE DUTIES —

- tend to defeat the purpose of their levy, 83.
- illegal, may be recovered back, 803.

EXCESSIVE MOISTURE —

- taxation for drawing off,
 - (See **DRAINS**.)

EXCESSIVE SALE —

- sale for taxes must be of only what is necessary, 496.
- sale for more, is void, 496.
- power to sell, is exhausted when tax is paid, 496.
- illegal addition of percentage, or costs, may render sale excessive, 497.

EXCESSIVE TAXES —

- tax in excess of authority, spread upon the roll, renders it void, 429, 497.
- one excessive tax does not defeat others which are severable, 429.
- what will render tax excessive, 429, 497.
- excessive in individual cases does not avoid roll generally, 430.

EXCESSIVE TAXES — continued.

- made so by fraudulent assessment, 218, 784.
- or by unlawful items of expense, 497.
- will only be enjoined on payment of what is legal, 763.
- in suit for, only what was illegal can be recovered back, 803, 816.
- one excessive tax does not avoid levy if aggregate not too large, 289.
- construction of statute as to, 293.

EXCISE TAXES —

- what are, 4.
- on business, 570-584.
(See BUSINESS.)
- on corporations, 379-383.
(See CORPORATIONS; FRANCHISES.)

EXCLUSIVE PRIVILEGES —

- grant of, forbidden, 175.

EXECUTION —

- tax warrant is in the nature of,
(See COLLECTOR'S WARRANT.)
- process against collector in nature of,
(See COLLECTOR OF TAXES.)

EXECUTION OF POWER —

- must be strict in tax cases, 350.
- of collector, must be strict, 442, 455.
- to sell, must be exact, 453-477.

EXECUTIVE, THE —

- cannot levy taxes, 42, 43.
- not subject to *mandamus*, 740.

EXECUTIVE AND MINISTERIAL OFFICERS —

- must keep within limits of their authority, 43.
- cannot refund taxes, 747, 753.
- compelling performance of duty by,
(See MANDAMUS.)
- protection of, by process, 797-801.
- protection of, by certificate on which they must act, 796.

EXECUTOR —

- taxation of, for estate property, 376, 377, 396.
- suit against, for tax on estate, 435.

EXEMPT PROPERTY —

- inserted on roll, assessors may be compelled to strike off, 732, 822.
- taxes collected from, may be required to be refunded, 732.
- taxes on, auditor-general may be required to reject, 741.
- abatement of taxes upon, 747.
- refunding taxes upon, 753.
- including in assessment, will not render assessor personally liable, 791.
- taxation of, not a mere irregularity, 777.
(See EXEMPTION.)

EXEMPTION —

- of agencies of federal government from state taxation, 82-90, 380, 383.
- of agencies of state government from federal taxation, 82-90.
- of property, by contract, 66-82.
- by charters of incorporation, 71, 72.
- implied, in case of all public property, 172-174.
- of persons in a class taxed, produces inequality, 170.
- customary, of household furniture, tools of trade, etc., 201.
- from motives of charity, 202.
- of church property, school property, etc., 202.
- constitutional provisions bearing on right to make, 175-201.
- general right of the state to make, 171, 200.
- is involved in the power to apportion, 200.
- general right of the state to recall, 69, 204.
- intent to make must be clear, 184, 204-207.
- must be strictly construed, 205.
- from taxes, will not apply to special assessments, 207.
- instances of special cases, 208, 209.
- of corporation, which employs its means for other purposes than those for which its powers are given, 210, 211, 213.
- of corporation, not transferable, 212.
- of personalty from highway tax, 183, 245.
- constitutional restraints upon, 177, 179, 180, 183, 188, 191, 195, 197, 198.
- principles which should support, 169-172.
- invidious, not admissible, 169-171, 214-216.
- not to be made without legislative authority, 201, 202.
- power to make, is a discretionary power, 171.
- construction of certain exemptions, 205-212.
- unlawful, may render roll void, 214, 215.
- unintentional, will not avoid the levy, 216, 217.
- decision upon right to, a judicial act, 787.
- party entitled to, may replevy property seized, 818.
- state may make, without regard to municipal power to tax, 246.

(See EXEMPT PROPERTY.)

EXEMPTION FROM RESPONSIBILITY —

- officers performing judicial functions have, 786.
- (See JUDICIAL OFFICER.)
- of assessors, 786-795.

EXHAUSTING AUTHORITY —

- to tax, sometimes by single exercise, 349, 350.
- abortive attempt is not, 350, 428.
- to collect taxes, by issue of one process, 428.
- by boards of review, what is not, 419.

EXHIBITIONS AND SHOWS —

- taxation of, 581, 600.
- (See AMUSEMENTS.)

EXONERATION —

- from taxation, cannot be compelled by *mandamus*, 781.
- (See ABATEMENT.)

EX PARTE PROCEEDINGS —

- tax sales are, 471.
- necessity for strict compliance with law in such cases, 471-2.

EXPENSE —

- saving of, by joint suit in equity, 769-771.
- not of itself a reason for equitable jurisdiction, 771.
- of local works, assessment of on parties benefited, 606, 661-684.
(See ASSESSMENTS, LOCAL.)

EXPENSES OF GOVERNMENT —

- general, taxation for, 110-118.
(See PURPOSES OF TAXATION.)

EXPORTS —

- taxation of, by the states, limited to inspection fees, 83.
- not to be taxed by the United States, 90.

EXTENDING THE TAX —

- fixes liability of person and property, 424.

EXTENSION OF TIME —

- to collector, whether discharges sureties, 713.

EXTRATERRITORIAL TAXATION —

- state has no power to levy, 55, 159-163.
 - case of contracts made in state and owned abroad, 55.
 - case of bonds on a road lying in two states, 231.
- in case of municipal corporations, 60, 61.

EXTRINSIC EVIDENCE —

- cannot be received on *certiorari*, 759.

F.**FACT, ERRORS OF —**

- how corrected in records, etc.,
(See AMENDMENTS.)
- not corrected on *certiorari*,
(See CERTIORARI.)
- personal liability for,
(See JUDICIAL OFFICER.)
- jurisdiction dependent on, 793.

FACULTY —

- assessment on the,
(See FRANCHISES; PRIVILEGES.)

FAILURE OF BENEFITS —

- will not defeat local assessment, 608.

FAIR ON ITS FACE —

- certificate that is, protects officer who is to act upon it, 790, 795.
- process that is, will protect ministerial officer, 800.
- when a process is not, 800.

FAITH, PUBLIC—

municipal bodies may be compelled to tax for purposes of keeping, 685-708.

(See **MANDAMUS**; **REPUDIATION**.)

FALSE DESCRIPTION—

of land in assessment, whether may be rejected, 404.

(See **DESCRIPTION**.)

FALSE RETURNS—

liability of officer for, 261.

FARES ON RAILROADS—

(See **GROSS RECEIPTS**; **TOLLS**.)

FARMING THE REVENUE—

what is, 434.

FAVORITISM—

in exemptions, 153.

(See **INVIDIOUS EXEMPTIONS**.)

FEDERAL COURTS—

(See **COURTS OF THE UNITED STATES**.)

FEDERAL LICENSES—

grant and force of, 605.

do not displace state regulations, 596, 605.

FEDERAL TAXATION—

(See **UNITED STATES**.)

FEE SIMPLE—

is usually valued, instead of separate estates, 410.

separate payments on separate interests, 411.

is usually sold in selling lands for taxes, 410, 493.

FEEES—

for licenses,

(See **LICENSE FEES**.)

for inspection,

(See **INSPECTION**.)

FEMALES—

taxability of, 59.

(See **DOWRESS**; **MARRIED WOMAN**.)

FENCES—

taxation for, 116, 621.

FERRY BOATS—

taxation of, 93.

FERRY COMPANIES—

taxation of, 205.

FICTIONS OF LAW—

are not to work injustice, 566-7.

the doctrine applied to case of adverse possession, 567.

application of, where two acts done at same time, 813.

FIGURES IN VALUATION —

without dollar mark,
(See DOLLAR MARK.)

FILING OF ASSESSMENT —

requirement of, must be complied with, 866.

FINALITY —

of judgment as to facts covered by it,
(See JUDGMENT.)
of assessment as to value of property,
(See ASSESSMENT.)
of legislative action as to purposes of taxation,
(See PUBLIC PURPOSES.)

FINES AND PENALTIES —

(See PENALTIES.)

FIRE ENGINE —

taxation by town for, 135.

FIRE, PREVENTION OF —

taxation for, 134, 138.

FISCAL AGENT —

of United States, not taxable by states, 83.

FLORIDA —

taxation of property in, must be by value, 628.

FORCE —

taxes collected by coercion, may be recovered back if illegal, 814.
what constitutes, 814.
(See VOLUNTARY PAYMENTS.)

FORCED CONTRIBUTIONS —

distinguished from taxes, 2.
taxes levied without apportionment are, 237.
tax levies where the statutory provisions are disregarded are, 853.

FORECLOSURE OF REDEMPTION —

statutes for, must be strictly conformed to, 536-538.
judicial proceedings for a, 545.

FOREIGN BONDHOLDER —

not taxable in the state on his bonds, 21.

FOREIGN CORPORATIONS —

doing business in state must submit to its conditions of taxation, 57.
are not citizens, 65.
separate classification of for taxation, 181, 197, 214, 221, 224, 228, 887.
owning a road in two states, taxation of, 230.

FOREIGN COUNTRIES —

ambassadors of, not taxable, 19.
vessels, etc., not taxable, 19.

FOREIGN RESIDENTS —

(See NON-RESIDENTS.)

FOREIGN STOCKHOLDERS —

not taxable on corporate dividends, 70.

FORFEITURES —

(See **PENALTIES.**)

FORFEITURES OF PROPERTY —

provisions by law for, in case of delinquent taxes, 461-465.

question of legislative competency to make, 461.

intent to create a forfeiture must be clear, 462, 471.

if forfeiture admissible, questions of compliance with the law would be open afterwards, 465.

FORMAL DEFECTS —

(See **AMENDMENTS.**)

FORMS —

prescribed by statute, necessity for following, 432.

in case of collector's return, 454.

in the authentication of the assessment, 412.

in the warrant for collection,

(See **COLLECTOR'S WARRANT.**)

in case of tax deeds, 514, 530.

when intended for benefit of tax payers, 283.

FORTIFYING TITLE —

right of, by buying at tax sale, 506-509.

FOURTEENTH AMENDMENT —

to federal constitution, protection of, 50-53.

FRANCHISE, ELECTIVE —

(See **ELECTIVE FRANCHISE.**)

FRANCHISES —

may be taxed as well as persons, 22, 34, 82, 379-383.

in what cases taxation is just and in what not, 84.

granted by congress for federal purposes, not taxable by states, 84.

what granted by congress are taxable by states, 85, 89.

provisions in charters regarding taxation of, 71, 72.

value of, to be considered in assessing shares, 227.

valuation of, for taxation, 383.

may be taxed though the property is taxed also, 223, 226, 233.

application in case of, of the presumption against duplicate taxation, 223-234.

when exemption of property will exempt franchise, 233.

may be taxed though capital invested in government securities, 84.

exemptions of, from taxation, how they affect special assessments, 208.

consolidation of, effect on taxation, 212.

exemption of, does not exempt property, 232.

taxation that would annihilate may be enjoined in equity, 773.

(See **BANKS; NATIONAL BANKS; RAILROAD COMPANIES.**)

FRAUDS —

in assessment, may justify an injunction, 219, 784, 785.

on the federal revenue, 457.

FRAUDS—continued.

- in tax sales, will avoid them, 489-491.
- in redemption, may be relieved against, 540, 541.
- of contractor, no defense to assessment, 671-2.
- conditions may be imposed when tax is enjoined for, 763, 785.
- do not necessarily exist where tax is illegal, 774.
- relief against, where they deprive parties of substantial rights, 784-5.

FRAUD, CONSTRUCTIVE—

- in tax sales, renders them void, 490, 492, 500.
- instances, of purchase by the officer himself, 492.
- of purchase by tenant who should have paid the tax, 500, 501.
- of purchase by the mortgagor, 501.
- by tenant in common, 502.
- by owner of life estate, 502.
- by one whose land was grouped with that of another, 502.
- by agent buying the principal's land, 502.
- by vendee under executory contract, 502, 503.
- by any one whose duty it was to pay, 502.
- by one who has conveyed with covenant, 505.
- case of the mortgagee, 503.
- case of an adverse claimant, 506.

FRAUDULENT COMBINATIONS—

- at tax sales, render them void, 490.
- one not aware of them, not affected thereby, 491.

FRAUDULENT CONTRACTS—

- those in fraud of the revenue are, 438-4.

FRAUDULENT EVASIONS—

- of taxes, cases of, 415-417.

FREE BRIDGE—

- taxation to establish, 130.

FREE SCHOOLS—

- taxation for, 120, 348.
- (See EDUCATION.)

FREEDOM, PRINCIPLES OF—

- (See CONSTITUTIONAL PRINCIPLES.)

FREIGHT—

- taxes on, 96, 97.
- on the carriers of, 576.

FRONTAGE—

- assessment by the, for local improvements, 642, 644-648.
- (See ASSESSMENTS, LOCAL.)

FUND, SPECIAL—

- payment for local improvement from, 668-670.

FUNDAMENTAL LAW—

- (See CONSTITUTIONAL PRINCIPLES.)

G.

GAMES —

(See AMUSEMENTS.)

GAMING IMPLEMENTS —

taxation of, for the purpose of prohibition, 13.

impositions on keepers of, under police power, 593.

GAS LIGHT —

special assessments to provide, 167, 621.

GAS PIPES —

laid in streets, are taxable as machinery, 368.

GAS WORKS —

taxation for, 184, 621.

GENERAL EXEMPTIONS —

from taxation, do not apply to local assessments, 207.

right to recall, 204.

(See EXEMPTIONS.)

GENERAL LAW —

for municipal taxation, 276, 277.

modifying local powers by, 294.

GENERAL POWERS —

to tax, are strictly construed as against municipalities, 276-279.

what they cover in case of towns, 278.

will not authorize special assessments, 609.

to sell lands, construed strictly, 678.

to levy fees under police power, will not justify taxes for revenue, 586, 597.

construction of, in general,

(See CONSTRUCTION OF TAX LAWS.)

GENEROSITY —

not legally demandable of tax payer, 215.

GEORGIA —

provisions for uniform taxation in, 179.

are not violated by taxes on business, 179.

provisions for *ad valorem* taxation, 179.

GIFTS —

taxes cannot be laid for making, 115, 118, 122, 126.

the rule applied to manufacturing corporations, 115, 126.

in charity, 124.

as pensions, may be made,

(See PENSIONS.)

as bounties for military service, 111, 136.

(See BOUNTIES.)

GOLD —

states may collect taxes in, 14.

GOOD FAITH —

action in, by members of board of equalization, gives no right of action, 752.

absence of, in assessors, does not render them personally liable, 793.

GOODS —

taxation of,

(See **PERSONAL PROPERTY**.)

levy of distress upon, for satisfaction of taxes, 438.

must be the proper warrant for, 438.

not liable to constitutional objections, 438.

case of levy on property of one not taxed, 438-9.

replevin in such case, 440.

demand to be first made, 441.

personal notification to party concerned, 442.

notice of sale, etc., 442.

authority in making, must be strictly pursued, 442.

what will render officer trespasser *ab initio*, 442, 802.

municipal corporations cannot authorize without statutory authority, 438.

sale of, not usually enjoined, 772.

levy on, is presumptive satisfaction of tax, 781.

when collector liable for, 797-803.

exhausting before land is sold, 554, 777, 781.

payment to relieve from seizure, is payment under duress, 810.

so is payment after threat of seizure, 810.

exhibition of process is such threat, 810.

sale of, for illegal tax, gives right of action, 815.

GOVERNMENT —

taxes, the property of, 1.

taxing power essential to, 4, 49.

maxims which should govern in taxing, 8-12.

other purposes than revenue in taxing, 12, 13.

may collect taxes in kind, 13.

is to give protection for taxation, 19-25.

customary taxes by, 25-40.

general right of, to tax, 39.

division of powers of, 41.

checks and balances of, 42.

representative responsibility in, 242.

(See **REPRESENTATIVES**.)

agencies of, are exempt from taxation, 82.

property of, not within the intent of tax laws, 172-3.

public domain, not taxable, 87.

general purposes for which it may lay taxes, 103-139.

(See **PUBLIC PURPOSES**.)

United States, taxation by,

(See **UNITED STATES**.)

municipal, taxation by,

(See **MUNICIPAL CORPORATIONS**.)

GOVERNMENT — continued.

contracts by, for exemptions,

(See **CONTRACTS**; **EXEMPTIONS**.)

principles which should govern its taxation,

(See **PRINCIPLES OF TAXATION**.)

can only act through officers, 248.

construction of revenue acts of, 263-296.

may tax all kinds of business, 570.

may regulate rights and occupations, 586-605.

has general control of its municipalities, 678, 693.

powers of, are liable to abuse, 280.

any, is better than none, 280.

political remedies for wrongs in, 823.

privilege of choosing representatives in, is insignificant in value as compared with other rights, 59.

powers of, are held in trust, 774.

GOVERNMENT OF THE STATES —

(See **LEGISLATIVE POWER**; **STATES**.)

GOVERNMENT OF THE UNITED STATES —

(See **UNITED STATES**.)

GOVERNMENT STOCKS —

(See **PUBLIC SECURITIES**.)

GOVERNOR OF STATE —

whether subject to *mandamus*, 740.

GRADE OF STREETS —

assessments for, 613.

(See **ASSESSMENTS**, **LOCAL**.)

GRADUATING LICENSE FEES —

in reference to the size of town, 243.

as between classes of lawyers, 243.

in case of entertainments, 186.

in case of liquor dealers, 602.

general purposes of, 592-596.

right to make, when no restrictions are imposed, 597, 598.

in case of merchant's sales, 243.

GRANT —

of lands for taxes,

(See **TAX DEED**.)

of the power to tax,

(See **POWER TO TAX**.)

of franchises,

(See **FRANCHISES**.)

of taxes by the people's representatives,

(See **REPRESENTATIVES**.)

of taxes by the people,

(See **VOTING THE TAX**.)

of exemptions,

(See **EXEMPTIONS**.)

GRANT — continued.

- of power of local taxation, 63, 276.
- of power to lay local assessments, must be special, 609.
- of privileges,
(See PRIVILEGES.)
- of the power to tax business, 574.
- of power to make exemptions, is not compulsory, 200, 201.

GREAT BRITAIN —

- early taxation in, 35.
- excise fees in, 40.
- land tax of, 26, 27.
- hearth and window taxes in, 27.

GRIEVANCE, PRIVATE —

- remedies for, at the common law,
(See COMMON LAW REMEDIES.)
- remedies for, in general,
(See REMEDIES FOR EXCESSIVE AND ILLEGAL TAXATION.)
- joinder of complaints for,
(See JOINT COMPLAINTS.)
- must exist to authorize private party to apply for *mandamus*, 736, 741.
- does not exist unless one is injured, 216.

GRIEVANCE, PUBLIC —

- what may be remedied by *mandamus*, 733, 742-3.
- in case of threatened illegal corporate action, 764-772.
- where municipal bodies do not meet their obligations, 685, 738-9.

GROSS RECEIPTS —

- taxation of, 8, 96-98, 189, 211, 330, 331, 332.

GROUPING OF LANDS —

- not admissible, where statute requires them to be separately assessed, 400.
- is not a mere irregularity, 400.
- reasons for not allowing, 400.
- statute against, is mandatory, 401.
- what to be considered separate parcels, 402.
- in valuation, not admissible, 409.
what amounts to a, 409.
- in making sale, renders sale void, 493-495.
reasons for the rule, 494.
when several lots may be treated as one parcel, 494.
- in tax conveyance, 495.

GUARANTY —

- none by municipalities, of correct action on the part of their officers, 818.
(See CAVEAT EMPTOR.)

GUARANTIES, CONSTITUTIONAL —

- (See CONSTITUTIONAL PRINCIPLES.)

GUARDIAN —

- tax on, for the minor's estate, 877.

H.

HACKMEN —

taxation of, 582, 602.

HARBORS —

taxation for, 182.

special taxation of municipalities for, 690, 693.

HAWKERS —

licensing, 602.

taxation of, 95-97, 579, 602.

HEALING ACTS —

what admissible, 297.

liability of, to abuse, 301.

retroactive, forbidden in some states, 301.

may be special, 300.

must not be invidious, 301.

cannot cure want of jurisdiction, 302.

may heal irregularities, 302.

cannot make good what could not originally have been authorized, 306.

instances of defects not cured by, 303-305.

unlawful discriminations cannot be made good, 305.

sale of wrong land cannot be validated, 305.

or of land after the tax is paid, 305.

general principle as to what may be made good, 305-6.

may be prospective, 308, 309.

may apply to pending suits, 307.

not to cases which have passed into judgment, 307.

HEALTH —

taxation for protection of, 137.

draining lands for, 616-619, 654, 655.

whether health must be a purpose of drainage assessments, 591.

board of, is a state functionary, 684.

compulsory taxation for, 684.

HEARING —

right to, not to be taken away retrospectively, 306.

is of right in tax cases, 51, 361-366.

alterations in assessments without opportunity for, are illegal, 361, 410-421, 778.

notice of, must be given as statute provides,

(See NOTICE.)

in review of assessment, parties dissatisfied may have, 747.

if not applied for, all remedy is usually lost, 747.

decision upon, is final, 748.

on *certiorari*, only extends to jurisdiction, 756-758.

(See CERTIORARI.)

when may be had in equity,

(See EQUITY.)

general right to,

(See LAW OF THE LAND.)

HEARTHES —

taxation of houses by, 27.

HEIRS —

assessment of estate to, 396.

(See ESTATES OF DECEASED PERSONS.)

HIGH SCHOOLS —

taxation for,

(See EDUCATION.)

exemption of buildings for,

(See EXEMPTIONS.)

HIGH WATERS —

protection against,

(See LEVEES.)

HIGHEST BIDDER —

right of, to lands sold for taxes, 498.

HIGHWAYS —

duty of government to provide for, 130.

chartering corporations to make, 131.

principles applicable to, whether they apply to railroads, 131-134.

cannot tax to make, unless the land has been appropriated, 133.

methods of providing for construction of, 144-152.

districts for taxation for, 176, 177, 179.

personalty not to be exempted in taxing for, 133.

exceptional burdens for construction of, 145.

special assessments for, 145, 610.

are state works, 144.

are constructed by localities, 144.

labor contributions for, 14, 26, 180, 192, 232, 537, 611.

requirement of, in the nature of a police regulation, 537.

states may compel municipalities to construct, 632.

whether this principle can apply to a road exceptionally expensive,
694-698.

apportionment of cost of, between counties, etc., 632.

special districts for, 153-159.

(See BRIDGES; FREE BRIDGE; PLANKROADS; STREETS; TURNPIKES.)

HIGHWAY LABOR —

requirement of, 14, 26, 192.

is in nature of police regulation, 537.

right to perform, not to be taken away by officer, 777.

decision on exemption from, is a judicial act, 737.

officers not liable for error in, 737.

commutation for, 15, 180, 234.

recovery for, when levy illegal, 806.

HOMESTEAD —

exemption of, from taxation, 201.

redemption of, from sales, 538.

HORSES —

taxation in respect of, 29.

HOSPITALS —

taxation for, 125.

HOTEL PROPERTY —

exemption of, 215.

taxation of, 224.

HOUSEHOLD GOODS —

exemption of, 201.

HOUSES —

taxes on, measured by rents, 27.

by hearths, 27.

by windows, 27.

(See BETTERMENTS; IMPROVEMENTS.)

HUSBAND AND WIFE —

(See HOMESTEAD; MARRIED WOMAN.)

I.**IDENTIFICATION —**

of land in tax proceedings,

(See DESCRIPTION.)

IGNORANCE —

of one's rights, in paying an illegal tax, no ground for recovery back,
809.

ruling in Kentucky, 810.

ILLEGAL ACTION —

of officers, presumption that it will not be persevered in, 780.

remedies for,

(See REMEDIES FOR EXCESSIVE AND ILLEGAL TAXATION.)

ILLEGAL CONTRACTS —

those in fraud of the revenue are, 433.

will not be enforced, 434.

whether the rule applies to contracts in fraud of foreign revenue laws,
434.

where license is required and not taken out, 572.

ILLEGAL OCCUPATIONS —

taxation of, under internal revenue law, 598.

may be taxed by the state, 596-598.

ILLEGAL TAXES —

collector may refuse to collect, 709.

whether he should raise question of illegality, 709.

if collected must be paid over, 705.

cannot be validated retrospectively by the legislature, 302, 552-3.

those laid for private purposes are, 55.

(See PURPOSES OF TAXATION.)

ILLEGAL TAXES—continued.

- those are, which violate contracts with the state, 66-78.
 - or impair the obligation of contracts, 80.
 - or are laid on agencies of government, 82-89.
 - or abridge privileges of citizens, 99.
 - or which are laid in disregard of constitutional provisions, 101.
 - or which the states lay on foreign or interstate commerce, 90-99.
 - or are violative of treaties, 100.
 - or which are laid without apportionment, 243.
 - or otherwise than by official action, 248.
 - or by local boards, etc., without legislative authority, 277.
 - or in disregard of mandatory provisions of statute, 285-287.
 - or which are in excess of statutory authority, 346-349.
- may be abated, 747.
- may be contested without applying for abatement, 796.
- cases of errors which constitute, 758, 777.
- enjoining collection of, 760-778.
 - not usually permitted on grounds of irregularity alone, 772-777.
 - combined with legal, will only be enjoined on the legal being paid, 763.
 - will be enjoined when they constitute cloud on title, 773.
 - (See EQUITY.)
- protection of collector in enforcing, 797-800.
- liability of collector of the customs for enforcing, 794, 804.
- are not necessarily or usually fraudulent, 784.
- error in the assessment will not of itself make, 775.
- liability of town, etc., for, after paid over, 804.
 - only exists when the tax is a nullity, 805.
 - does not exist if tax voluntarily paid, 809.
 - what are voluntary payments, 809.
 - what compulsory, 814.
 - meaning of voluntary, 811.
 - recovery on, is limited to money paid, 815.
 - recovery where tax only in part illegal, 816.
- liability of assessors for levying, 815.
 - of collector for enforcing, 815.
- remedy by replevin in case of, 818.
- estoppel of party taxed, by his conduct, in some cases, 819.
- remedy by *mandamus*, 822.
 - or by prohibition, 822.
- the political remedy sometimes the only one, 823.

ILLEGALITIES—

- correction of, by *certiorari*, 753-759.
 - (See CERTIORARI.)
- in municipal organization, may be cured by delay, 754, 763.
- enjoining collection in case of, 760-785.
 - (See INJUNCTION.)
- protection in case of, where officer is to act upon certificate, 554, 557.
 - or upon process which is fair on its face, 795.

ILLINOIS —

- constitutional provisions for equal taxation in, 180, 628.
- taxation of property must be by value, 626.
- constitutional provisions affecting special assessments, 628.
- special fund for assessments in, 668.
- levies in, must be by corporate authorities, 654, 692.

IMMIGRANTS —

- tax in respect of, is a tax on commerce, 97.

IMMUNITIES —

- of citizens of the several states, not to be abridged in taxation, 98.

IMPAIRING CONTRACTS —

- (See **CONTRACTS**.)

IMPARTIAL TRIBUNAL —

- right of every party to a hearing before, 361, 746.
- (See **HEARING**; **LAW OF THE LAND**.)

IMPLICATION —

- repeal by, 294.

IMPLICATIONS —

- are against contract not to tax, 69.
- against duplicate taxation, 227.
- (See **DUPLICATE TAXATION**.)
- against exemptions from taxation, 204, 205.
- (See **EXEMPTIONS**.)
- in favor of correctness of legislative apportionment, 242.
- in favor of legislative action as to purposes of taxation, 103.

IMPLIED EXEMPTIONS —

- from taxation, what are, 172.

IMPOLITIC TAXES --

- imposition of, 575.

IMPORTED PACKAGES —

- (See **IMPORTERS**.)

IMPORTERS —

- tax on, is a tax on commerce, 90, 91.
- tax by states on goods imported, when admissible, 98.

IMPORTS —

- taxation of, a customary resource of government, 83.
- not to be taxed by the states, 90.
- what is a tax upon, 90, 91, 94.

IMPOSITIONS —

- special exemptions from, construed, 205-213.
- exemption from "civil imposition," construed, 206, 209.

IMPOSTS —

- what are, 3.
- discrimination in, 110.
- unlawful, may be recovered back, 794-804.
- unless paid without protest, 804.
- exemption from "tax or impost," 208, 209.

IMPRISONMENT —

- for taxes may be authorized, 17, 18.
- this not imprisonment for debt, 18.
- not now generally allowed, 437.
- may be provided for in case of license fees, 437.

IMPROVEMENT —

- of public waters, tolls for use of, 94.
- of wet lands, special assessments for, 591.
- must have reference to the public interest, 591.
- the public health not the sole consideration, 591.
- (See DRAINS.)

IMPROVEMENTS —

- discrimination in favor of, 245.
- (See BETTERMENTS.)

INADEQUACY OF PRICE —

- will not defeat tax sale, 499.
- is usually found to exist, 471.

INADEQUATE RELIEF —

- legal remedies afford, in some cases, 760.
- remedy in equity in such cases, 760-764.
- in case of cloud upon title, 778.
- in case of one in possession whose land another claims, 733.
- in case of threatened irreparable injury, 766, 773.
- (See EQUITY.)

INCIDENTAL BENEFITS —

- will not support taxation, 108, 123.
- (See MANUFACTURING ENTERPRISES.)
- will not support special assessments, 650, 651.
- (See BENEFITS.)
- to those not taxed, will constitute no objection to a tax, 163.

INCIDENTAL INJURIES —

- from exercise of lawful powers, cannot entitle a citizen to compensation, 127.
- compensation sometimes made in case of, 127.

INCOME —

- taxes on, 8, 28, 179.
- meaning of, 221.
- difficulty in adequate enforcement of tax on, 23.
- reasons which render it unequal, 28.
- taxes should be in proportion to, 24.
- exemption of, from taxation, how construed, 231.
- of a corporation may be taxed, though its dividends are exempt, 233.
- of corporation on, when stock exempt, 233.
- franchise taxes measured by, 382.

INCONVENIENCES —

- to result from setting aside a tax levy, may be reason for refusing a *certiorari*, 754.

INCONVENIENCES — continued.

must be considered in deciding upon injunction, 762.
from delays in collection, may justify summary remedies,
(See SUMMARY REMEDIES.)
or the taking away of common law remedies,
(See REPLEVIN.)

INCORPORATIONS —

(See CORPORATIONS.)

INCREASE —

in assessment without notice, 361, 420.
this not a mere irregularity, 777-8.

INCUMBRANCE —

when an illegal tax may constitute an apparent, 778.
removal of, in equity, 778.
(See CLOUD UPON TITLE.)
taxation of,
(See MORTGAGE.)

INDEBTEDNESS —

public, taxation for, 101, 188.
incurred for illegal object is void, 188.
private, may be taxed,
(See BONDS; CREDITS.)
of municipalities, *mandamus* to compel payment of, 788-9.
compulsory taxation by state to meet, 685.
payment of taxes on, as a condition to recovering, 459.
municipal, as a tender for taxes, 603.

INDEMNIFICATION —

of municipal officers acting in good faith, 127.
legislature sometimes compels, 127, 686.
of purchaser at tax sale, municipalities not bound to, 818.
of losers by riots, 686.
of losers by exercise of taxing power, 128.

INDIAN LANDS —

taxation of, after Indian title extinguished, 898.

INDIAN TRIBES —

trade with, not taxable by states, 94.

INDIANA —

constitutional provisions for equal taxation in, 183.
requiring property to be taxed by value, 626.
affecting special taxation, 629.
special fund for assessments in, 670.

INDIRECT TAXES —

what are, 6-8.
not illegal, 584.
may be equally just with any other, 7, 166.
what may be unjust, 7, 167.
on luxuries, policy of, 7.

INDIVIDUAL RIGHTS —

protection of, by constitutions,
(See CONSTITUTIONAL PRINCIPLES.)

INELIGIBILITY —

to office, effect of, if the party acts, 249.
(See OFFICERS DE FACTO.)

INEQUALITY —

is meant to be avoided in taxation, 2, 164.
apportionment to secure against, 126, 127.
(See APPORTIONMENT.)
cannot always be prevented, 165.
may exist in case of single tax, 164.
why a tax on luxuries not subject to objection for, 165.
does not render a tax illegal, 165.
in the case of school taxes on non-residents, 166.
does not necessarily exist where tax is restricted to few subjects, 169.
discriminations which produce, not necessarily unlawful, 169.
are unlawful when special and invidious, 169-171, 218.
taxing one kind of occupations and not others, may not cause, 169-171.
constitutional provisions designed to guard against, 175-199.
produced by exemptions,
(See EXEMPTIONS.)
accidental omissions of property, do not invalidate the levy, 216.
fraudulent assessments, relief against, 218, 784.
caused by duplicate taxation, 219-234.
(See DUPLICATE TAXATION.)
taxing land and the mortgage upon it, 223.
taxing corporations on property and on franchise, 223, 224.
taxing income and the property it is invested in, 221.
presumption against intent to cause, in tax laws, 227-234.
produced by granting monopolies, 236.
(See MONOPOLIES.)
must result from frequent changes in legislation, 236.
in the case of license fees, 600, 601.
purposely caused in case of prejudicial employments, 586, 598-9.
abatement of taxes in cases of, 747.
(See ABATEMENT.)
caused by unequal assessments, cannot be corrected by *certiorari*, 755-6.
or in equity, when fraud is not charged, 769.
no remedy against assessors for, 786-789.
unless they deprive the tax payer of some legal right, 792.
does not necessarily result from illegalities, 802.
political redress the principal security against, 823.

INFANTS —

are taxable, though they have no voice in representation, 20, 58-9.
can only redeem from tax sales on the statutory conditions, 534.
taxation of property of, to guardian, 877.

INFERIOR JURISDICTIONS —

corrections of errors of, by *certiorari*, 753.

(See CERTIORARI.)

the remedy by prohibition in case of, 822.

errors of judgment in, cannot be corrected by *mandamus*, 727-730.

may be compelled by *mandamus* to perform ministerial action, 742

conditions to appeals from, 551.

INFORMALITIES —

(See ERRORS; IRREGULARITIES.)

INHABITANTS —

(See RESIDENCE.)

INHERITANCES —

taxes on,

(See SUCCESSIONS.)

INJUNCTION —

the available remedy in equity in case of illegal tax, 761.

not awarded unless the case comes under some recognized head of equitable jurisdiction, 760.

mischiefs that may flow from awarding, in tax cases, 762.

not usually awarded in case of personal taxes, 772-775.

awarded in cases of irreparable injury, 761, 766, 771, 773.

issue of, in tax cases may be forbidden, 762.

or equitable conditions imposed, 763.

conditions imposed by courts in issuing, 763.

may issue in cases of fraud, accident or mistake, 764.

to prevent multiplicity of suits, 764, 770.

who to apply for, in case of public injury, 765.

in case of threatened misappropriations, 766-768.

application for, should be prompt, 768.

whether corporate organization to be questioned on, 768.

to protect the value of securities, 772.

to protect franchise from destruction, 773.

in case of discrimination in discounts, 775.

not granted because of depreciation in property, 775.

nor because title has been in dispute, 775.

by some courts in any case of illegal municipal taxation, 774.

not awarded against political action, 45, 765, 769.

nor in case of merely excessive assessments, 775.

nor of merely irregular taxation, 775-778.

not generally awarded in case of personal tax in respect of lands, 773.

joint bills for, 769.

not awarded where the remedy at law is adequate, 760, 773.

to restrain fraudulent assessments, 784.

to restrain illegal corporate action, 764, 769.

whether tax payers can file bill for, 765.

irreparable injury in such cases, 765.

what will stop one from applying for, 819.

INJURIES WITHOUT REMEDY —

cases of, under tax laws, will occur, 828.
(See **INEQUALITY.**)

INJURY —

from riots, municipalities may be compelled to indemnify, 686.
from an exercise of the taxing power, may be indemnified, 127.

INJUSTICE —

of taxation cannot render it void, 3.
of legislative action, judiciary cannot take cognizance of, 43-45.
except in case of wanton perversion of power, 46, 106.
impossibility of avoiding, in taxation, 164-168.
intentional, may render tax illegal,
(See **INVIDIOUS ASSESSMENTS; INVIDIOUS EXEMPTIONS.**)
resulting from accidental omissions,
(See **OMISSIONS.**)
by the state, will not be presumed, 721.
of tax, no excuse for county treasurer for not proceeding with, 741.
what will render tax void,
(See **ILLEGAL TAXES.**)
what cannot be validated by legislation,
(See **CURATIVE LAWS.**)
abatement of tax in cases of, 747.
reviews for the correction of, 747, 748.
certiorari not a remedy for,
(See **CERTIORARI.**)
of tax levy, no ground for injunction, 777.
remedy in equity in case of intentional, 761-784.
of state, in enforcing local taxation for local purposes, 689-699.

INQUEST OF OFFICE —

whether essential in forfeitures for delinquency, 461-464.
(See **FORFEITURES.**)

INQUISITORIAL PROCEEDINGS —

necessary in case of tax on income, 28, 35.
objections to, 28, 35.
cannot be effectual, 28.
in case of hearth taxes, 27.
in case of taxes on personalty, 35.

INSPECTION LAWS —

of states, fees under, 90, 603.
(See **HEAD MONEY.**)

INSPECTORS OF ELECTION —

not liable for erroneous exercise of judicial functions, 787.
(See **JUDICIAL OFFICERS.**)

INSTITUTIONS OF LEARNING —

exemption of, from taxation,
(See **EXEMPTIONS.**)

INSURANCE COMPANIES —

- whether inequality is produced in singling out for taxation, 170, 173, 176, 185, 186, 189.
- capital of mutual, what is, 886, 887.
- surplus of, what is, 886.
- taxes on foreign, 176.
- guaranty stock of mutual, 886, 887.
- English joint stock, taxation of, 887.
- commutation by, 214.
- (See CORPORATIONS.)
- fees for regulation, 603.

INTEGRITY —

- statutes to protect officers acting with, 791.
- whether want of, will render assessors liable, 793-795.
- of officers, the chief protection in tax matters, 823.

INTELLIGENCE —

- taxes upon,
- (See NEWSPAPERS.)
- of public officers, reliance upon in taxation, 823.

INTENT —

- must govern in construction of statutes, 264, 274.
- if plain, rules of interpretation are unimportant, 264.
- aids in arriving at, 264, 265.
- (See CONSTRUCTION.)
- to defraud,
- (See FRAUD.)
- of party in describing lands, may be aided, 404-406.
- whether this principle applicable to descriptions in assessment roll, 404-406.
- malicious, whether it will render assessors liable, 793-795.

INTEREST —

- taxes do not commonly bear, 17, 436.
- taxes on, 30.
- what recoverable in suit for illegal taxes paid, 815.
- imposed as a penalty for delay in paying taxes, 457-461.

INTERESTS, SEPARATE —

- in lands, sometimes separately assessed, 411.
- assessed together, separate payments on, 411.
- liens, etc., in case of, 446.
- purchases by one joint owner, 502.
- redemption in cases of, 539.

INTERNAL IMPROVEMENTS —

- taxation for, 132.
- grounds on which it must be supported, 132-134.
- compulsory, not admissible,
- (See COMPULSORY LOCAL TAXATION.)

INTERNAL REVENUE —

- penalties for frauds upon, 456.
- construction of statutes for,
(See CONSTRUCTION OF TAX LAWS.)
- liability of collector of, 802, 804.
(See COLLECTOR OF TAXES.)
- taxes laid for,
(See EXCISE TAXES; TAXES.)

INTERPLEADER —

- bills of, may sometimes be necessary, 786.

INTERPRETATION —

- of revenue statutes, should aim at the intent in passing them, 265.
- aids to, where intent is not apparent, 264, 265.
- rules for reaching, 368.
(See CONSTRUCTION.)

INTOXICATING DRINKS —

- taxation of, as luxuries, 83.
- frauds and evasions when taxes heavy, 83.
- taxation of manufacturers and dealers in, 181.
- license to keep tavern, whether it includes license to deal in, 590.
- laws prohibiting dealing in, 593-595.
- may be taxed, though the sale unlawful, 594-596.
- taxation of, under the police power, 599, 602.
- federal licenses to dealers in, 596, 605.

INTRUDERS —

- into office, who are, 248, 251, 256.
- distinguished from officers *de facto*, 251.
- are estopped from disputing their authority when called upon to account for moneys collected, 256.

INVIDIOUS ASSESSMENTS —

- distinguished from taxes, 3.
- illustrations of, 218.
- relief in equity from,
(See INJUNCTION.)

INVIDIOUS CURATIVE LAWS —

- are not admissible, 302.
- illustrations of, 302-306.

INVIDIOUS EXEMPTIONS —

- are not admissible, 214-216.
- will not make one's tax void if it is not thereby increased, 216.
- in case of manufacturing enterprises, 171.

INVOLUNTARY PAYMENTS —

- of illegal taxes, recovery back in cases of, 804.
- those made under protest are deemed to be, 809, 810.
- or under threat of distress, 814.
- or on presentation of legal process, 814.
(See VOLUNTARY PAYMENTS.)
- collection of interest in case of, 815.

IOWA —

- constitutional provisions for equal taxation in, 183.
- do not admit of exemptions of corporate property, 184.
- special fund for assessments in, 670.
- short statute of limitations in, 561.

IRREGULAR ASSESSMENTS —

- are not to be corrected on *certiorari*,
(See CERTIORARI.)
- will not be enjoined,
(See INJUNCTION.)
- do not render assessors trespassers, 786-789.
(See ASSESSORS.)
- towns are not liable for, 805.
(See IRREGULARITIES.)

IRREGULAR TAXES —

- are not void for that reason alone, 775.
(See ILLEGAL TAXES.)

IRREGULARITIES —

- methods of curing in tax cases, 297-323.
- cannot be cured by conclusive rules of evidence, 297.
or by legislative mandates, 299.
- may be cured by special curative laws, 300.
or by general laws, 307.
or by prospective laws, 308.
(See CURATIVE LAWS.)
- or by reassessing the tax, 309-312.
- or on a judicial hearing, 313.
- curing by amendment, 313-323.
(See AMENDMENTS.)
- in the execution of directory statutes, may be overlooked, 280, 292.
- clerical, may be disregarded, 314, 300.
- conditions sometimes imposed, to the taking advantage of, 550-554.
- in case of judgments for taxes, do not render the proceedings invalid, 529.
but may authorize a reversal, 529.
- what not mere irregularities, 528-530, 777.
- in case of local assessments, 614.
- not corrected on *certiorari*,
(See CERTIORARI.)
- not a ground for relief in equity,
(See EQUITY, COURT OF; INJUNCTION.)

IRREPARABLE INJURY —

- a tax which will cause, may be restrained, 773.
- instances of a tax which might destroy a franchise, 773.
- distress of goods is not supposed to cause, 772.
exceptional cases, 773.

IRREPEALABLE EXEMPTIONS —

- states may grant, 66.
- necessity of consideration for, 67.

IRREPEALABLE EXEMPTIONS — continued.

- by corporate charters, 71.
- do not exist where right to repeal is reserved, 72.
- implication against intent to grant,
(See EXEMPTIONS.)

ISSUING LICENSES —

- proceedings on, 603.
- conditions imposed, 603.
- whether they are of right when the conditions are complied with, 603.

J.

JOINDER OF PARTIES —

- in cases of alleged illegal taxation, 752, 753, 756, 761, 768, 769-772, 783.

JOINT BOARDS —

- must meet and consider subject referred to them, 257.
- separate action of members is invalid, 257, 258.
- custom cannot change this rule, 258.
- if only two of three members are chosen, they cannot act, 258.
- majority may act if all cannot agree, 259.
- presumption in favor of action of, 259.
- are subject to the writ of *mandamus*, 740-742.
- acts by, at unauthorized meetings, 330, 349.
- certiorari* to review action of, 747, 754, 758.
- (See BOARDS OF EQUALIZATION; BOARDS OF REVIEW; SUPERVISORS,
BOARD OF.)

JOINT COMPLAINTS —

- where an illegal tax affects all tax payers alike, 753, 769.
- where two or more are alike affected, 769.
- cannot be entertained where the grounds of complaint are distinct, 769.
- reasons favoring them, 770.
- cannot be entertained on sole ground of saving expense, 771.
- by tax payers to restrain political action, 764-769.

JOINT OWNERS —

- assessment of property of, 399.
- when interest to be separately assessed, 411.
- separate payment of taxes by, 411.
- redemptions by, 539.
- separate judgments against, for taxes, 523.
- separate purchases by,
(See TENANT IN COMMON.)

JUDGMENT —

- compelling payment of, by *mandamus*, 734-738.
- by federal courts, 744.
- of board of review, is final, 748-752.
- cannot be set aside by statute, 305.
- summary, against collector and sureties, 717-723.

JUDGMENT, ERRORS OF—

- do not render taxes illegal, 671, 789.
- do not render an officer liable, 786-789.
(See JUDICIAL OFFICERS.)

JUDGMENT FOR TAXES—

- provisions for, in some states, 523.
- preliminary review of proceedings, 524.
- court must have jurisdiction, 525, 530.
- jurisdiction must appear by the record, 526, 530.
- report to the court as a basis for its action, 527.
- notice of application for judgment, 527.
- defects which avoid the proceedings, 528, 529.
- who may appear and defend, 527.
- irregular action will not avoid, 529.
- judgment in case of joint owners, 530.
- proceedings subsequent to, 362.
- recitals in record, 362.

JUDGMENT OF ONE'S PEERS—

- the guaranty of, in Magna Charta, 47-53
(See CONSTITUTIONAL PRINCIPLES; JURY TRIAL; LAW OF THE LAND.)

JUDICIAL ACTION—

- assessor's exercise, in valuing property, 788.
- is had by boards of equalization, 422.
 - by boards of review, 422.
 - by highway officers in some cases, 787.
 - by appraisers of damages, 787.
 - by inspectors of election, 787.
 - by school directors, 787.
 - by township boards, 788.
- is void if it is usurped, 789.
- ministerial officers do not exercise, in enforcing taxes, 43-45.
(See JUDICIAL OFFICERS.)
- by courts, not necessary in tax cases, 47-53.
 - but may be provided for,
(See JUDGMENT FOR TAXES.)
- by appellate boards, 752.

JUDICIAL CORRECTIONS—

- of tax proceedings, 313-323.
- on *certiorari*,
(See CERTIORARI.)
- by allowing amendments,
(See AMENDMENTS.)

JUDICIAL DUTY—

- discretion in exercise of, cannot be controlled by *mandamus*, 726-729.
- performance of, when may be compelled, 728-734.
- liability in performance of,
(See JUDICIAL OFFICERS.)

JUDICIAL OFFICERS —

- are not liable for errors of judgment, 786.
- reasons for the exemption, 786.
- the principle extends to all who exercise judicial functions, 787.
- instances of such officers, 787-8.
- the principle applies to assessors, 788.
 - what it protects them against, 789.
- are liable for exceeding their jurisdiction, 789.
 - instance, of personal tax on non-resident, 789.
 - or of assessing a tax never voted, 790.
 - or an excessive tax, 790.
 - or a sum voted for an illegal purpose, 790.
- are liable for depriving a party of a substantial right, 792.
- distinction between error of judgment and excess of jurisdiction, 790-792.
- whether malice will render liable, 793-795.

JUDICIAL POWER —

- taxation does not pertain to, 43, 47.
- what it consists in, 43.
- not to be exercised by the legislature, 297-299.
- (See JUDICIARY.)

JUDICIAL PROCESS —

- (See CERTIORARI; JUDICIARY; MANDAMUS.)

JUDICIAL SALES —

- sometimes provided for in tax cases, 523-530.
- proceedings to, are *in rem*, 527.
- (See JUDGMENT FOR TAXES.)

JUDICIARY —

- can afford no redress against oppressive taxation, 5, 6.
- the levy of taxes does not belong to, 43-47.
- cannot question the policy of tax laws, 44, 112.
- can only restrain excess of jurisdiction, 44, 45, 106, 140, 149.
 - as where tax legislation is merely colorable, 46, 622, 641.
 - or has private purposes in view, 103-106, 126.
 - (See REMEDIES FOR EXCESSIVE AND ILLEGAL TAXATION.)
- is sometimes vested with statutory power of review, 46, 749.
- must presume in favor of legislation, 105.
- is not to judge of legislative motives in taxing, 112.
- is sometimes authorized to correct irregularities, 313.
- power of, to permit amendments in tax cases, 314.
- cannot control discretionary local powers of taxation, 342-3.
- sitting to revise tax proceedings, must observe statutory regulations, 365.
- whether forfeitures must be declared by, 464.
- (See FORFEITURES.)
- cannot redress wrongs in special assessments, 661.
- cannot limit the acknowledged powers of the legislature, 5.
- right to a hearing by,
 - (See LAW OF THE LAND.)

JUDICIARY — continued.

officers of the, not personally liable for errors,
 (See JUDICIAL OFFICERS.)
 judgments by, for taxes,
 (See JUDGMENTS FOR TAXES.)
 power to compel performance of official duty,
 (See MANDAMUS.)

JURISDICTION —

to tax, what gives, 20, 104.
 extends to all the subjects of taxation, 5.
 exists where protection is due, 20.
 may exist in behalf of government *de facto*, 4.
 is confined to territorial limits, 55.
 does not exist in the case of non-residents, 55-6.
 of personalty, depends on residence of owner, 58, 370.
 cannot reach corporate shares of non-resident corporators, 23.
 unless the charter provides therefor, 57.
 of states, does not embrace agencies of government, 82.
 must be limited to the district taxed, 140.
 excess of, in taxation may be restrained, 44-5.
 (See JUDICIARY.)
 want of, cannot be cured retrospectively, 52, 53, 287, 310, 353.
 (See CURATIVE LAWS.)
 consent cannot give, in tax cases, 371.
 necessity for, when judgments are to be taken for taxes, 527.
 (See JUDGMENT FOR TAXES.)
 to levy special assessments depends upon property being benefited, 606-608.
 (See ASSESSMENTS, LOCAL.)
 in summary proceedings, must appear by the recitals, 721.
 limitations upon, in the nature of taxation,
 (See LIMITATIONS UPON THE TAXING POWER.)
 limitations specially imposed by constitutions, 101.
 limitations imposed by the federal constitution,
 (See CONSTITUTION OF THE UNITED STATES.)
 of the United States to tax,
 (See UNITED STATES.)
 an assessment made without, is void, 751.
certiorari to review questions of, 753-759.
 (See CERTIORARI.)
 municipal bodies must keep strictly within, 759.
 want of, in judicial officers will render them personally liable, 739.
 what constitutes a want of, in assessors, 790-792.
 of supervisor, what necessary to, 795.
 tax laid without, may be resisted, 796.
 keeping inferior tribunals within, by prohibition, 822.

JURISDICTION, INFERIOR —

(See INFERIOR JURISDICTION.)

JURY TRIAL —

- guaranty of, in Magna Charta,
(See LAW OF THE LAND.)
- not of right under tax laws, 47-53, 298, 657.
- reasons why it could not be allowed, 47-50.
- right of, is not violated by special assessments, 633.
- summary remedies in tax cases an exception to, 432.
- not of right on question of collector's delinquency, 714, 718.
- is of right when land is demanded of one in possession, 784.
- where one is entitled to, on demand, that is his remedy for an excessive assessment, 756.

JUSTICE —

- of special assessments, 606, 634.
- is determined by the law providing therefor, 637.
- of taxation, cannot be determined by the courts,
(See JUDICIARY.)
- claims founded in, will support taxation, 127.
- municipalities may be compelled to provide for, 635.
- right of trial of, 637.

JUSTICE OF THE PEACE —

- certiorari* to, in case of militia penalties, 757.

JUSTIFICATION —

- of officer by his warrant,
(See PROCESS.)
- of officer by certificate on which he is to act,
(See SUPERVISOR.)
- of local assessments by the special benefits conferred, 607-609.
- of taxation by the protection afforded by government, 2, 20.

K.

KANSAS —

- special fund for assessments in, 669.
- constitutional provisions for equal taxation in, 184, 185.
- short statute of limitations in, 564.
- constitutional provisions affecting assessments, 630.

KENTUCKY —

- liability of city for special assessments, 669.
- special fund for, 669.
- constitutional provisions for equal taxation in, 185.

KIN, NEXT OF —

- (See SUCCESSIONS.)

KNOWLEDGE —

- that illegal contract is being performed, effect of, 820.
(See ESTOPPEL.)

L.

LABOR—

- taxes sometimes made payable in, 14, 26, 193.
- discrimination in privilege to pay in, 234.
- on highways, 611.
- deprivation of rights to pay in, 777.
- commuting for, 15, 180, 234.

LACHES—

- in applying for *certiorari*, 752, 755.
- in objecting to irregular organization of municipal corporations, 754, 768.
- in bringing suit to recover lands,
(See LIMITATION, STATUTES OF.)
- when one will be estopped by, 805.
(See ESTOPPEL.)

LAND—

- taxes on, in England, 26, 27.
- taxes upon, by value, 35-39.
- assessment of, for taxation, 392-410.
 - classification of, as seated and unseated, 393.
 - resident lands, assessment of, 397-399, 411.
 - separate tracts to be separately assessed, 400.
 - description, what requisite, 404-408.
 - valuation, 409, 410.
 - equalization of, 421-423.
 - lying in two townships, how assessed, 161.
 - single parcels not to be divided in, 401.
- forfeiture of, for taxes, 461-465.
(See FORFEITURE.)
- sale of, for taxes, 321-361, 444-456, 469-531.
 - lien of the tax, 445-450.
 - suit to enforce the lien, 448-450.
- sale of, on judgment for taxes, 523-530.
(See SALE OF LAND FOR TAXES.)
- redemption of, from tax sales, 532-543.
(See REDEMPTION.)
- recovery of, after conveyance, 549-569.
 - short statutes of limitation for, 555-564.
 - requirement that betterments be paid for, 554.
 - and that taxes be paid, 550-554.
- draining under the police power, 591.
- draining by means of special assessments, 616.
 - whether this may be done for improvement merely, 616.
- special assessments upon,
(See ASSESSMENTS, LOCAL.)
- sale of, for municipal taxes requires special authority, 673.

LAND — continued.

- personal liability for taxes upon, 896.
 - where lands have been sold, 445-6.
 - for special assessments upon, 607, 674-677.
- can only be taxed within the district,
 - (See EXTRATERRITORIAL TAXATION.)
- discriminations in taxing within the district,
 - (See OVERLYING DISTRICTS.)
- remedies for excessive or illegal taxation of, 746.
 - by abatement, where it is excessive, 747.
 - against assessor when land not taxable, 777-8.
 - when land is wrongfully exempted, 777.
 - in case of cloud upon title, 778.
 - (See CLOUD UPON TITLE.)
 - quieting title to, 783.
 - joint suits by several owners, 769.
 - relief in case of fraudulent assessments, 784.
 - (See FRAUD.)
- resisting collection of tax upon, 796.
- adverse possession of,
 - (See ADVERSE POSSESSION.)
- mandamus* to relieve from taxes on, 822.

LAND CONTRACT —

- assessment of, to agent, 878. •

LAND TITLES —

- change in ownership will not affect lien for taxes, 455-6.
- loss of, by adverse possession,
 - (See ADVERSE POSSESSION.)
- cloud upon, how relieved against,
 - (See CLOUD UPON TITLE.)
- quieting,
 - (See QUIETING TITLE.)
- equity not the proper tribunal for trying, 784.

LANDLORD —

- title of, cannot be cut off by purchase by tenant, 500.
- assessments of lands of, to occupant, 396-400.

LAW, ERRORS OF —

- correction of, by *certiorari*,
 - (See CERTIORARI.)
- extending to jurisdiction, render officers liable,
 - (See JURISDICTION.)
- in judicial officers, create no personal liability,
 - (See JUDICIAL OFFICERS.)

LAW OFFICER OF THE STATE —

- interference by, in case of illegal corporate action, 765.
- mandamus* on application of, to compel assessment of property, 733.
 - to compel county to assess state tax, 735.
 - to compel corporate officers to furnish list of stockholders, 734.
 - to compel levy of tax to pay demands, 734.

LAW OF THE LAND—

- the guaranty of, 47.
- does not necessarily imply judicial proceedings, 47, 48.
- what is, 47-53.
- what curative laws are, 297-305.
 - (See CURATIVE LAWS.)
- admits of distress for taxes, 438-440.
- whether it will sanction imposition of penalties by ministerial officers, 456-460.
 - or of legislative forfeitures, 464-468.
 - (See FORFEITURES.)
- not violated by special assessments, 623.
 - nor by summary process against collectors and their sureties,
 - (See COLLECTOR OF TAXES.)
- right to an effectual remedy by,
 - (See CONSTITUTIONAL PRINCIPLES.)

LAWS—

- impairing obligation of contracts forbidden, 80-82, 545.
- by states, imposing certain duties, forbidden, 90, 91.
- curative, may heal defects in tax proceedings, 297.
 - what cannot be cured by, 297-299.
 - may be made applicable to pending suits, 307.
- construction of, in general, 265-273.
 - (See CONSTRUCTION.)
- limitation, application of, in tax cases, 355-365.
 - (See LIMITATION, STATUTES OF.)
- retrospective, may cure want of power to tax, 137.
- presumption against, 291-293.
- revenue, what are, 1, 265.
 - specification of purpose in, 325.
- directory, what are, 280-289.
- mandatory, what are, 280, 285.
- allowing redemption, are favorably construed, 533.
- violative of spirit of constitution, not necessarily void, 695.
- establishing rules of evidence, 297.
 - (See EVIDENCE.)

LAWYERS—

- taxation of, 176, 243, 576.

LEGACIES—

- taxation of, 80, 81.
 - (See SUCCESSIONS.)

LEGALITY—

- in tax proceedings, municipal corporations do not warrant, 818.
 - (See CAVEAT EMPTOR.)
- how to be shown in cases of tax titles,
 - (See EVIDENCE.)

LEGAL PROCESS—

- taxation of, 81.

LEGAL TENDER CURRENCY —

including in assessment, 226.

LEGISLATION —

importance of permanance in, 236.
 lobby services to procure, 185.
 restraints upon, by constitutional principles,
 (See CONSTITUTIONAL PRINCIPLES.)
 colorable taxation by, is void, 46, 111, 641.
 (See STATUTES.)

LEGISLATIVE AUTHORITY —

is necessary for any tax, 324.
 must be had for assessments, 607.
 may change local institutions at will, 678.
 but cannot take all power to itself, 678-9.
 in what cases it may compel local taxation, 680-700.
 matters of police, courts, etc., 681.
 construction of highways, support of schools, 682-3.
 payment of debts, indemnification of officers, 685-6.
 compensation for losses by riots, 686.
 no compulsory power in matters concerning only the corporators, 688-700.
 may abate state taxes, 747.
 cannot make assessments, 410.
 cannot set aside judgments by curative laws, 805.

LEGISLATIVE DUTIES —

performance cannot be compelled by *mandamus*, 740.
 (See POLITICAL ACTION.)

LEGISLATIVE INTENT —

(See CONSTRUCTION.)

LEGISLATIVE POWER —

taxing power is a, 41-53.
 must grant taxes, 41.
 must decide upon the purposes of taxation, 103.
 and upon questions of policy involved, 48-49, 53.
 presumption in its favor, 105.
 must apportion taxes, 165, 242.
 discretion of, not subject to judicial control, 149.
 must prescribe districts for taxation, 149.
 may determine for itself the methods of establishing districts, 150.
 may make exemptions from taxation,
 (See EXEMPTIONS.)
 limitations upon, by federal constitution,
 (See CONSTITUTION OF THE UNITED STATES.)
 limitations upon, by state constitutions, as regards exemptions, 175-196.
 limitations upon, as regards local assessments,
 (See ASSESSMENTS, LOCAL.)
 presumption in favor of correctness of apportionment, 242.

LEGISLATIVE POWER—continued.

may delegate local powers of taxation,

(See **LOCAL POWER TO TAX.**)

may levy retrospective taxes, 291-2.

power of, to cure defects in tax proceedings, 297-323.

(See **CURATIVE LAWS.**)

power to declare forfeitures, 464.

(See **FORFEITURES.**)

whether it may extend or shorten time to redeem, 544.

may prescribe districts for special assessments, 638.

may determine the principles of apportioning such assessments, 638-449.

whether it may audit claims against municipalities, 687.

cannot at pleasure impose debts upon municipalities, 689-702.

cannot grant monopolies,

(See **MONOPOLIES.**)

cannot confer power to tax upon the judiciary, 44.

territorial limitations on power of,

(See **EXTRATERRITORIAL LEGISLATION.**)

exercised by local bodies,

(See **POLITICAL ACTION.**)

LESSEE—

cannot buy lessor's title at tax sale, 500.

LEVEES—

construction of, may be ordered under power of police, 590.

special assessments for, 166, 177, 245, 620.

justification therefor, 620.

apportionment of expense, 448, 449.

general taxation for, 620.

LEVY OF DISTRESS—

cannot in general be enjoined, 772.

ability to make collection by, no defense in a bill to remove cloud,
778-9.

collection of illegal tax by, 810-812.

(See **DISTRESS.**)

LEVY OF TAXES—

meaning of term, 324.

mandamus lies to compel, by supervisors, 735.

and by county trustee, 735.

but not to compel people to vote taxes, 734.

compelling, to pay judgments, 735.

or other settled demands, 737.

by the state for municipal demands,

(See **COMPULSORY LOCAL TAXATION.**)

LEVY ON THE PERSON—

(See **ARREST.**)

LIABILITY—

(See **ASSESSORS; JUDICIAL OFFICERS; OFFICERS; PERSONAL LIABILITY;
TOWNS; USURPERS.**)

LIBERTY —

has come from contests over taxation, 59.
principles of,
(See CONSTITUTIONAL PRINCIPLES.)

LIBRARIES —

exemption from taxation, 202.

LICENSES —

granted to give privileges, 572.
granted for purposes of regulation, 592-605.
granted to give monopolies, 592, 593.
(See MONOPOLIES.)
what they are, 592, 594, 596.
granted by the federal government, 605.
by the state, cannot be nullified by town or county, 601.
may be taxed, 29, 572.
regulations for issuing, 603.
right to, when conditions complied with, 603.
power to recall, 604.

LICENSE TAXES —

payment of, a condition to doing business, 572.
imposed for purposes of regulation, 592-597.
imposed for revenue, are taxes, 572, 597.
imposed for monopolies, 235, 592.
imposed for prohibition, 592, 595.
may be imposed on any employments, 600-605.
on marriages, 40, 600.
on amusements, 600.
on lotteries, 601.
on games of chance, etc., 601.
on disinterment of dead body, 53.
collection of, 604.
whether to be returned when license revoked, 604.
money paid for, when voluntarily paid, 815.
equality in, 169.
apportionment of, 243, 593, 595, 603.

LICENSED TRADERS —

among the Indians, not taxable by states, 95.

LIEN OF LOCAL ASSESSMENTS —

sometimes established by statute, 672.
attaches to the buildings, 672.
remains, though a void sale has been made, 672, 674.

LIEN OF TAXES —

only exists by legislation, 445-450, 546-548.
municipal authorities cannot create, 448.
not affected by change in ownership, 445-447.
who liable for tax in such case, 447.
enforcing by sale, 469-530.
(See SALE OF LAND FOR TAXES.)

LIEN OF TAXES — continued.

- enforcing by suit, 448-450.
- statutory when a sale proves defective, 581.
- of one tax not removed by redeeming from another, 530.
- relief from, when illegal,
(See EQUITY, COURT OF.)

LIFE TENANT —

- assessment to, 899.
- redemption by, 539.
- payment of tax by, 467.

LIGHTING STREETS —

- special assessments for, 621.

LIMITATIONS, STATUTES OF —

- general power of the legislature to establish, 556.
- short statutes of, for tax cases, 555-564.
 - questions of right and policy involved in, 556, 557.
 - application of, to case of vacant tenements, 565-567.
 - who to be deemed the true owner, 560.
- nature of the claim which is affected by, 567-8.
- general principles governing, 569.
 - suit against collector, how limited, 804.
 - against county, 818.
 - at law for taxes, 435, 436.

LIMITATIONS ON THE TAXING POWER —

- general doctrine, 101, 102.
 - must be for the public good, 54.
 - for public purposes, 55.
- territorial, 55.
(See EXTRATERRITORIAL TAXATION.)
- must be voted by people or their representatives, 58-61.
- power must not be delegated, 43, 61-66.
 - except to municipalities, 63.
- power, how affected by contracts, 66-82.
- government agencies, officers, etc., not to be taxed, 82-90.
- states not to tax the public domain, 87.
 - nor to lay taxes on commerce, 90-98.
 - nor tonnage duties, 91-93.
 - in abridgment of privileges and immunities of citizens, 99.
 - nor those which impair obligation of contracts, 80-82, 545.
- express, imposed by state constitutions, 101.
- in case of special assessments, 622.
- cannot be exceeded under orders of courts, 738-9.
- on local powers in general, 329.

LIQUORS —

- taxation of manufacturers and dealers in, 580.
 - fees imposed on, under police power, 593-596, 602, 604.
 - policy in these impositions, 583.
 - may be imposed though the business is illegal, 594-596.
- taxation of, as articles of luxury, 165, 168.

LISTING —

- by assessors, what is, 351.
- by tax payers, for assessment,
(See **LISTS**.)

LISTS —

- of members, corporate officers may be required to furnish, 744.
- furnishing by tax payers, 356.
- penalties for not bringing in, 357.
- effect of including property not taxable, 360.

LITERARY AND SCIENTIFIC INSTITUTIONS —

- special exemptions of, from taxation, 202.
- taxation in aid of, 122.

LOANS —

- city cannot raise money to make, 117.
- government, not taxable by states, 84.
- by corporations, taxation of, 231.
- by individuals, may be taxed, 22, 52, 181.
(See **CREDITS**.)
- secured by mortgage, may be taxed though the land is taxed also, 220,
223.
- to corporations by non-residents, not taxable within the state, 22, 23,
160.

LOBBY SERVICES —

- taxation for, not admissible, 135.

LOCAL ASSESSMENTS —

- (See **ASSESSMENTS, LOCAL**.)

LOCAL COMPULSORY TAXATION —

- by legislature, not generally admissible, 678.
- admissible in case of objects of state concern, 680.
- such as preservation of the peace, 681.
- support of courts, court-houses, etc., 681.
- construction and repair of highways, 682.
- preservation of public health, 684.
- support of public education, 683.
- payment of corporate debts, 685.
- making compensation for destruction by rioters, 686.
- indemnifying officers, 686.
- whether legislature may audit claims against towns, etc., 687.
- duplicate nature of municipal corporations, 688.
- decisions regarding right to compel taxation in matters concerning only
themselves, 688-702.

LOCAL LAWS —

- what are, in tax cases, 325.

LOCAL POWERS TO TAX —

- constitutional power to confer, 63.
- in case of lands partly in different municipalities, 161.
- for highway purposes, etc., 144, 152.

LOCAL POWERS TO TAX — continued.

- are to be strictly construed, 101, 102.
- instances of action in excess of, 133-136.
- not to be exercised to influence legislation, 135.
- for military bounties, must be special, 136.
- cannot be exercised for private purposes, 126, 137.
- or for amusements, 128.
- exercise of, must be confined to the district, 159-163.
- exemptions from exercise of, 200-214.
- general, must be confined to ordinary purposes, 276-289.
- liability to abuse, no argument against, 280.
- exercise of, 324-350.
- meetings to vote taxes, 334.
- must be regularly called, 334.
- must be limited in action to purposes specified in call, 335.
- warning of, 335-339.
- notice of, 336.
- action of, to be favorably construed, 337.
- votes must appear of record, 339.
- legislative control over, 275-279, 343.
- judiciary cannot control, 337, 342, 343.
- (See POLITICAL ACTION.)
- restrictions on exercise of, 340-349.
- those imposed by federal constitution, 344.
- those imposed by state constitution, 344.
- other restrictions, 344.
- restraints on, to protect minorities, 345.
- conditions precedent must be observed, 343.
- confining exercise of, to tax payers, 331.
- are always subject to repeal, 275-279.
- exhausting authority under, 349.
- must be strictly executed, 350.
- are compulsory, when state has an interest in their exercise, 630-637
734.
- compelling exercise of, to pay debts, 734-737.
- for the purposes of local improvements,
- (See ASSESSMENTS, LOCAL.)
- conferred under the police power,
- (See LICENSES; LICENSE FEES; POLICE POWER.)
- taxes on business under, 574-584.
- attempted illegal exercise of, how restrained, 764.
- contracting debts an incipient step to exercise of, 685, 764.
- power to tax or borrow is not power to do both, 276.

LOCAL WORKS —

- payment for, out of special fund, 668-671.
- city the agent of parties assessed, 668-670.
- collection of cost by contractor, 668.
- acceptance of, conclusive on persons taxed, 671.
- (See ASSESSMENTS, LOCAL.)

LOCALITY OF PROPERTY —

gives jurisdiction to tax, 19-23.

(See JURISDICTION; NON-RESIDENTS; PERSONALTY.)

LOCOMOTIVES —

tax upon, as property, 96.

what taxes upon, are not admissible, 96.

(See RAILROAD COMPANIES.)

LOSSES —

by riots, indemnity for, 696.

by officers acting in good faith, indemnity for, 128, 686.

(See DAMAGES.)

LOTTERIES —

fees for regulation of, 601.

tax upon, adjudged to be a penalty, 361.

LOUISIANA —

constitutional provisions for equal taxation in, 186.

do not preclude special assessments, 188, 630.

special fund for assessments in, 668.

short statute of limitations in, 563.

property in, must be taxed by value, 626.

LOWER HOUSE —

origin of revenue laws in, 42.

LOW LANDS —

taxation for draining, 137.

draining under the police power, 591.

(See DRAINS.)

LUXURIES —

instances of taxes upon, 32, 165.

effect when excessive, 33.

justice of special taxation of, 165.

M.

MACADAMIZED ROADS —

taxation for, 130.

MACHINE SHOPS —

of railroad company, whether exempted in general exemption from taxation, 211, 218.

MACHINERY —

the term held to include gas pipe, etc., 368.

MAGNA CHARTA —

protection by principles of, 47-53.

(See CONSTITUTIONAL PRINCIPLES.)

MAINE —

property in, must be taxed by value, 188, 626.

MAJORITY —

- of joint boards, when may act, 259.
(See JOINT BOARDS.)
- of electors, what is, 334.
- voting taxes by less than, 334.

MAKING ASSESSMENT —

- is a judicial act, 788-9.
- assessors not liable for errors in,
(See ASSESSORS.)

MALICE —

- whether assessors liable in case of, 793.

MALT LIQUORS —

- duties on, under police power,
(See POLICE POWER.)
- taxation of, for revenue,
(See LIQUORS.)

MANDAMUS —

- general nature of the writ, 726.
- award of, rests in discretion, 727.
- right to redeem may be enforced by, 534.
- is denied when another adequate remedy exists, 726.
- will not lie to enforce a discretionary authority, 725.
 - or to enforce performance of political duties, 734.
- to assessors, cannot control them in their judgments, 730.
 - this rule applies to all assessments, 730.
 - and to other discretionary duties, 730-734.
 - not to mere ministerial duties, 733.
 - may compel them to insert taxable property on roll, 733.
- to school directors, will not lie to compel them to exonerate a person taxed, 731.
- to judicial officers, when may be issued, and what its scope, 727-730.
- to boards of review, may compel them to proceed to a hearing, 730, 734.
- to county treasurer, to compel issue of distress warrant against collector, 741.
- to supervisors, to compel them to levy state tax, 735.
- to compel issue of certificate of tax sale, 742.
- to compel the making of a record, 730.
- to require the making of an official affidavit, 731.
- to give effect to decision of a board of review, 732.
- to require non-taxable property stricken from roll, 732, 743.
- to correct erroneous assessments, 733.
- to require delivery of assessment roll, 733.
- to require levy of tax to pay municipal debts, 734-738.
 - but not in excess of legal limitation, 738.
 - or so as to leave municipality without means, 739.
 - or otherwise than at the proper time, 740.
 - or by due course of law, 740.
 - not to pay unadjusted demands, 737.

MANDAMUS — continued.

- to compel payment of surplus moneys at tax sale, 742.
- will not lie to coerce legislative duties, 740.
- will lie to enforce ministerial duties, 742.
 - even by a board having legislative functions, 740.
- will not lie to the executive, 740.
- will lie to compel corporate duties in tax cases, 734-738, 744.
- will not lie to compel an official act by one not an officer, 736.
 - nor an act that could not voluntarily have been done, 736.
 - nor in advance of the time for doing the act, 736.
- will lie to require collector to proceed in collection, 742.
 - and to receive tax without interest, 743.
 - and to properly account, 742, 743.
- to compel county treasurer to pay over state tax, 743.
 - and state treasurer to refund illegal tax, 743.
- to prevent misappropriations, 744.
- to require making of proper tax deed, 742.
- to compel acceptance of county warrants, 743.
- jurisdiction of federal courts to issue, 744.

MANDATORY STATUTES —

- what is understood by, 280-289.
- instances of, 120, 255, 280-288, 478.
- necessity of obedience to, 280.
- failure to observe, is not a mere irregularity, 758.
- (See STATUTES.)

MANUFACTURE —

- ice cutting is not, 375.
- right to remove property from the state for purposes of, 61.

MANUFACTURERS —

- business taxes upon, 583, 602.
- of liquors, taxation of, 580, 593-596, 602, 604.
- (See LIQUORS.)
- what corporations are held to be, 375, 378, 388.

MANUFACTURES —

- taxation of, 32, 33, 583.

MANUFACTURING ENTERPRISES —

- taxation not admissible in aid of, 115-117.
- exercise of the eminent domain for, 117.
- exemptions in favor of, 187, 188, 206.
- discriminations in duties, in aid of,
- (See PROTECTION.)

MARRIAGES —

- are sometimes taxed, 40.
- license fees imposed upon, for regulation, 600.

MARRIED WOMAN —

- husband not liable for tax of, 17.
- taxation of land of, to husband, 396.
- redemption of homestead interest by, 538.

MARRIED WOMAN — continued.

- must redeem under the statutory conditions, 534.
- special provisions for redemption by, 534.
- no implied exemption in favor of, 20.

MARSHES —

- taxation for the purpose of draining, 591.
- special assessments for draining, 616.
- (See DRAINS.)

MARYLAND —

- constitutional provisions for equal taxation in, 188.
- short statute of limitations in, 563.
- property in, must be taxed by value, 626.
- liability for special assessments in, 669.

MASSACHUSETTS —

- constitutional provisions for equal taxation in, 189.
- application of, to special assessments, 630.
- special fund for assessments in, 670.

MASTERS OF VESSELS —

- taxation of, 97.

MAXIMS —

- of policy in taxation, 8-13.
- that taxation is for revenue, 11.
 - qualifying this for purposes of protection, 12.
 - or to discourage certain occupations, 13.
- that taxation and protection are reciprocal, 19-25.
- that every man has a remedy in the law, 47-53.
- that taxation is only for public purposes, 55-101.
- that taxation and representation go together, 59-61.
- that sovereign powers are not to be delegated, 61-65.
- that one sovereignty cannot be taxed by another, 82-89.
- (See PRINCIPLES OF TAXATION.)
- that he who seeks equity must do equity, 763-4.
- de minimis lex non curat*, 430.

MEANING OF WORDS —

- (See CONSTRUCTION; DEFINITIONS.)

MEETING HOUSES —

- (See CHURCHES.)

MEETINGS —

- of aggregate bodies, are essential to valid action, 357-8.
- presumption that meeting has taken place, 359.
- action by majority in case of, 259.
- of towns, etc., to vote taxes, 332.
 - are only legal as they comply with, 333.
 - how appointed, 334.
 - limiting subjects to be considered, 335.
 - must be regularly called, 336.
 - notification must be given, 337.

MEETINGS — continued.

- of towns, what sufficient warning of, 335-337.
 - action of, to be favorably construed, 337.
 - votes must appear of record, 339.
 - must be strictly confined to purposes of the call, 337.
 - courts cannot control, 337, 342.
 - submitting proposition a second time, 339.
 - taking vote by yeas and nays, 341.
 - necessity of adhering to vote taken, 341.
 - action not final in some cases, 343-4.
 - power of legislature over action of, 344.
- of boards of review,
 - (See **BOARDS OF REVIEW.**)

MERCHANTS —

- taxation of business of, 221, 243, 578, 603.
- following another occupation, may be taxed upon it, 578-9.
- discriminations against those not residents, 578.
- may be taxed on stock and also on occupation, 578.

MERITS —

- of assessment will not be reviewed on *certiorari*, 755.
- (See **CERTIORARI.**)

METHODS —

- of taxation,
 - (See **TAXATION.**)
- of apportionment,
 - (See **APPORTIONMENT.**)
- of collection,
 - (See **COLLECTION OF TAXES.**)
- of obtaining relief in tax cases,
 - (See **REMEDIES FOR EXCESSIVE AND ILLEGAL TAXATION.**)
- of enforcing official duty,
 - (See **MANDAMUS.**)
- of enforcing the responsibility of collectors,
 - (See **COLLECTOR OF THE CUSTOMS; COLLECTOR OF TAXES.**)

MICHIGAN —

- uniformity of taxation in, 190.
- taxation of property by value in, 626.
- constitutional provisions affecting special assessments, 631.
- special fund for assessments in, 679.
- short statute of limitation

MILITARY BOUNTIES

- taxation for, 111.
- (See **BOUNTIES.**)

MILITARY COMMISSIONS

- granted to, 101.
- own charter

MILITARY SERVICE

- cert

MILITARY SERVICE —

- taxation of property of one engaged in, 204.
- one exempt from, may be taxed to pay bounties for volunteers, 625.

MILL DAMS —

- condemning lands for, 114.

MILLS —

- taxation for, 114, 115, 116, 127.

MINES —

- construction of exemptions for, 206, 290.

MINISTERIAL DUTIES —

- may be performed by clerks, 291.
- what are, 291, 330.
- performance of, may be compelled by *mandamus*, 742.
- the principle applicable to bodies having discretionary powers, 728, 729
(See **MANDAMUS**.)

MINISTERIAL OFFICERS —

- confined strictly to their statutory authority, 42.
- cannot refund taxes unless specially empowered, 747.
- levy of taxes by, 692.
- certiorari* does not lie to, 757.
- protection of, by process, 800.
(See **PROCESS**.)
- compulsory process against, 742.
(See **MANDAMUS**.)

MINNESOTA —

- equality and uniformity of taxation in, 190.
- taxation of property by value in, 626.
- constitutional provisions affecting special assessments, 662.
- collection of assessments in, 670.

MINORITIES —

- constitutions framed for protection of, 345.

MINORS —

- taxation of, 20, 58-9.
- redemption by, must be made under the statutory conditions, 534.
- special provisions for redemption by, 534.
- may sell their rights subject to redemption, 534.
- guardian may be personally taxed for property of, 377.

MISAPPROPRIATION —

- levy will not be enjoined, on allegation of intent to make, 760.
- may be restrained as a public wrong, 745, 766-768.
- restraining on bill filed by private parties, 768.
- no individual action at law for, 818.
- does not render a tax levy illegal, 427, 818.

MISCHIEFS —

- of improvident use of *certiorari*, 754.
- of enjoining taxes, 762.
- of the remedy by replevin, 818.
- in tax cases, mostly corrected only by political remedies, 828.

MISCONDUCT—

(See COLLECTOR OF TAXES; FALSE RETURN; MALICE.)

MISFEASANCE—

- of officer, does not render town, etc., liable, 817.
- of collector, when it will render him trespasser *ab initio*,
(See COLLECTOR OF TAXES.)
- of officers in making false returns,
(See OFFICERS.)
- of assessors, etc., damages for, 817.

MISSISSIPPI—

- equality of taxation in, 191.
- constitutional provisions in, bearing upon special assessments, 632.
- taxation of property by value in, 626.

MISSOURI—

- equality of taxation in, 191.
- constitutional provisions in, bearing upon special assessments, 632.

MISTAKE—

- in description of land, effect of, 404-408.
(See DESCRIPTION.)
- in naming the party liable to assessment, 308, 397.
- in redemption, not relieved against, 541.
except where it is mistake of officer or purchaser, 541.
- in assessments, correction of, by abatement, 748, 761, 784, 785.
- in listing property for taxation, 857.
- in payment of taxes, 467.
- may give jurisdiction to equity, 761.
- of party in paying an illegal tax, 809
- of officers, towns are not liable for, 817.
- in omitting property from assessment will not render levy void,
(See OMISSIONS.)
- correction of, by amendments,
(See AMENDMENTS.)
- correction of, by statute,
(See CURATIVE LAWS.)

MISTAKE OF LAW—

- in assessors, does not render assessment void, 216, 217.
- does not render judicial officers liable,
(See JUDICIAL OFFICER.)

MOBS—

- compensation for losses by, 686.

MODIFICATION—

- of local powers to tax, right of, 278, 349.
- construction in cases of, 291, 292.

MONEY—

- taxes on the interest of, 30.
- taxes are presumptively payable in, 710.
- collector limited to receiving, 710, 711.

MONEY — continued.

- collector must safely keep at his peril, 711.
- demands against the public not receivable instead of, 710.
- coin may be demanded by states, 14.

MONEY HAD AND RECEIVED —

- action of, by state against collector, 704.
 - defense to, must be on substantial grounds, 705.
 - insufficiency of collector's authority, no defense, 705.
 - or defect in his official title, 705.
 - or the illegality of the tax, 705.
- action on collector's bond for, 707-717.
- action against town, etc., for, 804.
 - will only lie when tax is void, 805.
 - and where it has been paid under compulsion, 805.
 - and where it has been paid over by the officer, 805, 806.
 - and where no other remedy has been elected, 805.
 - unless expressly given by statute, 806.
 - will not lie for an irregular assessment, 808.
 - what to be deemed a voluntary payment, 809.
 - (See VOLUNTARY PAYMENT.)
 - value of highway labor not recoverable in, 806.
 - demand not necessary before bringing, 815.
 - interest recoverable in, 815.
- refunding, in case of illegal collections, 753.

MONOPOLIES —

- taxation capable of being employed to build up, 235.
- spirit of the constitution forbids, 235.
- instances of, in England, 235.
- case of patented pavements, 235.
- license fees for purposes of, 593.
- taxation for private purposes, compared to, 592.

MONUMENTS —

- power of municipal corporations to erect, 278.

MORAL OBLIGATIONS —

- will support taxation, 110, 111, 127.
- municipalities may be required to recognize, 688.

MORTGAGEE —

- purchase by, at tax sale, 503, 504.
 - whether mortgagor's title may be cut off thereby, 503.
- title of, cannot be cut off by mortgagor's purchase, 500-504.
- may redeem from tax sale, 538, 539.
- payment of tax by, 466.

MORTGAGES —

- to be taxed to owner where he resides, 56.
- by railroad company, does not make bonds held by non-residents taxable, 22.
- to United States, will not exempt property mortgaged from taxation, 90.

MORTGAGES — continued.

- must be taxed, where taxation is required to be in proportion to property, 177, 180.
- may be taxed, though the property mortgaged is taxed also, 178, 220, 228.
- construction of exemption of, 206.
- not in existence at date of assessment, cannot be taxed, 355.

MORTGAGOR —

- cannot cut off mortgage by tax purchase, 500-504.
- whether title may be cut off by mortgagee's purchase, 508, 504.

MOTIVES —

- (See JUDICIAL OFFICER; MALICE.)

MULTIPLICITY OF SUITS —

- joinder of complaints in equity in order to avoid, 769, 770.
- mere saving of expense not a reason for, 771.
- necessity that there should be some ground of equity jurisdiction, 771.
- in case of many suits against one party, 764.

MUNICIPAL CORPORATIONS —

- may be empowered to tax, 68.
- powers may be changed at the discretion of the legislature, 142.
- recalling powers must be subject to payment of debts, 76.
- charters of, not contracts, 78.
- have no inherent power to tax, 678.
- assets of, after dissolution, 16, 76-78.
- repudiation by, 75-77.
- general purposes of, 134, 135.
- state control of property and moneys, 142, 143.
- enlargement of limits improperly, 157-159.
- different taxing districts in, 156-159.
- what property taxable on, 173.
- taxation of, for general purposes, 166.
- taxing city lands as rural, 196.
- apportionment of property and debts when changes made, 239.
- voting taxes for, 324-350.
- employed by the state as collectors, 468.
- may tax business, 574.
- but must be specially empowered, 574.
- construction of powers to tax, 143.
- grant of licenses by, 597.
- enforcing licenses by imprisonment, 488.
- cannot nullify state licenses, 601.
- (See LICENSES.)
- special assessments for streets in, 610.
- for sewers, drains, etc., in, 616.
- for water pipes in streets, 620.
- for sidewalks, 588, 615.
- for parks, 615.

MUNICIPAL CORPORATIONS—continued.

- special assessments for lighting streets of, 621.
- constitutional objections to, 623-637.
- apportionment of, 637-650.
- property subject to, 650.
- proceedings in levying and collecting, 653-672.
- personal liability for, 674-677.
- acceptance of work, conclusive on persons assessed, 671.
- act as agents for tax payers in levying and collecting assessments, 668-670.
- not taxable by United States, 86.
- taxation by, under legislative compulsion, 678-702.
 - in what cases allowable, 681-686.
 - cases of preservation of the peace, support of courts, etc., 681.
 - construction of highways, 682.
 - support of schools, 683.
 - preservation of public health, 684.
 - payment of corporate debts, 685.
 - compensation for injuries by rioters, 686.
 - indemnification of officers, 686.
 - in what cases not allowable, 690-702.
 - contracts, 690-700.
 - local improvements, 690.
 - state buildings, 691.
 - city parks, 691.
 - cases which recognize the supreme authority of the legislature, 693-700.
- apportioning cost of roads between, 684.
- and cost of suits, 687.
- and debts and property on division of, 185, 239, 685, 687.
- state cannot make contracts for, 690, 691, 692, 700.
- right of, to trial on question of indebtedness, 687.
- power of, to erect monuments, etc., 278.
- ownership of property of, on division, 239.
- collection of taxes on division, 239.
- abatement of taxes by authorities of, 747, 751.
- appeal by, from assessments, 750.
- refunding taxes by, 753.
- review of proceedings of, 753-759.
- (See CERTIORARI.)
- action preliminary to taxation will not be enjoined in general, 764, 769.
- (See POLITICAL ACTION.)
- questioning organization of, in tax cases, 754, 768, 790, 822.
- estoppel of, by acts or neglects in tax cases, 820, 821.
- tax to pay bonds will not be enjoined unless bonds void, 777.
- failure to observe by-laws does not avoid action, 768.
- whether merely illegal taxation by, may be enjoined, 775-778, 785.
- exercise powers in trust for corporators, 774.
- remedies against, for misappropriation, 764-767.
- (See MISAPPROPRIATION.)

MUNICIPAL CORPORATIONS — continued.

- restraining action *ultra vires*, 764-768.
- illegal organization of, must be complained of promptly, 754, 822.
- action against, for moneys illegally collected, 804-818.
(See MONEY HAD AND RECEIVED.)
- liability of, for acts of officers, 816, 817.
- do not warrant title to property sold for taxes, 818.
- remedy for usurpation by, 822.
(See COUNTY; TOWN.)
- compelling taxation by, to pay judgments, etc., 685, 784.
or other settled demands, 685, 787.
- taxation by, under orders of federal courts, 744.
- cannot be compelled to tax beyond statutory powers, 788.
- action of, cannot be questioned on ground of members of the council
having been improperly seated, 252.

MUNICIPAL REVENUES —

- are presumptively derived from taxation, 700.
- state control of,
(See LOCAL COMPULSORY TAXATION.)

N.

NAME —

- error in, in assessment, 808, 897.

NATION —

- (See UNITED STATES.)

NATIONAL BANKS —

- may be taxed by states, 84, 389.
- only to be taxed as state banks are, 390.
- may be required to pay taxes on shares, 392.
- action against assessors for illegal taxation, 769.

NATIONAL DEBT —

- (See NATIONAL SECURITIES; PUBLIC DEBT.)

NATIONAL SECURITIES —

- not taxable by the state, 82.
- mandamus* in case of illegal taxation, 745.
- excise tax on corporations whose moneys are invested in, 383.

NATURE OF THE TAXING POWER —

- what it is, 41-53.
(See TAXING POWER.)

NAVIGATION —

- (See SHIPS.)

NEBRASKA —

- taxes on legal process in, 81.
- constitutional provisions for equal taxation in, 192.
- provisions affecting local assessments, 632.

NECESSARIES —

taxation of, 34, 164, 165.

NECESSITY —

for a government, 280.

the foundation of the right of eminent domain, 113-118.

and of taxation, 1, 5, 724.

private convenience must yield to, in collection of taxes, 482, 704, 819.

NEGATIVE PROVISIONS —

may render statute mandatory, 283.

NEGLECT OF DUTY —

of collector, action for, 706.

by assessor, liability for, 792.

correction of, by *mandamus*,

(See MANDAMUS.)

by municipal corporations in not paying debts,

(See COMPULSORY LOCAL TAXATION.)

NEGLIGENCE —

of assessors in not levying tax, liability for, 792.

in applying for relief, 776.

(See LACHES.)

NEGOTIABLE PAPER —

of municipalities, issue of, may cause irremediable mischief, 767.

taxation of, 80.

NET INCOME —

not same thing as dividends, 221.

(See INCOME.)

NEVADA —

constitutional provision for equal taxation in, 198.

taxes on legal process in, 81.

taxation of property to be by value, 626.

NEW ASSESSMENT —

(See REASSESSMENT.)

NEW HAMPSHIRE —

constitutional provisions for equal taxation in, 192.

NEW JERSEY —

constitutional provisions for equal taxation in, 198.

NEW STATES —

may not tax the public domain in, 87.

may tax possessory interests, 87.

when lands in, are so disposed of as to be taxable, 88.

NEW TERRITORIES —

(See TERRITORIES.)

NEW YORK —

special fund for local assessments in, 670.

NEWSPAPERS —

taxes on, 81.

NEXT OF KIN

(See ESTATES OF DECEASED PERSONS; SUCCESSIONS.)

NON-AGE —

(See MINORS.)

NON-RESIDENT LANDS —

assessed separate from resident, 393.

this requirement imperative, 395.

must be correctly described,

(See DESCRIPTION.)

a railroad track is not, 386.

(See UNSEATED LANDS.)

assessment fixes character of, for tax purposes, 432, 526.

assessment of, as resident, 395.

NON-RESIDENTS —

personal tax not to be assessed against, 21, 56, 160, 365, 369, 377, 316.

right to collect a debt in the state not taxable, 22, 23, 160.

personalty of, may be taxed where actually found, 21, 56, 57, 365, 373-4.

cannot be taxed through a corporation in which they own shares, 23, 57.

unless the charter provides therefor, 23.

voluntarily returning some personalty for taxation, do not waive objection to taxing more, 21.

persons residing on government or Indian lands are, 55.

agent holding land contract for, may be taxed for it, 57.

not an attorney holding notes for collection, 57.

objecting only to valuation of property taxed, cannot afterwards insist it was not taxable, 57.

may be taxed on business where it is carried on, 60, 99, 375.

though right to vote there is not given, 60.

must not be discriminated against, 99, 170, 219.

different methods of procedure admissible in case of, 100.

incidental benefits to, from taxation, 168.

not chargeable with constructive notice of illegal assessment, 365.

not taxable on notes because of their being secured in the state, 373.

trustees, taxation in case of, 375-6.

notice of sale of lands of, 432.

recovery by, for personal tax paid, 316.

(See NON-RESIDENT LANDS.)

NORMAL SCHOOL —

local taxation for, 697.

NORTH CAROLINA —

constitutional provisions for equal taxation in, 193.

affecting local assessments, 633.

for taxing property by value, 194.

NOTARY PUBLIC —

authority to tax "trades, occupations and professions," does not include, 576.

NOTICE—

- statutory provisions for, are in general mandatory, 287, 363-4.
- of town meetings, the statute itself may be, 334.
- omission of public notice in such cases not fatal, 334.
- of special town meetings, must be given, 335.
- business of special town meeting must be confined to objects mentioned in, 337.
- effect of neglect to give, or of giving misleading notice, 335, 336.
- how proof of, should be made, 336.
- of assessments, right of parties to, 52, 356-366, 656, 778.
- to bring in tax list, 359.
- of adverse proceedings, in general, is matter of right, 363.
- of road taxes, necessity for, 442.
- of tax to be given before distress levied, 442.
- of tax sales, must comply with statute, 482.
 - if not described in statute, must be in writing, 483.
 - may be given by publication, 482-3.
 - required to be given to occupant, how complied with, 483, 484.
 - is a prerequisite to any authority to sell, 483.
 - instances of fatal defects in, 483-487.
 - how proof of, to be made, 487.
 - publication of, must be in regular issues of the paper, 486.
- after tax sale, when required to be given, 513.
- of application for judgment for taxes, 525-6.
- to foreclose redemption, 536-538.
- of meeting of board to review assessments, 751.
 - record thereof, 752.
- of increase of assessment, right to, 785.
- of change in assessment, 361, 420, 778.
- of objections to a public work, duty of party to give, 819-821.
- curing defect in, retrospectively. 308.
 - limitation upon the right, 306.
 - (See HEARING.)
- right to, in case of summary proceedings against collector, 721.
- constructive, from records,
 - (See RECORDS.)

NUDUM PACTUM—

- obligations contracted without authority of law are, 183.
- contracts in violation of revenue laws are, 433.

NUISANCE—

- taxation in order to abate,
 - (See DRAINS.)
- right to declare liquor selling to be, 602.

NULLITY—

- colorable taxation is a, 44-53.
- delegation of power to tax is a, 43, 61.
- what burdens are a,
 - (See LIMITATIONS ON THE TAXING POWER.)

NULLITY — continued.

- tax which is a, may be resisted, 796.
- and collector may refuse to collect, 799.
- is no cloud upon title, 779.
- an excessive tax is a,
(See EXCESSIVE TAXES.)
- tax sale after payment or tender is a, 469.
- tax without apportionment is a,
(See APPORTIONMENT.)
- any tax without jurisdiction is a,
(See JURISDICTION.)
- a merely irregular assessment is not a, 775.
(See IRREGULARITIES.)
- a levy which is a, if paid without objection cannot be recovered back,
809.
(See VOLUNTARY PAYMENT.)
- sale for two taxes, one of which is a, 803.
- liability of town, etc., where tax is a, 804.
- town not liable for a void sale never enforced, 815.
- legislature cannot validate a,
(See CURATIVE LAWS.)
- when a local assessment is a, 657.

O.

OATH —

- to tax payer's list, failure to make, 857.
(See AFFIDAVIT.)

OATH, OFFICIAL —

- (See OFFICIAL OATH.)

OBJECTION —

- failure to take in season, may work an estoppel,
(See ESTOPPEL.)
- payment of illegal tax without, no recovery in case of,
(See VOLUNTARY PAYMENT.)

OBJECTS OF TAXATION —

- (See PURPOSES OF TAXATION.)

OBLIGATION —

- (See BOND; MORAL OBLIGATION; NUDUM PACTUM.)

OBLIGATION OF CONTRACTS —

- must not be impaired in taxation, 66-72.
- this precludes state setting aside its own contracts, 78-75.
(See CONTRACTS; EXEMPTIONS.)
- states cannot tax debts owing therein to non-residents, 22, 23, 160.
- taxing residents on debts owing them does not impair, 22.

OCCUPANT —

purchaser at sheriff's sale of right of, may redeem, 539.
of land, personal tax upon, 396-400.
must be assessed for land, if statute so provides, 396.
assessment of lands of several to one as agent, 397.
whether he may acquire title at tax sale, 506-508.
claiming land but losing it, may be compensated for betterments, 554.
cannot waive for the owner the right to a notice, 537.
possessory right of, on public lands, may be taxed, 367-8.

OCCUPATION —

what is sufficient to entitle one to notice, 482.
what constitutes, 394-396.
(See SEATED LANDS.)
of part of a parcel of land, fixes character of all as occupied, 394.

OCCUPATIONS —

taxation of, 570-585.
should be where business is, 584.
what to be deemed privileges under tax laws, 571-573.
licenses for permission to follow, 572.
whether business unlawful if license not taken out, 572.
privileges liable to taxation, 572.
licensed by state, municipality cannot preclude being carried on, 573.
may be licensed by state and also by county or town, 573.
construction of municipal powers to tax, 574.
what included in "occupation, trade or profession," 584.
may be licensed for purposes of regulation, 583-605.
(See POLICE POWER.)
but not for purposes of monopolies,
(See MONOPOLIES.)
illegal, may still be taxed, 594-596.
selection of for taxation cannot be controlled by courts, 769.

OFFENSES —

taxation for punishment of, 681.
against the revenue laws, 433-4, 456-461.

OFFICE FOUND —

whether necessary to a forfeiture, 464-5.
(See FORFEITURES.)

OFFICERS —

taxation may be imposed to indemnify, 127.
municipalities may be required to indemnify, 636.
taxation can only be had by means of, 248.
definition of, 248.
kinds of, legislative, executive and judicial, 248.
inferior ministerial, 248.
de facto, what are, 249.
ousting by judicial proceedings, 251.
distinguished from usurpers, 248, 251.

OFFICERS — continued.

de facto, acts of, not to be assailed collaterally, 253-256.

cannot by action build up rights in their own favor, 251-253.

these rules apply in tax cases, 255.

intruders, when estopped from denying official character, 256.

joint action by, 257.

must be meeting for, 258, 259.

custom cannot change this rule, 258.

invalid if requisite number not chosen, 259.

majority may act, 259.

presumptions which support action, 259.

returns and certificates of, are evidence, 260-262, 796.

generally held conclusive, 260.

liability for false, 261.

amendment of records, rolls, etc., by, 318-323.

(See AMENDMENTS.)

curing irregularities of, by statute, 297-312.

(See CURATIVE LAWS.)

correcting irregularities judicially, 313.

(See JUDICIAL CORRECTIONS.)

mistakes of, when parties are making redemption, may be relieved against, 533, 536.

may be compelled by *mandamus* to permit redemption, 534.

refusal of, to give certificate for purposes of redemption, 541.

cannot add to the conditions of redemption, 542.

requirement of official oath, 725.

(See OATH, OFFICIAL.)

requirement of official bond, 725, 799.

(See COLLECTOR OF TAXES; SURETIES.)

penalties against, for non-performance of duty, 725.

compelling performance of duty by, 726-744.

(See MANDAMUS.)

excess of jurisdiction by,

(See JURISDICTION.)

unequal taxation caused by, 200, 218, 219.

making sales must not be purchasers, 492.

will not be restrained from collection if the law warrants the action, 777

judicial, not liable for errors, 786-795.

whether this principle applies in case of malicious action, 792-795.

(See JUDICIAL OFFICER.)

protection of, by process, 800.

(See PROCESS.)

presumption that they will pause in illegal action, 783.

of highways, judicial action by, 787.

what is not such action, 777.

protection of, by certificate, 795.

municipalities not liable for torts of, 816.

collecting moneys, are not liable after they are paid over, 801.

(See COLLECTOR OF TAXES.)

OFFICERS — continued.

- action for damages against, 817.
- proceedings by *quo warranto* against, 822.
- political remedies in case of, 823.
- of municipalities, action by, *ultra vires*,
(See ULTRA VIRES.)
- cannot refund taxes unless specially empowered, 753.
- taxation of salaries of,
(See SALARIES.)
- estoppel by action from questioning taxes, 820.

OFFICERS, CORPORATE —

- may be compelled by *mandamus* to perform duty under tax laws, 744.

OFFICES —

- federal, may be taxed by United States, 583.
- state, may be taxed by states, 584.
- state, may be taxed by county, etc., under proper authority, 584.
- of one government cannot be taxed by the other, 85, 584.
- taxation of county, 198.

OFFICIAL ACTION —

- necessity for, in tax cases, 248.
(See OFFICERS.)
- by persons irregularly claiming office, 249.
- cannot be required of those no longer officers, 726.
- liability for,
(See REMEDIES FOR EXCESSIVE AND ILLEGAL TAXATION.)
- by usurpers,
(See USURPERS.)

OFFICIAL AUTHORITY —

- protection by,
(See PROCESS.)
- excess of,
(See JURISDICTION.)

OFFICIAL BOND —

- of collector, may be valid though not in compliance with statute, 706.
- or not required by statute, 706.
- liability of sureties upon, 712-718.
(See COLLECTOR OF TAXES.)

OFFICIAL OATH —

- neglect to take, does not create personal liability, 795.
- does not preclude one being officer *de facto*, 253, 255.
- reliance upon, for protection of the public, 725.

OFFICIAL RETURNS —

- conclusiveness of, 260.
- liability for false, 261.
- of failure to collect tax, 454, 527.
- what should be shown by, 454.
- disproving, 527.

OFFSET —

- of damages against special assessment, 612.
- of rents and profits against redemption moneys, 534.
(See SET-OFF.)

OHIO —

- constitutional provisions for equal taxation in, 193.
- constitutional provisions bearing upon special assessments, 638.
- payment of special assessments in, 670.

OMISSIONS —

- supplying, 297.
- of property from tax roll, when may be corrected by *mandamus*, 733.
- accidental, will not vitiate the whole tax, 216, 217.
- caused by error of law, 217.
- unlawful, if purposely made, vitiate tax, 214-216.
- are not mere irregularities, 777.

ONUS OF PROOF —

- purchaser must take, when tax title is in question, 471-481, 517-523, 530.
- change of this rule by statute, 518-523.
(See PRESUMPTION; TAX DEED.)

OPENING STREETS —

- special assessments for, 610.
- offsetting benefits against damages in case of, 612.
- principles governing proceedings in, 612.
(See ASSESSMENTS, LOCAL.)

OPINIONS —

- (See JUDICIAL OFFICERS.)

OPPRESSIVE TAXES —

- courts cannot relieve against, 52.
- (See POLITICAL REMEDIES.)

ORDER —

- preservation of, is a state duty, 680.
- municipalities may be compelled to tax for, 680.
- and to make compensation for losses by riots, 686.

ORDERING SALE FOR TAXES —

- (See JUDGMENT FOR TAXES.)

ORDERING TAX LEVY —

- (See JUDGMENT; COMPULSORY LOCAL TAXATION.)

ORDERLY PROCEEDINGS —

- are essential in taxation, 2.

ORDINANCES —

- for special assessments, instances of, 669, 670.
- (See MUNICIPAL CORPORATIONS.)

OREGON —

- constitutional provisions to secure equal taxation in, 193.
- taxation of property in, must be by value, 626.
- provision in, affecting special assessments, 638.

ORES —

assessment of, for taxation, 353.

ORGANIZATION —

of school districts, delay in questioning, 754.

estoppel in case of, 768.

defective, unlawful tax in case of, 790.

ORPHAN ASYLUM —

exemption of, from taxation, 206.

OVERFLOW —

of streams, assessments for prevention of, 620.

(See LEVEES.)

OVERLYING DISTRICTS —

for the purposes of state buildings, etc., 150, 151, 153, 154.

in street cases, 152.

(See ASSESSMENTS, LOCAL.)

in the case of general city taxation, 156-159.

(See RURAL LANDS.)

OWNER —

when land to be assessed to, 396.

assessments of lands when unknown, 397, 398.

effect of consent to assessment in wrong list, 396.

former, assessment to, 396.

transferring title after assessment, 396.

when wife is, lands not to be assessed to husband, 396.

assessment to one of several, 397.

mistake in name, 397.

when must petition for local assessment, 657.

personal liability of, for assessments, 674-677.

(See ASSESSMENTS, LOCAL.)

recovering lands may be required to pay for betterments, 554.

losing title by adverse possession,

(See LIMITATION, STATUTES OF.)

who is, for purposes of redemption, 536-538.

P.

PACKAGES —

imported, when they become taxable by states, 90.

PAPERS AND BOOKS —

(See AMENDMENTS; RECORDS.)

PARCELS OF LAND —

separate, must be separately assessed, 400-403.

what are, 402, 403.

must be separately valued, 409.

and separately sold, 493.

dividing sale when tax on part is paid, 493.

(See TENANT IN COMMON.)

erroneous descriptions of, avoid tax, 796.

(See DESCRIPTION.)

PARKS —

taxation for, 61, 129, 615.
(See COMPULSORY LOCAL TAXATION.)

PAROL EVIDENCE —

to show vote of a school tax, 839, 840.
to prove lost records, 840.
(See EVIDENCE.)

PART LEGAL —

(See TAX, PART LEGAL.)

PARTIALITY —

in tax laws, 168.
in customs duties,
(See PROTECTION.)
in assessments,
(See INVIDIOUS ASSESSMENTS.)
in exemptions,
(See EXEMPTIONS.)

PARTIES —

(See JOINT COMPLAINT; RELATOR.)

PARTNERSHIP —

taxation of members severally, 874.
assessment of lands of, 897.

PASSAGE —

from one state to another, right of, 87.

PASSENGERS —

taxation on carriage of, when in violation of federal constitution, 87, 96.
taxation of carriers of, 576.

PATENT RIGHT —

regulations for sale of, 597.

PATENTED PAVEMENT —

taxation for, 236.

PAUPERISM —

taxation in relief of, 124.

PAVING STREETS —

assessments for the purpose of, 147, 148.
for repaving, 618.
(See ASSESSMENTS, LOCAL.)

PAYMENT OF MUNICIPAL DEBTS —

compelling tax for, by *mandamus*, 735.
levy of tax for, under state compulsion, 686.

PAYMENT OF PUBLIC DEBT —

taxation for, 101, 138.

PAYMENT OF TAX —

- demand of, before levy of distress, 441.
- extinguishes authority to sell, 450-453, 469.
- by one part owner, 493.
- whether it can be shown to defeat judgment, 530.
- must be made in money, 452.
 - unless scrip, etc., be receivable by law, 452.
- subrogation where one should have paid who did not, 466-468.
- requirement of, as condition to recovery of land, 550.
 - in what cases this is not admissible, 552-554.
- requirement of, as condition to maintaining suit, 559.
- in license cases, as condition of doing business, 571.
- in labor, is of right when the law permits it, 777.
- if tax illegal, the law affords adequate remedy, 772, 778, 797, 804.
- if voluntary, no remedy against town, etc., though tax is illegal, 804.
 - what is voluntary payment, 809.
 - what is involuntary payment, 814.
- (See VOLUNTARY PAYMENT.)
- recovering back, where tax is only in part illegal, 815.
- errors in making, 451.

PAYMENT OVER —

- by collector, before town can be liable, 804.
 - whether collector afterwards liable, 802.
- compulsory proceedings against collector to enforce,
 - (See COLLECTOR OF TAXES.)

PEACE, BILLS OF —

- (See QUIETING TITLE.)

PEACE, PRESERVATION OF —

- is a state duty, 681, 686.

PEACEFUL REMEDY —

- by not yielding to illegal demands, 796.

PEDDLERS —

- taxation of, 95-97, 579, 602.

PENAL LAW —

- strict construction of, 263-272, 275, 359.

PENALTIES —

- for delinquency in payment of taxes, 456-461.
- under federal revenue laws, 456.
- how imposed, 457-459.
- forfeiting right to suit, etc., 459-461.
- imposed on redemption, 536.
- for non-performance of official duty, 716.
- for failure to list property for taxation, 357-361.
 - (See TAX PAYERS' LISTS.)
- construction of laws which impose, 272, 359.
- cannot be added on affirming assessment, 749.
- will not be relieved against because of disputed title, 775.

PENNSYLVANIA —

- short statute of limitations in, 558.
- constitutional provision for equal taxation in, 196.

PENSIONS —

- taxation for, 111.

PEOPLE —

- voting taxes by,
(See VOTING THE TAX.)
- assent of, to taxes, 59, 242, 382-344, 679.

PEOPLES REPRESENTATIVES —

- (See REPRESENTATION.)

PERMANENCE IN LEGISLATION —

- importance of, to equal taxation, 236.

PERMANENT IMPROVEMENTS —

- (See BETTERMENTS.)

PERNICIOUS EMPLOYMENTS —

- propriety of discriminating against, 583.
- taxation in regulation and restraint of, 592-605.
- (See POLICE POWER.)

PERSON —

- corporation considered as being, for purposes of an appeal, 750.
- application of the word to corporations generally, 377.

PERSONAL ALLEGIANCE —

- has no necessary connection with right to tax, 20.
- (See NON-RESIDENT.)

PERSONAL LIABILITY —

- of residents for taxes, 369, 397.
- in case of trusts, 375.
- in case of partnerships, 374.
- in case of private banker, 374.
- in cases of discretionary authority,
(See DISCRETIONARY ACTION.)
- of purchasers of land for taxes previously assessed, 439.
- of owners of land for special assessments, 607, 674-677.
- of officers for false return, 261.
- of officers for neglect of duty, 725.
- of assessors, 786.
(See ASSESSORS.)
- of judicial officers generally, 786.
(See JUDICIAL OFFICERS.)
- of supervisors, 795.
(See SUPERVISOR.)
- of collector, 797.
(See COLLECTOR OF TAXES.)
- of collector of the customs,
(See COLLECTOR OF THE CUSTOMS.)

PERSONAL PROPERTY —

- within the state, may be taxed, though the owner is a non-resident, 22, 23, 369-379.
- bonds, etc., held abroad, not taxable in state, 22, 23.
- taxation of, by value, 35-40.
- is to be taxed where the owner resides, 22, 23, 369-379.
- employed in business, where taxable, 374.
- tangible, where taxable, 373.
- lists for assessment of, 356-361.
- detention of, for payment of taxes, 444.
- held in trust, where taxable, 375.
- belonging to estate of deceased person, where taxable, 376.
- distress and sale of, for taxes, 438-443.
- liability of officer in case of abuse, 442.
- (See TRESPASSER AB INITIO.)
- to be exhausted before lands are sold, 454-456.
- levy upon for tax, is *prima facie* satisfaction, 781.
- not generally assessed for local works, 651.
- cannot be excused from taxation without authority of law, 215.
- taxes upon, will not generally be restrained, 772.
- except in cases of fraud or irreparable injury, 773, 784.
- the rule applies to a personal tax assessed in respect of lands, 778.
- illegal tax on, may be recovered back, 797, 804.
- unlawfully taken, may be recovered by replevin, 818.
- case of house owned by one on land of another, 367.
- or on exempt land, 367.
- assessment of railroad property as, 369.
- right to cut timber is, 367.
- of corporations, should be assessed at the place of the business office, 378.

PETITION —

- for local improvement, sometimes required, 657.
- to state for refunding of illegal tax, 804.
- for license, will preclude recovery back of license fees, 809.

PHYSICIANS —

- taxation of, 376.

PILOTAGE —

- state regulation of, 94.

PLACE OF SALE —

- fixing by law and notice, 487-489.

PLANKING —

- of streets, special assessments for, 613.
- (See ASSESSMENTS, LOCAL.)

PLANKROADS —

- existence of, in city streets, will not preclude special assessments for improving, 664.

POLICE—

compulsory local taxation for, 690-692, 696.
regulation of, is a state duty, 681.

POLICE POWER—

levying burdens under, to discourage certain trades, etc., 20, 586.
this proper in case of pernicious employments, 586.
taxation for regulation and restraint under the, 182.
this distinguished from taxation generally, 186.
case of highway labor, 586.
case of sidewalk assessments, 588.
case of sewers, 590.
case of levee assessments, 590.
case of drain taxes, 591.
other cases, 592.

license fees under, 592.

sometimes have restriction in view, 592-595.
what a license is, 596.
grant of, 597.

fees, when a tax, 597-599.

what may be licensed under, 600.

employments generally, 600.
marriages, 600.
amusements, 600.
lotteries, 601.
games of hazard, etc., 601.
keeping of dogs, 601.

what occupations usually licensed, 602.

discriminations in, not unlawful, 602.
case of inspection fees, 603.

issuing the license, 603.

right of applicant to license if he complies with conditions, 603.

recalling license, 604.

whether fee must be returned on, 604.

collection of license fees, 425, 604.

state regulations not interfered with by federal licenses, 605.

POLICY—

governs in determining suffrage, 59.

must always be had in view in taxation, 8-12, 25.

discriminations in taxation from considerations of, 586-588.

(See PROTECTION.)

of special assessments, 622.

maxims of, in taxation, 8-12.

(See PUBLIC POLICY.)

POLITICAL ACTION—

when it exhausts the power to tax, 349.

cannot be controlled by the courts, 337, 342.

not to be reviewed on *certiorari*, 755.

cannot be enjoined, 764.

POLITICAL DUTIES —

performance of, cannot be enforced by *mandamus*, 732.

POLITICAL ECONOMY —

rules of, which should govern in taxation, 8-12.

(See *POLICY*.)

POLITICAL REMEDIES —

in case of abuse of legislative power, 5, 106-7.

redress of wrongs in taxation by, 217.

these often the only redress, 823.

reasons why they are of little value in some cases, 701, 724.

POLLS, TAXES BY —

sometimes laid, 191.

not often just or politic, 25.

in labor, 14, 26, 180, 192, 232, 587, 611.

can only be levied on residents, 870.

POOR PERSONS —

exemption of, from taxation, 201.

taxes in aid of,

(See *CHARITY*.)

POOR-HOUSES —

presumptively exempt from taxation,

(See *PUBLIC PROPERTY*.)

POPULAR ASSEMBLAGES —

voting taxes by, 332-350.

(See *VOTING THE TAX*.)

POPULARITY —

not to be expected for tax laws, 724.

POSSESSION —

presumptions arising from, as affecting titles, 477-480.

whether it precludes party from buying at tax sale, 506-509.

notice to party in, to cut off redemption, 537.

limitation of time to bring suits in case of, 555-564.

(See *LIMITATION, STATUTES OF*.)

constructive, in case of vacant tenement, 565-567.

who to be considered the true owner, 560, 561.

betterments made during, recovery of value of, 554.

removing cloud on title in case of, 778.

(See *CLOUD UPON TITLE*.)

quieting title in case of, 784.

(See *QUIETING TITLE*.)

of personalty, trying right to,

(See *REPLEVIN*.)

rights by, may be taxed, 367-8.

POSSESSORY RIGHT —

on the public lands, may be taxed, 87.

purchaser of, at sheriff's sale may redeem, 539.

(See *OCCUPANT*.)

POSTAL SERVICE —

charges for, not considered taxes, 89.

POSTPONEMENT —

of tax sale, 488.

of time for collecting taxes, 713-715.

POWER —

abuse of, derives no sanction from time, 129.

liability of, to abuse, is no argument against existence of, 105, 280.

to sell for taxes, is terminated by payment, 450, 469.

or by tender, 453.

to sell, must be express, 481.

must be strictly executed, 469.

compliance with, must be affirmatively shown, 472.

to tax, exists in every sovereignty, 4.

extent of, 5, 19-25, 105-108.

nature of, 41-53.

exhausting, 256.

limitations upon, 54-102.

for local purposes, must be strictly construed, 275.

for special assessments, must be express, 609.

and be strictly executed, 609.

to tax business, construction of, 574.

to levy police taxes, 586-588.

to divest one of his estate, must be strictly pursued, 285-6.

weight of custom in construction of, 129, 587.

(See TAXING POWER.)

arbitrary, in taxation, does not exist, 103.

POWER OF POLICE —

(See POLICE; POLICE POWER.)

PRACTICE —

(See CUSTOM.)

PRACTITIONERS —

of law and medicine, taxation of, 576.

PRECEDENCE —

as between state and local taxes, 535.

PREFERENCE —

of occupations in taxation, 13, 34, 179, 181, 196, 588.

PRELIMINARY ACTION —

in laying taxes, cannot in general be enjoined, 764, 769.

leading to tax sales, necessity that it shall comply with statute, 469.

PREMATURE SALE —

by collector, liability in case of, 802.

PRESUMPTION —

against duplicate taxation, 227.

force of this, in construction of statutes, 227-234.

that apportionment is just, 242.

in support of tax titles, 477-481.

cannot supply the want of a record, 481.

PRESUMPTION — continued.

- in favor of the purposes for which taxes are laid, 105, 112.
- in favor of joint official action, 259.
- in favor of action of persons assuming to be officers, 253.
- that assessment is properly made to person unknown, 397-8.
- that process fair on its face is lawful, 798.

(See PROCESS.)

PRICE —

- at tax sale must be paid down, 498.
- inadequacy of, will not defeat sale, 499.
- estimating, for the purposes of taxation, 409.

PRIMA FACIE RIGHT —

- to lands, will constitute cloud upon title, 773.
- (See CLOUD UPON TITLE.)

PRIMARY SCHOOLS —

(See EDUCATION; SCHOOL DISTRICTS.)

PRINCIPAL AND AGENT —

(See AGENT.)

PRINCIPLES —

- of apportioning taxes, 24.
- of constitutional protection,
 - (See CONSTITUTIONAL PRINCIPLES.)
- underlying special assessments, 269, 606.
 - (See ASSESSMENTS, LOCAL.)
- liability of, to erroneous application, does not invalidate, 608.
- of representative government, protect the right of local taxation, 688-708.
- of equity,
 - (See MAXIMS.)

PRINCIPLES OF TAXATION —

- that taxes must be regular and orderly, 2.
 - apportioned by some uniform ratio of equality, 2, 140.
 - each person contributing in proportion to his revenue, 8.
 - the tax as to time, sum and manner of payment to be certain, 8.
 - to be levied at the time and in the manner most convenient for payment, 8.
 - to take from the people as little as possible over what is brought to the treasury, 8, 9.
- that taxes should bear some proportion to what government protects, 19.
 - should be laid by the people's representatives, 41, 59, 324.
 - who must select the subjects of taxation, 171, 200.
 - ought to select for the heaviest taxes prejudicial commodities, 583.
- that taxes must be laid according to the law of the land, 51.
 - only to provide for public necessities, 54.
 - and for the public good, 54.
 - and for public purposes, 55, 126.
 - which the legislature must declare, 103.
 - and only within the jurisdiction of the government laying them, 55.

PRINCIPLES OF TAXATION — continued.

- that the sovereignty is not to delegate its power, 61.
nor bargain it away, 66.
- that one sovereignty is not to tax another, 82-90.
- that revenue laws are not to be strained by construction, 265-279.
- that in collection private convenience must yield to public necessity,
432, 762, 772, 818.
- but leaving every man a remedy in the law, 861, 746.
- that the law favors the efforts of the citizen to preserve his estate from
forfeiture, 532.
- that it allows moral obligations to be recognized in taxation, 127.
and justifies special burdens in return for special benefits, 606-608.
and leaves local communities to regulate concerns that are exclu-
sively their own, 678, 689, 699.

PRIVATE CORPORATIONS —

- protection of charters of,
(See CHARTER; CORPORATIONS; FRANCHISE.)
- organized for charity, etc., may be aided by the government, 125.

PRIVATE ENTERPRISES —

- taxes cannot be laid in aid of, 115-117, 126.
- employment of the eminent domain in aid of, 116, 117.

PRIVATE PURPOSES —

- taxation must not be for, 108-117, 126, 127.
- but pensions, bounties, etc., may be paid, 111, 136.
(See PURPOSES OF TAXATION.)
- discriminations for protection,
(See PROTECTION.)

PRIVATE RIGHTS —

- (See CONSTITUTIONAL PRINCIPLES.)

PRIVATE SCHOOLS —

- taxation in aid of, 122.

PRIVATE WAYS —

- taking land for, 113.
- taxation for, is inadmissible, 114.
- effect of existence of, in case of local assessment, 646.

PRIVATE WRONGS —

- misuse of corporate powers may constitute, 764.
- injunction in such case, 765.
- redress of, in tax cases,
(See REMEDIES FOR EXCESSIVE AND ILLEGAL TAXATION.)

PRIVILEGES —

- taxes on, 95, 96, 179, 181, 182, 192, 193, 197, 198, 199, 571-573.
- usually confined to employments which are exceptional, 571.
- are usually collected in the form of license fees, 572.
- when failure to pay tax may render the business illegal, 572.
- taxing successions as, 584.

PRIVILEGES — continued.

taxing amusements as, 581, 584.
 of citizens of other states, must not be abridged in taxation, 50-53.
 licenses are, 596.

PRIVILEGES OF CITIZENS —

taxation of property or business in the state does not abridge, 99.
 unless it discriminates against them, 99.
 different modes of procedure in taxation do not abridge, 100.
 nor requiring foreign corporations to submit to special conditions, 100.
 making right to carry on business depend on time of residence does, 99.

PROCEEDINGS —

in assessing lands for taxation,
 (See **ASSESSMENT**.)
 in the levy of special assessments,
 (See **ASSESSMENTS, LOCAL**.)
 irregular, correction of by amendment,
 (See **AMENDMENTS**.)
 correction of, by statute,
 (See **CURATIVE LAWS**.)
 correction of, by judicial action,
 (See **JUDICIAL CORRECTIONS**.)
 correction of, by re-assessments,
 (See **RE-ASSESSMENTS**.)
 to compel performance of official duty,
 (See **MANDAMUS**.)
 dilatory, in tax cases, statutes to prevent, 719, 762, 818.

PROCESS —

if on its face apparently valid, will protect officer executing it, 797.
 importance of this rule, 798.
 does not protect officer against consequences of his own illegalities,
 801.
 protects collector, though a party is unlawfully taxed, 799.
 or though the tax was not lawfully voted, 799.
 or though the party arrested had been discharged in bankruptcy, 799.
 what is not fair on its face, 800.
 tax roll is not, if certificate attached is not valid, 800.
 or if the warrant shows that an illegal tax is included, 800.
 or if an affidavit attached appears to have been made prematurely,
 800.
 or if the warrant does not emanate from the proper officer, 800.
 defects which do not vitiate, 801.
 building up title upon, 801.
 abuse of authority under, 442, 802.
 (See **TRESPASSER AB INITIO**.)
 for collection of tax from personalty,
 (See **DISTRESS OF GOODS**.)

PROCESS — continued.

to compel performance of official duty,

(See **MANDAMUS**.)

in the case of illegal taxation,

(See **REMEDIES FOR EXCESSIVE AND ILLEGAL TAXATION**.)

summary, against collectors, 717-723.

(See **COLLECTOR OF TAXES**.)

PRODUCTION —

taxation of land by, 26.

PROFESSIONS —

taxation of, 576.

PROFITS —

apportionment of taxes by, 571.

taxes on, 381-388.

meaning of, 221.

(See **INCOME**.)

PROHIBITION —

of importation, by excessive duties, 12.

of occupations not licensed, 572.

the licensed occupations are privileges, 572, 584.

of occupations under the police power, 592-596, 602.

taxes should not go to extent of, 12.

PROHIBITION OF REMEDIES —

(See **INJUNCTION**; **REPLEVIN**.)

PROHIBITION, WRIT OF —

remedy by, in tax cases, 822.

right to, may be taken away, 749.

PROHIBITIONS ON THE STATES —

not to impair the obligation of contracts in taxing, 66.

not to tax the agencies of government, 56.

or commerce regulated by congress, 90-98.

not to tax imports or exports without consent of congress, 90.

not to levy duties of tonnage, 91.

not to abridge the privileges and immunities of citizens, 99.

(See **CONSTITUTIONAL PRINCIPLES**; **LIMITATIONS ON THE TAXING POWER**.)

PROHIBITORY LIQUOR LAW —

does not preclude taxation of liquors, 594.

PROMISE —

town vote to refund illegal taxes, when it amounts to a, 791.

(See **NUDUM PACTUM**.)

PROOF —

of giving notices, should recite the manner in which they were given, 336.

general averment of legality not sufficient, 336.

sufficient if it complies with statutory form, 487.

strictness required in making, 487.

PROOF—continued.

of tax proceedings must be made by the record, 333.

(See RECORD.)

of right to redeem, need not be presented, 540.

onus of, in case of tax sale,

(See SALE OF LANDS FOR TAXES.)

of legal existence of a school district, 790.

of tax proceedings, in order to justify the collector, 793.

PROPERTY—

is a creature of the law, 24.

constitutional protection to,

(See LAW OF THE LAND.)

taxation of, by value, 35-39.

justification of, even when apparently oppressive, 775.

local assessments upon, 617.

public, not to be taxed, 81.

(See PUBLIC PROPERTY.)

taxable, what is understood by, 172, 279, 372.

of private corporations may be taxed, though the franchise is taxed,
223-233.

(See CORPORATIONS.)

impossibility of avoiding duplicate burdens on, 219-234.

(See DUPLICATE TAXATION.)

of municipal corporations, constitutional protection to, 686-703.

assessment of, for taxation, 351-423.

(See ASSESSMENT.)

distress and sale of, for taxes, 438.

(See DISTRESS OF GOODS.)

collection of tax by detention of, 444.

sale of real, for taxes, 444, 469.

(See SALE OF LANDS FOR TAXES.)

redemption of, from tax sales, 532.

(See REDEMPTION.)

taxation of, does not preclude taxation of business, 573.

levies upon, for purposes of regulation, 583.

(See POLICE POWER.)

recovery of, after sale for taxes, 549.

destroyed by rioters, compensation for, 686.

apportionment of, on division of municipality, 185, 239, 635, 637.

PROPRIETORS—

of wet lands, assessments upon for draining, 52, 64, 616, 664.

(See ADJACENT PROPRIETORS; OWNERS.)

PROSPECTIVE ACTION—

statutes are to have, unless the contrary intent appears, 190.

the principle applied to tax laws, 292.

PROSPECTIVE HEALING ACTS—

right of states to pass, 303.

providing for re-assessments,*309.

(See CURATIVE LAWS.)

PROTECTION —

- and taxation, are reciprocal, 2, 19-25.
- right of the people to, entitles government to tax, 19.
- value of, to life and liberty, cannot be estimated, 20, 24.
- attempts to apportion taxes by value of, 24.
- against calamities, taxation for, 188, 590, 620.
- of property by constitutional principles,
(See LAW OF THE LAND.)
- against oppressive taxation,
(See POLITICAL REMEDIES; PRINCIPLES OF TAXATION.)
- against pernicious occupations, etc., by discriminating fees, etc., 594-596
(See POLICE POWER.)
- taxation for, 12, 13, 34.

PROTECTIVE DUTIES —

- are levied in some cases, 12, 83, 111.

PROTEST —

- when neglect to make, will preclude complaining of a tax, 809.
- illegal tax, paid without, cannot be recovered back, 809.
- exceptions, 805, 806.

PUBLIC BUILDINGS —

- special taxation for, 610.
- compulsory local taxation for, 680, 697.
(See COMPULSORY LOCAL TAXATION.)

PUBLIC CORPORATIONS —

- (See MUNICIPAL CORPORATIONS.)

PUBLIC DEBT —

- taxation for payment of, 101, 138.
- of municipalities, compulsory taxation for, 685.
mandamus to compel levies for, 685, 735, 744.
(See DEBT, PUBLIC.)

PUBLIC DOMAIN —

- not taxable by the states, 87-89.
- possessory rights on, may be taxed, 87.
(See RESERVATION.)

PUBLIC GOOD —

- taxes must be laid for the, 55, 606, 616.
- questions of, must be determined by the legislature, 55, 103.
but its determination must not be merely colorable, 46, 111, 641.
(See POLICY.)

PUBLIC GROUNDS —

- purchase of, by a town, 129.
(See PARKS.)

PUBLIC HEALTH —

- (See HEALTH.)

PUBLIC INSTRUCTION —

- (See EDUCATION; SCHOOLS.)

PUBLIC LANDS —

(See PUBLIC DOMAIN.)

PUBLIC MONEYS —

treasurer responsible for safe keeping of, 711.

impolicy in accumulations of, 8, 9.

misappropriation of,

(See MISAPPROPRIATION.)

PUBLIC PEACE —

compulsory taxation by municipalities for, 681.

losses by breaches of, compensation for, 686.

PUBLIC POLICY —

forbids officer who sells being purchaser, 492.

favors redemption, 532.

maxims of, in the levy of taxes, 8-11, 241, 586.

(See POLICY.)

exemptions based on considerations of,

(See EXEMPTIONS.)

PUBLIC PROPERTY —

of the United States, not taxable, 87-89.

of the state and its municipalities, is presumptively excepted from tax laws, 172-174, 177.

may be assessed for local improvements, 207-209, 653.

assessed and sold by mistake, 821.

PUBLIC PURPOSES —

taxes must be laid for, 55, 103, 139.

what are, 104-139.

general meaning of the term, 113.

must pertain to the district taxed, 140.

(See PURPOSES OF TAXATION.)

specification of, in advance of tax, 113.

PUBLIC SCHOOLS —

taxation for, 85-87.

(See EDUCATION.)

PUBLIC SECURITIES —

are not taxable by the states, 84, 85, 390, 393.

of the states and their municipalities, taxation of, 86.

investing capital of corporation in, does not preclude taxation of franchise, 84.

shifts to evade taxation by means of, 415-417.

PUBLIC SQUARE —

taxation for, 129.

PUBLIC USES —

taking property for, 118-119, 237, 612, 624.

(See EMINENT DOMAIN.)

what will justify taxation, 108-132.

(See PURPOSES OF TAXATION.)

PUBLIC VENDUE—

tax sale at, 344.

PUBLIC WORSHIP—

taxes cannot be levied for purposes of, 118.
houses of,

(See CHURCHES.)

PUBLIC WRONGS—

in the case of illegal corporate action, 764.
in the misapplication of public moneys, 818.
correction of, by political action,

(See POLITICAL REMEDIES.)

correction of, by *mandamus*,

(See MANDAMUS.)

PUBLICATION—

(See NOTICE.)

PUNISHMENT—

(See FORFEITURES; PENALTIES.)

PURCHASER—

by executory contract, may redeem, 539.

at sheriff's sale, may redeem, 539.

subject to assessments, may contest them, 637.

may be made personally liable for tax on lands bought, 439.

must take title subject to right to re-assess taxes, 311.

(See BONA FIDE PURCHASER.)

PURCHASER AT TAX SALE—

who may not be, 500-509.

must take the risk of the title, 476.

(See CAVEAT EMPTOR.)

may have *mandamus* to compel issue of certificate, 742.

or of deed, 742.

may be compelled to assign on redemption, 544.

right of, to redeem from prior sales, 534.

notice by, to owner of land purchased, 536.

cannot be compelled to accept redemption of undivided interest, 534.

frauds of, in redemption may be relieved against, 535-6.

right of, cannot be acquired by stranger, 540.

may accept redemption without strict compliance with the statute, 541.

cannot add to conditions of redemption, 542.

rights of, pending redemption, 542.

time to redeem from, cannot be enlarged, 544-546.

lien of, for taxes when title defective, 546.

suit of, to foreclose redemption, 545.

PURPOSES OF TAXATION—

what are admissible, 103-139.

legislature must decide upon, 41-48, 103-108.

limits of judicial authority in respect to, 104-106.

how affected by the grade of government, 108, 109.

PURPOSES OF TAXATION — continued.

- purposes in general, 109-117.
- will not embrace private business enterprises, 115-117, 126.
- general enumeration of, 106, 117, 138.
- religious instruction, 118.
- secular instruction, 119-124.
- public charity, 124.
- moral obligations, 110, 111, 127.
- amusements and celebrations, 128, 129.
- highways and roads, 130.
- canals, railroads, etc., 131-134.
- municipal purposes, 134, 135.
- military bounties, 111, 136.
- the public health, 137.
- protection against calamities, 138.
- payment of the public debt, 138.
- interest need not be exclusively public, 139.
- for what the municipalities may be compelled to tax, 680-688.
- for what they cannot be, 688-703.
- must pertain to the districts taxed, 140-163.
- construction of statutes as to, 277-279.

Q.

QUALIFYING —

- by officer, proof by parol of, 257.
- effect of failure in, 255.

QUARANTINE REGULATIONS —

- state power to make, 93.

QUESTIONING OFFICIAL TITLE —

- in case of usurpers, 251.
- in case of officer *de facto*, 252.

QUIETING TITLE —

- bill may be filed for, by claimant of lands in possession, 783.
- whether this may be done in case of proceedings void on their face, 783-4.
- cannot be done by one not in possession against one who is, 784.

QUO WARRANTO —

- against officers *de facto*, 252.
- for usurpation of corporate powers, 822.
- by state to restrain unlawful taxation, 822.
- not adapted to the redress of individual wrongs, 822.

R.

RAILROAD COMPANIES —

- may be taxed, though made use of by government, 88, 89.
- on government reservations taxable, 87.
- are taxable on their land grants, 88, 89.

RAILROAD COMPANIES—continued.

- cannot be taxed on freight carried from state to state, 96.
- nor on the use of locomotives and cars run from state to state, 96.
- may be taxed on locomotives as property, 96.
- cannot be taxed on their bonds held by non-residents, 22, 23.
- taxation for, 131-134.
- valuation of franchises of, for taxation, 227, 383.
- commutations for taxation of, 209-213.
- construction of exemption from taxation in charters, 204-213.
- tax on capital of, 226, 232.
- taxation on gross receipts, 8, 96-98, 211.
- effect of consolidation upon taxation, 212.
- wharf-boats, etc., of, whether taxable, 211.
- lands owned by, when taxable, 210, 211.
- taxation of by net earnings, 176.
- not to be discriminated against in taxation, 176, 180, 183.
- taxation of in unorganized territory, 184.
- apportionment of value of road by length, 197.
- exemption, whether transferable, 211, 212.
- whether general exemption will apply to machine shops, etc., 210
- value of property in, is included in tax on shares, 226.
- tax on interest paid by, is a tax on the creditor, 231.
- may be taxed on franchise, and also on property, 232.
- exemption of property from taxation, held to exempt franchise also, 223.
- tax on capital stock, held to exempt the franchise, 232.
- may stipulate in the charter to pay the state a proportion of earnings, 234.
- shares in, owned by resident, whether to be regarded as personal property "within" a city, 279.
- rolling stock of, where to be assessed, 369, 384.
- whether to be treated as real or personal, 363-9.
- property of, may be taxed as personal, if statute so provides, 369.
- districts for taxation of, 383.
- personalty of, should be assessed at the place of the business office, 378-384.
- track of, cannot be assessed as non-resident lands, 386.
- property of, is subject to special assessments, 650, 652.
- but only with reference to special benefits, 650, 651.
- easement of, in a street, does not preclude special assessments, 664.
- (See CORPORATIONS.)

RAILROADS—

- state may tax for constructing, 131.
- taxation in aid of construction, 131-134.
- (See RAILROAD COMPANIES.)

RAILWAYS, STREET—

- (See STREET RAILWAYS.)

RATES—

- exemption from, how construed, 207-209.
- for construction of sewers, 616-619.
- (See WATER RATES.)

RATIFICATION —

- by town, of illegal action by the collector, 817.
- by statute, of previous action taken by towns, etc., 186, 187.

REAL ESTATE —

- taxing by the production, 26.
- taxation by rents, 26.
- taxation by value, 19, 85-40.
- assessment of, for taxation, 392-414.
- how to be described in assessment, 404.
- valuation of, for taxation, 409.
- sale of, for taxes, 444, 469.
 - (See SALE OF LANDS FOR TAXES.)
- forfeiture of, for taxes, 461.
 - (See FORFEITURES.)
- redemption of, from tax sales, 532.
 - (See REDEMPTION.)
- recovery of, by tax purchaser, 549.
 - (See RECOVERY OF LANDS SOLD FOR TAXES.)
- special assessments upon, 606.
 - (See ASSESSMENTS, LOCAL.)
- outside a taxing district, whether may be taxed within it,
 - (See EXTRATERRITORIAL TAXATION.)
- what taxation of, out of the district, is irregular merely, 748.
- tax upon, when it may be enjoined,
 - (See EQUITY, COURT OF.)
- cloud upon title may be removed in equity,
 - (See CLOUD UPON TITLE.)
- quieting title to,
 - (See QUIETING TITLE.)
- joinder of complaints in case of illegal taxation of,
 - (See JOINT COMPLAINTS.)
- equity not the proper tribunal for trying titles to, 783.
- right of claimant in possession, to jury trial of his claim, 784.
- improvements upon,
 - (See BETTERMENTS; IMPROVEMENTS.)
- personal liability for taxes and assessments upon,
 - (See PERSONAL LIABILITY.)
- acquiring right to, by adverse possession,
 - (See ADVERSE POSSESSION; LIMITATION, STATUTES OF.)
- judicial sales for taxes, 857-862.

REAL PROPERTY —

- meaning of, in tax laws, 866-869.
- separate classification of as urban and rural in cities, 156, 196.

RE-APPORTIONMENT —

- of cost of road in several towns, 682.
- of debts among municipalities, 185, 239, 685, 687.

RE-ASSESSMENTS —

- curing defects in taxation by, 309, 313.
- in case of tax under an unconstitutional statute, 312.
- recognizing equities in, 298.
- cannot apply to void tax, 300, 310, 312.
- may be ordered to correct neglect of apportionment, etc., 312.
- judgment against a tax does not preclude a re-assessment, 312.
- may be had in case of local taxes, 312.
- authority to make, may be reason for setting aside irregular levies, 759.

REBELLION —

- collection of federal taxes during the, 246.
- (See CIVIL WAR.)

RECALLING LICENSES —

- power of, 604.
- whether fees must be returned on, 604.

RECEIPT —

- for taxes, is evidence of payment, 450, 452.

RECIPROCITY —

- of duty as between the tax payer and the state, 19.

RECITALS —

- in process, how they may affect its validity as a protection, 300.
- in tax deeds, 496, 518.
- corrections in, by amendment, 314-323.
- (See AMENDMENTS.)
- what necessary to show jurisdiction of court, 525-527.
- in judgments for taxes, 530.
- in case of summary proceedings against collectors, 721-2.

RECLAMATION OF LANDS —

- (See DRAINS.)

RECORD —

- of tax deed, 549.
- failure to make, will not preclude redemption, 533.

RECORDS —

- amendment of defects in, 313-323.
- (See AMENDMENTS.)
- purchaser of lands is supposed to examine, 311.
- tax purchaser must take notice of, 318.
- (See CAVEAT EMPTOR.)
- levy of taxes must appear by, 339.
- assessors may rely upon votes appearing by, 340.
- secondary evidence of, when lost, 340.
- want of, cannot be supplied by presumption, 431.
- of tax judgment, 529.
- reviewing defects in, on *certiorari*, 753.
- (See CERTIORARI.)
- fatal defects on face of, will preclude tax being cloud on the title, 779.
- protection of assessors by, 789.

RECORDS—continued.

tax payer must take notice of defects in, 811.
of sale, are better evidence than the certificates, 511.

RECOVERY OF LANDS SOLD FOR TAXES—

general remedy by ejectment, 549.
special rules sometimes provided, 549.
payment for betterments as a condition, 554.
payment of taxes, whether may be required, 550-554.
short limitation acts for, 555-564.
 construction of that of Pennsylvania, 558.
 of that of Wisconsin, 559.
 of that of Iowa, 561.
 of that of Maryland, 563.
 of that of Louisiana, 563.
 of that of Arkansas, 563.
 of that of Alabama, 563.
 of that of Michigan, 564.
 of that of Kansas, 564.
 of that of Colorado, 564.
adverse possession under, 565-567.
"color" or "claim" of title, 567-569.
"true owner" in case of, 569.
equity not the proper tribunal for, 784.
right to jury trial when suit is brought for, 784.

RECOVERY FOR TAXES ILLEGALLY COLLECTED—

cannot be had if tax merely irregular, 804, 808.
may be had against assessors who have acted without jurisdiction, 789.
 or against collector whose process is void, 800.
 or if he makes himself trespasser *ab initio*, 442, 802.
 but not after moneys paid over by him, 802.
may be had against collector of customs, 794, 804.
may be had against town, county, etc., 804, 814.
 what are the conditions to such recovery, 805.
 the suit must be for money actually paid over, 805.
 it can only be for void taxes, 805, 808.
 and only for what the municipality has received for its own use, 806.
cannot be had for taxes voluntarily paid, 805, 809.
 even though the levy was unconstitutional, 809.
 immaterial that the party did not know his legal rights, 809.
 or that the officer collecting was not of municipal appointment, 807.
 what are voluntary payments, 809.
 not those made under protest, 809, 810.
 or to relieve goods from seizure, 812.
 or under compulsion of process, 812.
no defense that money has been paid over to contractor, 807.
statutory changes in rules of recovery, 813.
demand not necessary before suit, 815.
what interest recoverable on, 815.
from the state, must be obtained by legislation, 804.
(See REFUNDING.)

REDEMPTION —

- right to make not to be prejudiced by amendment, 822.
- is favored by the policy of the law, 532.
- statutes for, are liberally construed, 532.
- is a statutory right, 533.
- statutory conditions to, 535.
- courts cannot give where the statutes do not, 534-536.
- pendency of civil war does not enlarge time for, 534.
- cases of minors, etc., sometimes specially provided for, 534.
- statutory provisions for foreclosing, 536.
- necessity that these be strictly observed, 536-538.
- who entitled to make, 538.
 - purchaser by executory contract, 539.
 - tenant in common, 539, 540.
 - original owner, though there is a tax title, 538.
 - wife, having a homestead right, 538.
 - lien creditor, 538.
 - purchaser at sheriff's sale, 539.
 - one in possession claiming title, 539.
 - dowress, 539.
 - husband, of the wife's lands, 539.
 - mortgagee or his assignee, 539.
 - guardian, 539.
 - not a mere stranger, 540.
- relief in cases of accident or fraud, 540, 541.
- can be none against the party's own mistakes, 541.
- purchaser may accept, waiving conditions, 541.
- purchaser or officer cannot impose conditions on, 542.
- effect upon title, 543.
- when purchase of tax title will be held to be, 501, 503, 504, 505, 543.
- foreclosing by statutory suit, 545.
- statutory lien for taxes when title defective, 546-548.
- legislature cannot enlarge time for, after sale, 544.
- whether it may shorten time, 545.
- control of purchases by the state, 545.
- right of one who makes to compel assignment to himself, 544.
- rights of parties pending, 542.

REFUNDING —

- by the state, of illegal taxes, 706, 753.
- by municipalities, of taxes collected for their use, 753.
- officers have no general authority for, 753.
- when may be compelled by *mandamus*, 733.

REFUSAL —

- to assess a person, who loses right to vote in consequence, 791-2.
- of auditing boards to allow claims, may be corrected by *mandamus*, 729.
- to perform official duty, how corrected,
 - (See MANDAMUS.)
- to levy tax to pay judgment, etc., 685.

REFUSAL—continued.

of municipalities to perform state duties, 690.
to perform political duties,
(See **POLITICAL DUTIES**.)

REGRADING—

of streets, taxation for, 613.

REGULARITY—

of tax sales must be shown by purchaser, 472-481, 517-523.
(See **SALE OF LAND FOR TAXES**.)
want of, when may be corrected by statute,
(See **CURATIVE LAWS**.)
correcting, record to show,
(See **AMENDMENTS**.)

REGULATION—

taxation for, 13.
burdens imposed under the police power for, 596-605.
(See **POLICE POWER**.)

REJECTING TAXES—

when may be compelled by *mandamus*, 733, 741.
requiring, on *certiorari*, 757.

RELATION—

of protest, to a time preceding payment, 818.
of tax deed, to time of purchase, 542.

RELATOR—

in tax cases, when private parties may be, 736, 765.
when law officer of the state should be, 765.
(See **LAW OFFICER OF THE STATE**.)

RELEASE OF GOODS—

payments made to obtain, are not voluntary, 814.

RELEASE FROM TAXATION—

(See **CONTRACTS**; **EXEMPTIONS**.)

RELIGIOUS INSTRUCTION—

taxes not to be levied for, 118.

RELIGIOUS PURPOSES—

use of school-house for, 118.
taxation for, not admissible, 118.

RELIGIOUS SOCIETIES—

what protection from government they are entitled to, 118.
exemption of property of, from taxation, 119.
must be strictly construed, 205.
do not preclude special assessments, 207, 652.
exemption ceases when property is sold or leased, 210, 211, 212.
use of school-houses by, 118.

RELINQUISHMENT —

of power to tax, 66-82.

REMAINDER —

(See **SURPLUS MONIES**.)

REMEDIAL STATUTES —

what are, 270.

may be presumed to reach back, for purposes of justice, 293.

the proper province of, 551-554.

laws for imposing revenue are not, 271.

REMEDIES FOR EXCESSIVE AND ILLEGAL TAXATION —

are always afforded by the law, 47-53, 432, 746.

by abatement, 747.

assessors may make, while they retain roll, 747.

legislative authority may make, 747.

taxing officers must have authority for, 747.

by reviews and appeals, 747.

these by assessors or by appellate board, 747, 748.

need not apply for, if tax is void, 748.

the proper remedy for excessive or unequal assessment, 748.

decision by reviewing authority final, 748-752.

for irregular assessment, statutory remedy is exclusive, 750.

right of city to appeal, 750.

by refunding, 753.

officers cannot refund without express authority, 753.

by certiorari, 753.

the remedy at common law, 753.

the writ not of right, 753.

promptness required in applying for, 755.

the writ only brings up the record, 755, 759.

discretionary action not reviewed on, 755.

only reaches jurisdictional questions, 756, 757.

what will be set aside upon, 758, 759.

by injunction, 760, 761.

mischievous use of this writ, 762.

conditions imposed on issuing, 763.

not generally awarded in case of personal taxes, 772-775.

except to prevent irremediable mischief, 773.

not awarded to restrain political action, 769.

nor for merely excessive assessments, 775.

nor for merely irregular assessments, 775-778.

what are not merely irregular, 777.

case of personal taxes in respect of land, 778.

joint complaint by several persons, when allowable, 769.

allowed in cases of fraud, 784.

by removing cloud from title, 778.

what constitutes a cloud, 779-783.

by having title quieted, 783.

for this, complainant must have possession, 784.

REMEDIES FOR EXCESSIVE AND ILLEGAL TAXATION — continued.

by action against assessors, 786.

 this will not lie for mere errors, 786-789.

 will lie in case of excess of jurisdiction, 789-793.

 and where by neglect a party is deprived of his rights, 792.

 bad motive in the assessor will give no right of action, 793-795.

by action against supervisor, 795.

 what necessary to his justification, 795, 796.

by resisting collection, 796.

by action against collector, 797.

 his protection by his process, 797-801.

 fatal defects in process, 800.

 process does not protect against his own illegalities, 801.

 these rules apply to federal collectors, 803.

in case of illegal corporate action, 764.

 in incurring debts, 764.

 who to apply for, 765.

 in attempted misappropriations, 766-768.

 necessity for promptness, 768.

where tax payer is unlawfully set into new municipality, 768.

prayer for must not be too broad, 764.

to prevent multiplicity of suits, 764.

to protect value of securities, 772.

by action against town, etc., 804.

 this only lies when tax was void, 805, 806.

 and when payment was compulsory, 805, 809-813.

 and after money is paid over by collector, 805.

 and where party has not elected to proceed against the officer,
 805.

 case of statutory action, 804, 806.

 municipality only liable for taxes collected for itself, 806.

 when cause of action accrues, 807.

 not important that collector was not of local election, 807.

 all payments are presumed to be voluntary, 810.

 what are not, 814, 815.

 recovery limited to amount received, 815.

 demand in case of, 815.

 recovery of interest, 815.

 no action on implied warranty, 818.

 case of misapplication by corporation, 818.

by replevin of goods, 818.

 this sometimes taken away, 818, 819.

by prohibition, 822.

by quo warranto, 822.

by mandamus, to strike illegal assessment from the roll, 732, 742.

 to compel allowance for illegal taxes paid, 733.

estoppel against resorting to, 819-821.

political redress,

 (See **POLITICAL REMEDIES.**)

REMEDY —

- on contract, pertains to the obligation, 76, 81.
- for false official return, 261.
- by suit for recovery of taxes, 435.
- by suit to enforce redemption, 535, 536.
(See COLLECTION OF TAXES.)
- by suit against collector of taxes, 704.
- on collector's bond, 706.
- summary against collectors, 717.
(See COLLECTOR OF TAXES.)
- for neglect of official duty,
(See MANDAMUS.)
- to recover lands sold for taxes,
(See RECOVERY OF LANDS SOLD FOR TAXES.)
- against corporations for neglect of officers, 816.
- limitation of time to apply for,
(See LIMITATION, STATUTES OF.)
- political, 823.
(See POLITICAL REMEDIES.)

REMITTING TAXES —

- power for, will not authorize exemptions, 200.
- officers can only make for legal cause, 201.
- general power for, cannot be given to supervisors, 201.

REMOVAL —

- summary, of collector, 721.
- of persons taxed, from the district, 801.

REMOVAL OF CLOUD UPON TITLE —

- (See CLOUD UPON TITLE.)

RENTS —

- taxation of, 26.
- offset of, against redemption moneys, 534.

REPAIRING WAYS —

- special assessments for, 615.
(See ASSESSMENTS, LOCAL; HIGHWAYS.)

REPAVING STREETS —

- right to levy special assessments for, 615.

REPEAL —

- by implication from general laws, not favored, 294.
- construction of acts of, 294.
- of exemptions, general right of, 69, 204.
exceptions to this, 66-82.
- of local powers to tax, 18, 19.
- of law under which collector's bond was given, 716.

REPLEVIN —

- for property seized for tax, 818.
- liability of the process to abuse, 818.
- the remedy sometimes taken away, 439, 818.

REPLEVIN — continued.

this does not take away right of third person, 819.

nor of one not liable to taxation, 819.

collector cannot defend action of, unless tax was legal, 801.

REPORTS, OFFICIAL —

(See RETURNS, OFFICIAL.)

REPRESENTATION —

and taxation go together, 59-63, 242, 678.

origin of this maxim, 58.

meaning of, in America, 58.

application of, to local taxation, 678-702.

precludes levy of taxes by the executive, 58.

does not insure low taxes, 59.

is only fully true when applied to the state at large, 59.

does not preclude taxes on those who cannot vote, 59.

application of maxim to federal government, 60.

(See COMPULSORY LOCAL TAXATION.)

REPRESENTATIVES —

of the people, must grant taxes, 48, 58.

responsibility of, to the people, the security against oppressive taxation,

5, 107, 241-248, 823.

(See POLITICAL REMEDIES.)

who to have a voice in choosing, 59, 60.

REPUBLIC —

arbitrary power does not exist in, 622-624.

REPUBLICAN GOVERNMENT —

principles of,

(See CONSTITUTIONAL PRINCIPLES.)

REPUDIATION —

by states, 73-75.

by municipalities, 75-77.

REPUTED AUTHORITY —

of one assuming to be an officer, 249-255.

(See OFFICERS.)

REQUEST —

for jury trial when the right is given, 756.

RESERVATIONS —

persons living on, not taxable by the state, 55, 871.

RESIDENCE —

personal assessments to be made at place of, 369, 371, 372.

(See DOMICILE.)

RESIDENT —

out of state, not personally taxable within it,

(See NON-RESIDENTS.)

out of district, may be taxed on property in it, 59, 60.

RESIDENT LANDS —

taxation of, separate from non-resident, 395, 396.

(See REAL ESTATE.)

personal liability for taxes on,

(See PERSONAL LIABILITY.)

RESIDUE —

(See SURPLUS MONEYS.)

RESPONSIBILITY —

of representatives to their constituents, the security against oppressive taxation, 5, 107.

(See REPRESENTATIVES.)

RESPONSIBILITY, PERSONAL —

(See PERSONAL LIABILITY.)

RESTRAINING COLLECTION —

(See INJUNCTION.)

RESTRAINTS —

on the power to tax,

(See LIMITATIONS UPON THE TAXING POWER.)

taxation for purposes of,

(See POLICE POWER.)

RESTRICTIONS —

on the power of the states to tax, 66-82.

(See CONSTITUTION OF THE UNITED STATES.)

on the power of the United States to tax,

(See CONSTITUTION OF THE UNITED STATES; CONSTITUTIONAL PRINCIPLES.)

on municipal powers to tax, what are, 345.

are sometimes the purpose in taxation, 13, 592-3.

(See POLICE POWER.)

RETAILERS —

of liquors, taxation of, 580, 594, 602, 604.

(See SPIRITUOUS LIQUORS.)

RETROSPECTIVE LEGISLATION —

may cure want of power to tax, 137.

presumption against intent to adopt, 291-2.

for curing defects in tax proceedings, 297-303.

(See CURATIVE LAWS.)

RETROSPECTIVE TAXATION —

may be imposed, 291-293.

presumed intent not to impose, 291-293.

RETURNS, OFFICIAL —

in general are conclusive, 260, 261.

officer liable for false, 261.

of assessment, 414.

liability for failure to make, 802.

of failure to collect tax, 454, 527.

disproving, 260, 456, 527.

of sale of lands, 513.

REVENUE —

taxation must be for purposes of, 11, 111, 112.
other incidental purposes,

(See **POLICY.**)

not the purpose of police taxation, 586-588.

(See **POLICE POWER.**)

license fees, when are for, 597.

farming out the, 434.

contracts in fraud of, are void, 433.

collection of the, 432-433.

(See **TAXATION; TAXES.**)

REVENUE LAWS —

what are, 265.

general purpose of, 11.

in some states originate with the popular house, 42.

construction of, in general, 263-294.

requirement of specification of purpose in, 325-327.

for local taxation, construction of, 276.

directory and mandatory provisions in, 280-291.

presumption against retrospective action of, 291.

(See **CONSTRUCTION.**)

REVENUE STAMPS —

collection of taxes by, 81, 460.

not taxable by the states, 85.

REVIEW OF ASSESSMENTS —

boards for, 418, 421.

right of parties to notice of meeting of, 420, 421, 751.

remedy by, in case of excessive taxation, 747-753.

decision of board of, when final, 748-750.

failure to apply for, effect of, 748.

errors in decision on, do not invalidate action, 750.

certiorari in cases of, 755, 758, 759.

increasing assessments upon, 778, 785.

REVISION —

of revenue laws, construction of, 295.

(See **REPEAL.**)

REVOKING LICENSES —

right of, 604.

RHODE ISLAND —

constitutional provisions of, bearing upon special assessments, 694.

RIGHT —

to a remedy, 746.

conditions to exercise of, 459-461.

constitutional,

(See **CONSTITUTIONAL PRINCIPLES.**)

to a hearing,

(See **HEARING.**)

- RIOTS —**
taxation to indemnify losers by, 686.
- RIVERS —**
protection against overflow of,
(See **LEVEES**.)
- ROADS —**
taxation for, 130,
(See **HIGHWAYS**.)
taxation for, under legislative compulsion, 682, 694-698.
(See **COMPULSORY LOCAL TAXATION**.)
labor, taxes in,
(See **LABOR**.)
officers of, not liable for error in their decisions, 787.
- ROBBERY —**
under the forms of law in tax cases, 46, 111, 641.
of collector, 711.
- ROLLING STOCK —**
taxation of, 369, 384, 603.
- RULES —**
fixed, taxation must be based upon, 2, 3.
(See **PRINCIPLES OF TAXATION**.)
- RULES OF CONSTRUCTION —**
of statutes in general, 263.
of revenue laws, 265.
of local powers to tax, 276.
(See **CONSTRUCTION**.)
- RULES OF EVIDENCE —**
right of the legislature to establish and change, 297.
must not preclude parties from showing their rights, 297.
application of, to tax sales, 517.
(See **EVIDENCE**; **PRESUMPTIONS**.)
- RURAL LANDS —**
in cities, sometimes taxed at different rates from other city property,
156.
brought into city without sufficient reason, taxation of, 157.
- S.**
- SACRIFICE —**
in taxation, equality of, 167.
in sale of land for taxes, 471.
- SAFE KEEPING —**
of public moneys, officer is liable for, 711.
- SALARIES —**
of federal officers, states cannot tax, 84.
of state officers, United States cannot tax, 85.
state and United States may tax those of their own officers, 583.
collection of taxes on, 433.

SALE—

of chattels for taxes, 438-442.

(See REPLEVIN.)

demand of the tax should be first made, 442.

misconduct of officer may render him trespasser, 442, 802.

will not preclude proceedings being set aside on *certiorari*, 758.

payment of tax to prevent, is payment under compulsion, 814.

title obtained by, is not warranted, 818.

(See CAVEAT EMPTOR.)

of collector's office, effect of, 257.

SALE OF LANDS FOR ASSESSMENTS—

must be special authority for, 672.

power usually conferred, 672.

(See ASSESSMENTS, LOCAL.)

SALE OF LANDS FOR TAXES—

collection by, 444-456.

conditions precedent must be observed, 454-456.

payment or tender discharges right to make, 450-453.

land must be liable, 469.

proceedings must be regular, 469-472.

regularity of, to be shown by purchaser, 472-477.

rule of *caveat emptor* applies, 476.

how far presumptions may support, 477-481.

special authority for, 481.

notice of, 482-487.

description of land in notice, 486.

must be made at time and place appointed, 487.

adjournment of, 488.

competition must be allowed at, 489.

officer cannot buy at, 492.

must be of separate parcels separately, 493.

undivided interests may be sold, 493.

surplus bond required in some states, 495.

excessive, is void, 496.

must be to highest bidder, 498.

must be for cash, 498.

must not be for more than is due, 498.

may be of complete title, 499.

sale of leasehold interest, 537.

inadequacy of price will not defeat, 499.

what persons may not buy at, 500-509.

case of tenant and mortgagor, 500, 503.

case of tenant in common, 502.

case of vendee in possession, 502.

case of an agent, 502.

case of mortgagee, 503.

case of vendor, 505.

case of party in possession, 506-509.

SALE OF LANDS FOR TAXES — continued.

- bids by state or county, 509.
- for different taxes at the same time, 511.
- certificate to purchaser, 511.
 - how issue of, compelled, 743.
- report of sale, 518.
- deed and its requisites, 513-516.
 - force of, as evidence, 297-299, 517-522.
 - how execution of, compelled, 742.
- judicial proceedings for, 523-530.
 - court must have jurisdiction, 525, 528, 529.
 - report of inability to collect, 526-7.
 - notice to parties, 527.
 - proceedings are *in rem*, 527.
 - what defects invalidate, 527-530.
 - confirmation of, who may oppose, 527.
 - questions of regularity concluded by judgment, 529.
- redemption from, 532-548.
 - (See REDEMPTION.)
- recovery of lands sold, 549-569.
 - (See RECOVERY OF LANDS SOLD FOR TAXES.)
- surplus moneys, compelling payment of, 742.

SALES OF MERCHANDISE —

- taxation of, 81, 177.
- license for may be required, 602.
- taxation of business of selling,
 - (See TRADERS.)
- taxation of property also, 573.

SALOON KEEPERS —

- (See SPIRITUOUS LIQUORS.)

SANITARY PURPOSES —

- taxation for, 187, 591, 684.
- special assessments for, 616-619, 654, 655.

SATISFACTION —

- of municipal debts, compelling taxation for, 685, 734.
- of tax on lands by levy on goods, 454, 781.
- of illegal tax voluntarily, precludes action to recover back, 809.
 - (See VOLUNTARY PAYMENT.)

SAVING OF EXPENSE —

- not a sufficient reason for uniting suits in equity, 771.
 - (See JOINT COMPLAINTS.)

SAVINGS BANKS AND SOCIETIES —

- tax on deposits in, not a tax on property, 221.
- excise taxes upon, 377-383, 388.
- tax on deposits invested in non-taxable securities, 227.

SCHOOL DIRECTORS —

- cannot be compelled by *mandamus* to abate taxes, 781.
- permissive authority of, to make exemptions, 209.

SCHOOL DISTRICTS —

- may be empowered to support free schools, 120, 348.
- non-residents sending to school may be taxed, 183.
- creation of, held to give power to tax, 276.
- authority of to tax by value will not justify poll tax, 276.
- tax not designed for purpose professed will be enjoined, 338.
- meetings in, to vote taxes, 332-343.
 - when favorable vote of, necessary to contract, 332.
 - how to be called, 334-337.
 - can act only when legally called, 335, 790.
 - proof of due calling, 335.
 - favorable construction of votes of, 337, 338.
 - specifying object of moneys voted, 338.
 - may vote tax for buildings constructed under invalid vote, 338
 - acquiescence in void proceedings does not confirm, 339.
 - record of, should show proceedings, 339, 340.
 - evidence in aid of defective record of, 340.
 - certifying votes of, to taxing officers, 341.
 - record of vote for school buildings conclusive, 343.
- constitutional provision for special taxation by, held not self-executing. 348.
- taxes by, are not within a limitation of town taxes, 348.
- may be created without the assent of people, 348.
- cannot vote to build school-house on site not legally designated, 349.
- statutes for establishing mandatory, 120, 282.
- exhaust their power to tax by one annual levy, 349.
- cannot exceed limit of taxation to pay judgment, 350.
- tax purporting to be voted by two jointly, held void, 331.
- exemption of property of, from taxation, 172-174.
 - not from special assessments, 652-3.
- people of, may be compelled to lay taxes, 683-4.
- refunding tax moneys on division of, 753.
- questioning validity of organization of, 754-5, 761, 768.
- should be party to suit to enjoin taxes, 761, 768.
- state will not interfere to enjoin tax when tax payers have remedy, 763
- tax void if voted by illegal meeting, 790.
- assessors when liable for levying taxes for, 790, 791.
- political action of, not controllable by *mandamus*, 734.
- officers of, not liable for discretionary action, 787-8.
- change in boundaries, effect of, 239.
- vote of taxes cannot be coerced by *mandamus*, 734.
- informal organization of, 754, 768, 790.

SCHOOL PROPERTY —

- use of, for religious purposes, 118.
- exemption of, from taxation, 125, 202.
- liability of, to special assessments, 652.
- general exemption of, not applicable to property merely held for revenue, 200.
- or to school property while leased for other purposes, 201.

SCHOOLS —

- support of, a prime object in American government, 119.
- generally left to corporations, 119, 121.
- enumeration of some in constitution does not preclude establishment of others, 119.
- range of studies admissible in, 119.
- power to tax for, when compulsory, 120, 282, 683.
- rules of admission to, must be impartial, 121.
- right to limit attendance to residents, 121, 183.
- state may control expenditures for, 121, 684.
- whether separate may be provided for colored persons, 121.
- controlled by churches, etc., assistance to, 123.
- state, may be aided by town where located, 123.
- whether such aid can be compelled, 690, 697.
- private, exemption of property from taxation, 125, 202.
- laws for may be different in different counties, 188.
- what is a free public school, 202.
- recovery for taxes unlawfully exacted, 807.
- liability of assessor in levying tax for, illegally, 790.
- construction of power to tax for, 277-280.
- private, aid of the state to, 122.
- voting taxes for,
- (See VOTING THE TAXES.)

SCRIP —

- payment of taxes in, 14, 710.

SECULAR INSTRUCTION —

- taxation for, 119-124.
- (See SCHOOLS.)

SECURITIES —

- taxation of,
- (See BONDS; CREDITS; MORTGAGES; PUBLIC SECURITIES.)

SECURITY —

- required of county treasurer does not release county from liability to state, 468.
- for performance of collector's duties,
- (See COLLECTOR OF TAXES.)

SEIZURE —

- of the person for taxes, 264, 437, 574, 699.
- of property for taxes,
- (See DISTRESS.)
- payment of tax to relieve from,
- (See VOLUNTARY PAYMENT.)
- replevin in case of unlawful, 818.

SELF-EXECUTING PROVISIONS —

- of a constitution, what are, 101, 326, 327.

SEMINARIES —

- exemption of, from taxation, 202.

SEPARATE INTERESTS —

may be separately valued if statute so provides, 411.
and separately sold, 493.
redemption in case of, 584.

SEPARATE PARCELS —

separate assessments of, 400.
(See GROUPING.)
what are, 402, 408.
separate sale of, 493.
must not be divided in assessment, 401.

SERVANTS —

taxation in respect of, 29.

SERVICES —

in procuring legislation, payment for, 135.

SET-OFF —

of demands against taxes, not allowed, 17.
of benefits against value of land taken for streets, 612, 613.
of demands receivable for taxes, against taxes collected, 710.
(See OFFSET.)

SEWERS —

construction of, may be ordered under police power, 590.
special assessments for, 613, 616-619, 641, 642, 658.
(See ASSESSMENTS, LOCAL.)
assessments for, in England, 618.
illegal exemption from tax for, 216.

SHARES IN CORPORATIONS —

(See STOCK IN CORPORATIONS.)

SHERIFF —

(See COLLECTOR OF TAXES.)

SHIPS —

of foreign countries, not taxable, 19.
tonnage duties on, cannot be laid by states, 91-93.
are taxable as property by states, 91-93.
tax on masters of, 97.
where to be taxed, 373.

SHORT STATUTES OF LIMITATION —

(See LIMITATION, STATUTES OF.)

SHORTENING TIME TO REDEEM —

question of right of, 544.

SHOWS —

taxation of, 39, 531.
(See AMUSEMENTS.)

SIDEWALKS —

delegation of authority to order, 65.
construction of, under police power, 588.
special assessments for, 613, 615.

SIGNING —

- of assessment roll, necessity for, 412.
- signing certificate attached, not equivalent to, 412.
- of tax roll by supervisors, 426, 427.

SILENCE —

- when may work an estoppel, 819-821.

SINKING FUND —

- tax for, 827-8.

SITUS —

- of corporate shares for taxation, 28.
- of personalty in general, 28, 869, 372.
- of credits, 21-23, 372.
- of the personalty of corporations, 869, 878, 884.

SLEEPING CARS —

- taxation of, 96, 97.

SOLDIERS —

- bounties for,
(See BOUNTIES.)
- exemption of property from taxation, 207.
- taxation while in service, 204.

SOUTH CAROLINA —

- constitutional provisions for equal taxation in, 197.
- assessments of property in, must be by value, 626.

SOVEREIGN POWERS —

- apportionment of, in government, 41.
- general nature of the division, 41-53.

SOVEREIGNTY —

- the taxing power an incident of, 4.
- taxation an act of, 200.
- of state or nation, not to be invaded by the other, 82-89.
(See EXTRATERRITORIAL TAXATION.)

SPECIAL ASSESSMENTS —

- (See ASSESSMENTS, LOCAL.)

SPECIAL BENEFITS —

- levying assessments with reference to, 606-677.
(See ASSESSMENTS, LOCAL.)

SPECIAL JURISDICTION —

- of courts to review proceedings in taxation, 818.
- of courts to render judgments for taxes,
(See JUDGMENT FOR TAXES.)
- to review assessments,
(See BOARDS OF EQUALIZATION; BOARDS OF REVIEW.)

SPECIAL LAWS —

- to be construed as leaving general in force, 279, 295.
- implied repeal or modification of, by general laws, 294.
- imposing new burdens, should be prospective, 291-293.
- for curing defects in tax proceedings,
(See CURATIVE LAWS.)

SPECIFIC TAXES —

what are, 233.

SPECULATION —

lands held for, may properly be taxed, though producing no income, 27.
and be subjected to special assessments for draining, 649.
collector not to make use of his office for, 711.

SPIRIT OF THE CONSTITUTION —

statutes which violate are not necessarily void, 695.
(See CONSTITUTIONAL PRINCIPLES.)

SPIRITUOUS LIQUORS —

why especially selected for taxation, 586.
policy in indirect taxation of, 9.
heavy taxation of, sometimes defeats the purpose, 33.
manufacturers and dealers in, are taxed on their business, 580.
stock taxed as property at same time, 580.
discriminations in taxing dealers, 581, 600.
whether one licensed as a tavern keeper may sell, 581.
taxation of, where regulation is the purpose, 602.
may be taxed, though the business is illegal, 594.
tax law not invalid for discriminating against, 599, 602.
power to declare the unlicensed selling a nuisance, 602.
license fee for regulating sale of, is not a tax, 598.
issuing licenses to sell, 603.
conditions to a license of the business, 603-4.
revoking licenses to sell, 604.

SPORTS —

taxation of, 39, 581.
(See AMUSEMENTS.)

SQUARES —

at street crossings, assessments for, 666.
public, taxation for, 129.

STAMPS —

revenue, are not taxable by the states, 85.
collection of taxes in, 31, 460.

STATE —

bids by, at tax sales, 509.
power of, to coerce local taxation, 678-700.
(See COMPULSORY LOCAL TAXATION.)
power to compel receipt of scrip for taxes, 14.
repudiation by, 73-75.
control of municipalities, 142.
remedies of, against its collectors, 704-722.
(See COLLECTOR OF TAXES.)
abatement of taxes by, 747.
refunding of illegal taxes by, 753, 804.
license by, cannot be nullified by county or town, 601.
determination of tax levy for, 324.
(See LEGISLATIVE ACTION; LEGISLATIVE POWER.)

STATE BOARD OF EQUALIZATION —

review of assessments by, 421-423.

STATE BUILDINGS —

(See PUBLIC BUILDINGS.)

STATE CONSTITUTIONS —

(See CONSTITUTIONS OF THE STATES.)

STATE INDEBTEDNESS —

payment of taxes in, 14, 74-5.

exemption of, from taxation, 204.

STATE LANDS —

taxation of, 88.

presumptively not taxable, 172-3.

special assessments upon, 653.

STATE PAPER —

publication of notice in, 484.

STATE PURPOSES —

taxation for, must be apportioned through the state, 140-146.

cases of state buildings and state works, 153.

taxation by municipalities for, 680-683.

what are, 680-683.

(See PURPOSES OF TAXATION.)

STATE TREASURY —

refunding illegal taxes received at, 804.

STATES —

may require taxes to be paid in gold, 14.

may make contracts not to tax, 66.

power of, to tax, how limited by the federal constitution, 66-100.

(See CONSTITUTION OF THE UNITED STATES.)

general right of, to tax and select the subjects, 164, 165, 200.

STATUTES —

revenue, what are, 1, 42, 325.

must have revenue for their purpose, 11, 42.

impairing obligation of contracts forbidden, 66-82.

(See CONTRACTS.)

construction of, in general, 263-296.

must be governed by the intent, 264.

must find intent in the words employed, 264.

extrinsic aid to, in cases of doubt, 264.

construction of revenue laws, 265-275.

leaning should not be to liberal construction, 274.

penal provisions should be strictly construed, 272-275.

conferring local powers to tax, should be strictly construed, 276-279.

directory and mandatory, 255.

what should be held mandatory, 280-288.

instances of directory provisions, 255, 280-290.

may lay taxes retrospectively, 291.

presumption against retrospective effect, 292.

STATUTES — continued.

- curative, the various classes of, 297.
- establishing conclusive rules of evidence, 297.
- legislative mandates, 299.
- for special cases, 300.
- what is within their compass, 297-306.
- prospective, 308.
- for re-assessments, 309.
- may give summary remedies for collection of taxes, 432, 438-9.
- allowing redemption, are to be favorably construed, 532.
- whether redemption can be shortened by, after sale made, 544.
- or lengthened, 545.
- what conditions may be imposed by, in suits to recover lands sold for taxes, 552-555.
- (See RECOVERY OF LANDS SOLD FOR TAXES.)
- remedial, what are, and how construed, 270-272, 293.
- of limitation, application of in tax cases, 555-569.
- (See LIMITATION, STATUTES OF.)
- retrospective, may cure defect in power to tax, 186.
- may abate taxes, 747.
- may protect officers acting in good faith, 791.
- taking away common law remedies, 818.
- or remedies in equity, 762.

STATUTORY POWER —

- divesting one of his estate, must be strictly construed, 284.
- and strictly executed, 284.
- tax sales are made under, 470.

STATUTORY REMEDY —

- for abatement of taxes, 747-750.
- must be sought in the time prescribed, 764.
- against the collector and his sureties, 717-722.

STAYING COLLECTION —

(See INJUNCTION.)

STEALING FROM COLLECTOR —

- of tax moneys, leaves him liable, 711.

STEAMBOAT —

- made use of for railroad purposes, question of exemption in case of, 211.

STOCK, PUBLIC —

- of the United States, not taxable by the states, 84.
- of states and their municipalities, taxation of, 204.
- investing capital of corporation in, does not preclude taxation of franchise, 84.

STOCK IN CORPORATIONS —

- to be taxed where owner has his domicile, 23, 221-224, 373.
- subject to conditions imposed by state in granting permission to transact business, 100.

STOCK IN CORPORATIONS — continued.

- when taxation of, will preclude taxation of corporate property, 211, 212
- property of corporation is represented by, 212, 221-228.
- when exempt from taxation where corporation is exempt, 211.
- tax on, is a different thing from a tax on the corporation, 221-228.
- sometimes corporation made collector of taxes upon, 433.
- sale of, by process fair on its face, passes title, 440.
- held by non-residents, cannot be taxed to corporation, 57.
- may be taxed as the charter shall provide, 57, 100.
- meaning of the word "stock" in tax laws, 279, 389.

(See **BANKS**; **CORPORATIONS**; **RAILROAD COMPANIES**.)

STOCK IN TRADE —

- may be taxed though the business is taxed, 578.

STOCKHOLDERS —

- obtaining lists of, by *mandamus*, 784.
- taxation of,

(See **STOCK IN CORPORATIONS**.)

STRANGER —

- to title, cannot redeem from tax sale, 540.
- payment of tax by, 451.

STREAMS —

- special assessment for preventing inundations by, 448, 590, 620.

STREET LIGHTING —

- special assessments for, 621.

STREET RAILWAYS —

- taxation of, 211, 229, 367, 608.
- assessment of track of, for widening the street, 651.

STREETS —

- general taxation for, 610.
- special assessments for land taken for, 612.
 - for cost of grading, 611, 618.
 - for paving or otherwise improving, 147, 148, 611, 636.
 - for altering, widening or extending, 618.
 - for repaving, replanking, etc., 613.
 - for cost of curbstones, etc., 614.
 - for sidewalks, 588, 615, 643.
 - for sewers for, 616, 641.
 - for water pipes in, 620.
- constitutional objections to, 623.
- apportionment of cost, 637-650.
- property subject to, 650.
- proceedings in levying and collecting, 653.
- payment of, from special fund, 668.
- personal liability for, 674.
- estoppel of parties assessed, by failure to make objections in due season, 819-821.
- dedication of land for, will authorize opening at expense of owners, 613.
- principle of assessment, not applicable to county roads, 695.

STRICT CONSTRUCTION —

- of power to tax,
(See POWER.)
- of power to divest one of his estate,
(See STATUTORY POWER.)

STRICT EXECUTION —

- of authority to tax, 350.
- of authority to sell for taxes, 470.
- of authority to lay special assessments, 609, 759.
- of authority for summary remedies, 720.

STRIKING FROM THE ROLL —

- of property not taxable, may be compelled by *mandamus*, 782, 822.
compelled by *certiorari*, 757.

SUBROGATION —

- where one has paid taxes for another, 466-468.
 - case of mortgagor and mortgagee, 466.
 - case of vendor and vendee, 467.
 - case of tenants for life, 467.
 - case of tenants in common, 467.
- payment under mistake as to ownership, 467.

SUBSIDIES —

- distinguished from taxes, 2.

SUBSTANTIAL RIGHTS —

- action for depriving one of, 792.
- irregularities which do not take away, will not render tax void, 757.

SUCCESSIONS —

- to estates, may be taxed as a privilege, 584.
- taxation of, in general, 8, 30, 206, 376, 597.
- of an alien, may be taxed, 97.
- taxation of bequests to colleges, etc., 206.

SUFFRAGE —

- right of, sometimes dependent on payment of taxes, 791-2.

SUITS —

- taxation of, 31.
- collection of taxes by, 15, 435.
- to enforce lien for taxes, 448-450, 546-548.
- to foreclose redemption, 545.
- to obtain redemption in case of fraud, etc., 540, 541.
- pending, application of curative laws to, 307.
(See ACTIONS; EQUITY; REMEDIES FOR EXCESSIVE AND ILLEGAL TAXATION.)

SUMMARY REMEDIES —

- for collection of taxes, necessity for, 432, 704.
- are not unconstitutional, 47-53, 432, 439.
- against collectors of taxes, 704-723.
(See COLLECTOR OF TAXES.)

SUPERVISOR —

- action against, 795.
- protection of, by certificate, 795.
- mandamus* to compel delivery of assessment roll by, 783.
- to compel levy of school tax, 735.

SUPERVISORS, BOARD OF —

- mandamus* will not be issued to, where party has another remedy, 727.
- may be compelled by *mandamus* to proceed to consider an account, 729.
- may be compelled to allow legal accounts, 729.
- and to refund moneys illegally collected, 743.
- and to assess state taxes, 735.
- and to levy a tax to pay judgments, etc., 735-738.
- cannot refuse to levy a tax because of misapplication of moneys, 427.

SUPPLEMENTARY LIST —

- when signing of, a good verification of the original, 414.

SUPPOSED BENEFITS —

- levy of assessments by, 607.
- (See ASSESSMENTS, LOCAL.)

SURETIES —

- in collector's bond, liability of, 712.
- obligation of, is *strictissimi juris*, 712.
- are only bound by the terms of their bond, 712.
- alteration in the obligation discharges, 712.
- whether extension of time for collection will discharge, 712.
- summary remedy against, 717-722.
- effect of change of law upon liability of, 715, 716.
- whether liable for an illegal tax collected, 802.

SURPLUS —

- of insurance company, taxation of, 386.

SURPLUS BOND —

- provision for, 495.
- consequence of failure to give, 555.

SURPLUS MONEYS —

- on tax sale, disposition of, 495.
- payment of, to party entitled, how compelled, 742.
- receipt of, does not estop from disputing tax, 821.

SWAMPS —

- taxation for draining, 187.
- special assessments for draining, 616.
- (See DRAINS.)
- draining under the police power, 591.

T.

TAKING AWAY REMEDY —

- cases of, 762, 818.
- (See CONSTITUTIONAL PRINCIPLES.)

TAKING OF PROPERTY —

- for public use,
(See EMINENT DOMAIN.)
- for taxes,
(See DISTRESS.)

TANGIBLE PERSONALTY —

- taxation of where located, 21, 56, 57, 373.

TARIFF —

- revenue, 83.
- protective, 34.
- prohibitory, 13, 112.
(See DUTIES; EXPORTS; IMPORTS.)

TAVERNS —

- taxation of keepers of, 583.
- extent of license to keep, 581.

TAX COLLECTOR —

- (See COLLECTOR OF TAXES.)

TAX DEED —

- cannot be made conclusive of title, 298-9, 517-522.
- right of highest bidder to, 498.
- execution of, 514, 549.
- recitals in, 513-516.
- does not prove a valid sale, 297-299, 517-522.
 - except as statutes so provide, 519-522.
- gives no title till after time for redemption has expired, 542.
- errors of form may not avoid, 515.
- error in, may be corrected in equity, 323.
- recording of, as a period from which actions may be limited, 542.
- constructive possession by virtue of, 565-567.
- when it does not give color of title, 567, 568.
- setting aside as a cloud on title,
(See CLOUD UPON TITLE.)
- mandamus* to compel delivery of, 742.

TAX DUPLICATE —

- issue of, 424.
(See COLLECTOR'S WARRANT.)

TAX LAWS —

- what are, 1, 265.
(See REVENUE LAWS.)
- repeal of, terminates proceedings under them, 13.
- construction of, 263-294.
(See CONSTRUCTION.)
- for curing defects in proceedings, 297-323.
(See CURATIVE LAWS.)
- enforcing official duty under,
(See MANDAMUS.)

TAX LAWS — continued.

limitations on the power to pass,
 (See **LIMITATIONS ON THE TAXING POWER.**)
 should aim at equality in the burden imposed, 164.
 may make exemptions, 171, 200.
 can only have effect through official action, 248.
 summary remedies under,
 (See **SUMMARY REMEDIES.**)
 contracts in fraud of, are void, 433, 434.

TAX LEGAL IN PART —

will be enjoined only when the legal part is void, 763.
 recovery of town in case of, 816.
 replevin in case of, 819.

TAX LEVY —

authority for, 324.
 (See **VOTING THE TAX.**)
 is void if excessive,
 (See **EXCESSIVE TAXES.**)
 enjoining, 760.
 (See **EQUITY, COURT OF.**)
 whole will not be enjoined to redress individual wrongs, 763.
 setting aside on *certiorari*,
 (See **CERTIORARI.**)
 compelling by *mandamus*,
 (See **MANDAMUS.**)

TAX PAYERS —

submission of question of taxation to, 331.

TAX PAYERS' LISTS —

objections to, 35-37.
 requirement of, 356-361.
 penalties for failure to hand in, 357-361.
 taking away appeal, for refusal to hand in, 358.

TAX PROCEEDINGS —

curing defects in, by statute, 297-308.
 by re-assessments, 309.
 by the action of courts, 313.
 by amendments, 313-323.
 what departures from the statutes will not defeat, 299.
 (See **IRREGULARITIES.**)

TAX ROLL —

premature issue of, 424.
 striking property from,
 (See **STRIKING FROM THE ROLL.**)
 warrant to, 424-431.
 (See **COLLECTOR'S WARRANT.**)
 compelling assessor to put omitted property on, 733.
 and to deliver correct copy of, 734.

TAX SALES—

(See SALES OF LANDS FOR TAXES.)

TAX WARRANT—

(See COLLECTOR'S WARRANT.)

TAXABLE PROPERTY—

meaning of, 279.

selection of, 171, 200.

TAXATION—

definition of, 1.

and protection, are reciprocal, 2, 19-25.

differs from forced contributions, etc., 2.

must have equality for its basis, 2, 142.

unlimited nature of, 5, 82.

is submitted to as a hard necessity, 5.

direct and indirect, 6-8.

maxims of, 8-11.

must be for revenue, 11.

regulation may be a purpose in, 11, 12.

discriminating in, for protection, 12.

jurisdiction for, 19-25.

should be in proportion to benefits, 24.

English, 25, 26, 35, 36, 40.

heavy, dates from the time power of the commons was established, 59.

power of, is a legislative power, 41-53.

colorable, may be treated as void, 46.

in the District of Columbia, 61.

in the territories, 61.

power of, not to be delegated, 61-66.

except to the municipalities, 63.

abridgment of power of, by contracts, 66-82.

general purposes of, 103-139.

(See PURPOSES OF TAXATION.)

general limitations upon, 54-57.

and representation, go together, 58-61.

agencies of government not subject to, 82-86.

districts for, 140-163.

(See APPORTIONMENT.)

extraterritorial, 55, 159-163.

equality and uniformity in, 164-236, 606, 638.

duplicate, sometimes unavoidable, 219-234.

presumption against intent to lay duplicate, 237.

exemptions from, 171, 200, 214.

(See EXEMPTIONS.)

accidental omissions from, 216.

diversity of, in different districts, 235.

distinguished from legislative appropriation of private property, 237,

242, 624.

TAXATION—continued.

- and representation go together, 58, 242.
- curing defects in, 297-323.
- (See TAX PROCEEDINGS.)
- restrictions upon municipal, 344.
- conditions precedent to, 348.
- repeal or modification of power for, 294.
- exhausting authority for, 349.
- official action in, 248.
- (See OFFICERS.)
- assessments of property for, 351.
- (See ASSESSMENT.)
- of business and privileges, 570.
- by federal government, 570.
- what to be deemed privileges, 571.
- kinds usually taxed, 575-584.
- imposed for purposes of regulation under the power of police, 586.
- (See POLICE POWER.)
- of corporations, 377, 387.
- (See CORPORATIONS.)
- of railroad companies, 383.
- of insurance companies, 386.
- of national banks, 389.
- by special assessment, 606.
- in England, 618, 676.
- (See ASSESSMENTS, LOCAL.)
- compulsory local, 678.
- admissible in matters of state concern, 680.
- not for matters of mere local concern, 687-703.
- to indemnify for losses by riots, 686.
- to pay corporate debts, 685.
- general, for a mere local purpose, is unjust, 606-7.
- enforcing official duty in regard to, 724.
- (See MANDAMUS.)
- remedies for excessive and illegal, 746.
- by abatement, 747.
- by review and appeal, 747.
- by refunding, 753.
- by *certiorari*, 753.
- by injunction, 760.
- by several jointly, 769.
- in equity to remove cloud on title, 773.
- in equity to quiet title, 783.
- in cases of fraud, 784.
- by suit against assessors, 786.
- by suit against supervisor, 795.
- by resisting collection, 796.
- by suit against collector, 796.
- by action against collector of customs, 803.

TAXATION—continued.

- remedies for excessive and illegal, by suit against town, etc., 804.
- in tort against officers, 816.
- by action of replevin, 818.
- by *mandamus*, 822.
- by prohibition, 822.

TAXES—

- definition of, 1-4.
- jurisdiction to lay, 4-6, 19-25.
- classification of, 3, 6.
- direct, 6.
- indirect, 6.
- maxims of policy in levying, 8-12.
- payable in kind, 13, 14.
- payable in labor, 14.
- capitation, 25.
- not commonly debts, 15-19.
- on credits,
 - (See BONDS; CREDITS; MORTGAGES.)
- on lands, 26.
- on houses, 27.
- on income, 28.
- on employments, 28.
- on carriage of property, 29.
- on wages, 29.
- on servants, etc., 29.
- on interest, 30.
- on dividends, 30.
 - (See DIVIDENDS.)
- on successions, 30, 206.
 - (See SUCCESSIONS.)
- on sales, bills, etc., 31.
- on newspapers, 31.
- on legal process, 31.
- on consumable luxuries, 32.
- on exports, 33.
- on imports, 33.
- on corporate franchises, 22, 23, 34.
 - (See CORPORATIONS.)
- on property by value, 35-39.
- on marriages, 40.
- on amusements, 40.
- on public securities, 34.
 - (See PUBLIC SECURITIES.)
- specific, 175.
- on licensed traders, 95.
 - (See TRADERS.)
- on business, 570-585.
 - (See BUSINESS.)

TAXES — continued.

- on privileges, 571-585.
- on offices, 588.
(See OFFICES.)
- on national banks, 339.
- apportionment of, 2, 24, 140-163.
(See APPORTIONMENT.)
- maxims governing levy of, 8-11.
(See PRINCIPLES OF TAXATION.)
- are pecuniary contributions when not otherwise explained, 15.
- are granted by the people's representatives, 41.
- to be levied for the public good, 54.
- to be for public purposes, 55.
- not to be extraterritorial, 55, 159-163.
- right to representation in levying, 58-61.
- impairing obligation of contracts are void, 66-82.
- on agencies of federal government by the states, 82-90.
- on agencies of state government by United States, 82-90.
- on revenue stamps, etc., 85.
- on salaries of federal and state officers, 84.
- on travel, 86.
- on the public domain, 87.
- on railroads, 89, 96.
(See RAILROAD COMPANIES.)
- on commerce by the states, 90-96.
(See COMMERCE.)
- which abridge rights of citizens, 99.
(See PRIVILEGES OF CITIZENS.)
- purposes for which they may be laid, 103-139.
(See PURPOSES OF TAXATION.)
- how direct are laid by the United States, 110.
- should be equal, 164-171.
- invidious discriminations in laying, 171.
- exemptions from, 171-213.
(See EXEMPTIONS.)
- invidious exemptions from, 214-216.
- duplicate levies of, 219-234.
- apportionment of, 237-247.
(See DUPLICATE TAXATION.)
- commuting for, 175, 187, 195, 234.
- official action in levying, 248-262.
(See OFFICERS.)
- construction of laws for, 263-296.
(See CONSTRUCTION.)
- curing defects in proceedings to obtain, 297-323.
(See CURATIVE LAWS.)
- voting of, 324-350.
- must be legislative authority for, 41, 324.
(See VOTING THE TAX.)

TAXES — continued.

- assessment of property for, 351-423.
(See **ASSESSMENT**.)
- collector's warrant for, 424-431.
(See **COLLECTOR'S WARRANT**.)
- collection of, 432-468.
(See **COLLECTION OF TAXES**.)
- lien of, on lands, 448-450, 546-548.
- collection by the state of its municipalities, 468.
- sale of lands for, 444-448, 454-456.
(See **SALE OF LANDS FOR TAXES**.)
- judicial sales for, 523-531.
(See **JUDGMENT FOR TAXES**.)
- redemption from sales for, 532-548.
(See **REDEMPTION**.)
- proceedings to recover lands sold for, 549-569.
(See **RECOVERY OF LANDS SOLD FOR TAXES**.)
- under the police power, 586-605.
 - how they differ from other taxes, 586-588.
 - case of sidewalks, 588.
 - case of sewers, 590.
 - case of levees, 590.
 - case of drains, 591.
 - other cases, 592.
- license fees, when are, 572, 597-599.
 - collection of, 604.
 - must not be prohibitory, 598.
- special assessments not classed as, 207, 606.
(See **ASSESSMENTS, LOCAL**.)
- enforcing duties in levy and collection of, 724-744.
(See **MANDAMUS**.)
- decision of proper authority as to amount of levy cannot be controlled by *mandamus*, 734.
- rejection of, when illegal, 743.
(See **STRIKING FROM THE ROLL**.)
- illegal, collector may refuse to collect, 741.
- injustice of, cannot defeat them, 3, 45, 164-168.
 - or excuse officer for not proceeding with, 741.
- compelling levy of, to pay judgments, etc., 735.
- levy of, by municipalities under state compulsion, 678-703.
(See **COMPULSORY LOCAL TAXATION**.)
- remedies by the state for, against collectors, 704.
(See **COLLECTOR OF TAXES**.)
- remedies where they are excessive or illegal, 746-823.
(See **REMEDIES FOR EXCESSIVE AND ILLEGAL TAXATION**.)

TAXING DISTRICTS —

- taxes levied must pertain to the, 140.
 - instances of violation of this rule, 143.
- general rule as to, 146.
- legislature must establish, 149.

TAXING DISTRICTS—continued.

different for different purposes, 151.
overlying, 153.

(See DISTRICTS.)

taxation beyond limits of, 159.

(See EXTRATERRITORIAL TAXATION.)

in cases of special assessments, 143, 639.

TAXING POWER—

is an incident of sovereignty, 4.

extent of, 5, 101.

proper exercise of, affords no ground of complaint, 6.
extent of, 6, 54, 83.

is legislative in its nature, 41-53.

is not to be delegated, 43, 61-66.

except to the municipalities, 63.

may be restrained by contracts, 66-72.

limitations upon, by constitutional principles,

(See CONSTITUTIONAL PRINCIPLES.)

limitations upon, by the federal constitution,

(See CONSTITUTION OF THE UNITED STATES.)

state restrictions upon, 101, 102.

construction of, in general,

(See CONSTRUCTION.)

local, construction of, 276.

in case of business taxes, 574.

in case of levies for regulation, 533, 597.

liability of, to abuse, 105, 280.

principles on which it should be employed,

(See PRINCIPLES OF TAXATION.)

TEACHERS—

taxation of, 577.

TELEGRAPH COMPANIES—

taxation of, 96, 98, 188.

TENANT—

assessment of land to, 399.

may not buy landlord's title at tax sale, 500.

(See OCCUPANT.)

TENANT FOR LIFE—

assessment of land to, 399.

payment of taxes, subrogation in case of, 467.

right of, to redeem, 539.

TENANT IN COMMON—

interests of, may be separately assessed, 411.

and separately sold, 411.

cannot buy interest of the others at tax sale, 502.

one may redeem for all, 539.

redemption of separate interest by, 534, 539, 540.

subrogation in case of payment by one for all, 467.

one cannot waive illegalities for all, 821.

TENDER —

- extinguishes lien for taxes, 453.
- will prevent a sale, 453.
- must be of the full amount due, 453.
- for purposes of redemption, 536.
- as a condition to recovery in ejectment, 551, 552.
- of certificates of public indebtedness, for license fees, 603.
- in settlement with collector, 710.
- on obtaining injunction, 782.

TENNESSEE —

- constitutional provisions for equal taxation in, 197.
- assessments of property in, must be by value, 626.

TERRITORIAL LIMITATION —

- on power of states to tax, 58-61.
- on power of municipalities to tax, 159.
- (See NON-RESIDENTS.)
- in case of municipal license tax, 60.
- the maxim that taxation and representation go together, 59.

TERRITORIES —

- taxation in, 60.

TESTAMENTARY GIFTS —

- taxes on, 80.
- (See SUCCESSIONS.)

TESTIMONY —

- (See EVIDENCE.)

TEXAS —

- property in, must be assessed by value, 626.

THEATRICAL EXHIBITIONS —

- taxation of, 581.

THEFT —

- from collector, does not discharge him, 711.

THREAT —

- of illegal creation of corporate debts, 764.
- of illegal enforcement of taxes, 760.
- of illegal distress, is compulsion, 814.
- (See VOLUNTARY PAYMENT.)

TIME —

- taxes must be voted at the proper, 285, 286.
- tax payer must have notice of that fixed for appeal, 286.
- allowed for notices, must be given, 287.
- proceedings bad if statute regarding, is not observed, 285, 286, 287, 288, 289, 290.
- when sale prematurely made cannot be validated, 806.
- of sale, notice of, 487.
- computing, in case of notices, 484.
- to redeem, cannot be enlarged, 544.
- to redeem, shortening the, 544.
- of advertising, to cut off redemption, 537-8.

TITLE —

at tax sale is not warranted, 476, 553, 818.

trial of, 549.

(See RECOVERY OF LANDS SOLD FOR TAXES.)

extinguishing by adverse possession,

(See LIMITATION, STATUTES OF.)

removing cloud upon, 778.

(See CLOUD UPON TITLE.)

quieting, in equity, 783.

(See QUIETING TITLE.)

collector cannot build up, if tax is void, 801.

tax deed as evidence of,

(See TAX DEED.)

purchaser must take, subject to right to re-assess a tax, 811.

power to divest, must be strictly construed and strictly pursued, 236-7, 470.

under patent, what is proof of, 550.

under tax deed, assailing collaterally, 550.

claim of, by county will not estop it from taxing to possessor, 821.

TITLE, OFFICIAL —

not to be questioned collaterally, 252.

questioning on *quo warranto*, 252.

questioning in suit by or against officer *de facto*, 252.

TOLLS —

meaning of the term, 4.

for use of state improvement, 94.

for use of wharf, 588.

TOLL BRIDGE —

duplicate taxation in case of, 224.

TOLL HOUSE —

when exempt from taxation, 218.

TOLL ROAD —

taxation to buy, 180.

TONNAGE —

taxes of, not to be laid by the states, 91, 110.

what are, 91-98.

TOOLS OF TRADE —

exemption of, from taxation, 201

TORTURE —

employment of, in taxation, 28.

TOWN AUDITORS —

action of, in allowing accounts, not to be reviewed in the courts, 757.

unlawful allowances by, 795.

TOWN BOARD —

levy of taxes by, 839.

members of, not liable for errors in their judicial action, 788.

(See JUDICIAL OFFICER.)

TOWN BONDS—

mandamus to compel payment of, 787-8.
compulsory levies for payment of, 685.
injunction to prevent issue of, 764.

TOWN MEETINGS—

remitting taxes by, 751.
(See TOWNS.)

TOWN PLATS—

questioning in tax proceedings, 750.
assessment of lots and blocks upon,
(See SEPARATE PARCELS.)

TOWN PURPOSES—

repair of fire engine, 134.
lighting streets, 134.
compensation for use of building, 185.
procuring legislation, 135.
purchase of a public square, 129.
paying bounties for military services, 186.
general enumeration of, 134, 278, 348-350.

TOWN TREASURER—

(See COLLECTOR OF TAXES.)

TOWN TRUSTEES—

liability of, for refusing certificate, 796.

TOWN VOTE—

meetings for, 332.
(See VOTING THE TAX.)
control of, by the courts,
(See POLITICAL ACTION.)
protection of officers by, 799.
what will constitute a promise by, 791.

TOWNS—

general power to tax usually conferred upon, 142, 679.
purposes of taxation by,
(See TOWN PURPOSES.)
apportionment of debts and property on division, 185, 239, 685, 687.
must have legislative power to tax, 324.
requisites of legislation for, 325-327, 329.
contracting debts by, 327, 333.
voting taxes by, 332.
meetings for the purpose, 332.
how appointed, 334.
notice of, 335.
must confine themselves to the purpose of the call, 335.
warrant for, 336.
action of, to be favorably construed, 337.
must be record of, 339.
proof of record of, when lost, 340.

TOWNS—continued.

- voting taxes by; meetings for; adherence to vote essential, 341.
 - certifying the vote, 341.
 - submission of tax to tax payers only, 333.
- courts cannot control political action of, 342, 343.
- restrictions on powers to tax, 344, 347-349.
- conditions imposed on power of to tax, must be observed, 329, 346.
- legislative control over taxation by, 346-349.
- exhausting power to tax, 349.
- strict execution of power by, 347.
- taxation under legislative compulsion, 678-703.
- refunding taxes by, 753.
- liability of, for illegal taxes collected, 805.
 - only attaches where the tax was void; 805.
 - and was paid under compulsion, 805.
 - and has been paid over by the officer, 805.
 - what is a compulsory payment, 814.
- do not guaranty correct action by their officers, 806.
- proper action against, for money collected, 815.
 - extent of recovery in, 815.
- not liable for mistakes, etc., of officers where money is not received, 816.
- cannot defend suit for illegal taxes by showing assessors not legally elected, 815.
- no action against, where the proceedings are wholly void, 815, 817.
- demand not necessary before suit, 815.
- recovery of interest in suit against, 815.
- do not warrant title to property sold for taxes, 818.
 - (See MUNICIPAL CORPORATIONS.)
- allowance of moneys to collector is equivalent to payment to, 815.
- indemnifying collector not a ratification of his illegal act, 817.
- suit against, on promises, 791.
- not liable to county for default of treasurer, 707.
- suit by, against county for illegal taxes paid, 807.

TRACK—

- of railroad company, assessment of, for paving the street, 652.
- is not non-resident land, 386.

(See RAILROAD COMPANIES.)

TRACTS, SEPARATE—

(See SEPARATE PARCELS.)

TRADE—

- what taxation of, is forbidden
- (See COMMERCE.)

TRADERS—

- discriminations in taxing, 95-97.
- licensed to trade with Indians, not taxable by states, 94.
- importing goods, not taxable by states as importers, 95.
- exchange and money brokers, taxes on, 97.
- dealing in articles not the growth of the state, whether specially taxable on their business, 96.

TRADERS — continued.

- taxes on business of, as a privilege, 570, 571
- licensed by the state, cannot have the license nullified by city, etc., 573.
- may be taxed by state and municipality under proper legislation, 573.
- license of, may be taxed, 573.
- power to tax, construed strictly, 574.
- graduating licenses of, 574, 579, 583.
- what kinds of, generally taxed, 575.
- taxes on auctioneers and commission dealers, 577.
 - on merchants, 578.
 - on peddlers and transient dealers, 579.
 - on butchers, 580.
 - on dealers in liquors, 580.
 - for regulation,
(See **POLICE POWER.**)

TRANSIENT DEALERS —

- taxation of, 95-97, 579.
- fees for regulating business of, 602.

TRANSPORTATION COMPANY —

- construction of exemption for, 210.

TRAVEL —

- unlawful taxation of, 86, 87, 99.
- (See **COMMERCE.**)

TREASURER —

- (See **COLLECTOR OF TAXES; COUNTY TREASURER.**)

TREATIES —

- taxation of land acquired by, 88.
- taxes in violation of, 100.

TREE PLANTING —

- encouragement of, by exemptions, 202.

TRESPASS —

- when it will lie against assessors,
(See **JUDICIAL OFFICER.**)
- when it will lie against collector,
(See **COLLECTOR OF TAXES.**)
- against supervisor, 795.

TRESPASSER —

- treasurer is, if he proceeds without warrant, 424.

TRESPASSER AB INITIO —

- what abuse of authority will render the officer a, 442, 802.
- (See **COLLECTOR OF TAXES.**)

TRIAL —

- right of every party to,
(See **LAW OF THE LAND.**)
- by jury,
(See **JURY TRIAL.**)
- of question of corporate indebtedness, 687-689.

TRIBUNAL—

right of every one to an impartial, 746.

(See HEARING; LAW OF THE LAND.)

what is open, in cases of taxation,

(See REMEDIES FOR EXCESSIVE AND ILLEGAL TAXATION.)

TRIBUTE—

distinguished from taxes, 2.

TROVER—

action of, in case of illegal levies, 815.

TRUE OWNER—

who deemed to be, when title in contest, 560.

TRUST—

municipal officers hold their powers in, 774.

TRUSTEE—

cannot buy property for himself at tax sale, 505-6.

(See TRUSTS.)

TRUSTS—

property belonging to, where to be assessed, 375.

abroad, cannot be taxed by state, 816.

TURNPIKE—

(See HIGHWAYS.)

TURNPIKE COMPANY—

easement of, in street, will not preclude special assessment to improve it, 664.

(See CORPORATIONS.)

taxation for, 695.

TYRANNY—

right of the people to vote the taxes, chief check upon, in some countries, 59.

of enforced local taxation, 669, 689.

U.

ULTRA VIRES—

taxation which is, is void, 827, 429.

contracts void which are, 827, 828.

(See NULLITY.)

contracting debts which are, may work irreparable injury, 767.

restraining threatened action, 767-8.

interference of the state for the purpose, 764.

UNANIMOUS VOTE—

what is evidence of, 658.

UNCONSTITUTIONAL LAW—

contracts cannot be established by, 70.

UNCONSTITUTIONAL TAX —

- collector may refuse to collect, 710.
- collected, must be accounted for by collector, 706.
- voluntarily paid, and paid over by collector, he is not liable for, to tax payer, 804.
- duplicate taxes not necessarily unconstitutional, 219.

UNDIVIDED INTERESTS —

- separate assessment of, 899.
- separate sale, 498.
- separate redemption, 450, 534, 539.
- redemption by one owner for all, 539.

UNEQUAL TAXATION —

- impossibility of avoiding, 164.
- the purpose of government to avoid, 164.
- what does not create, in a legal sense, 169-171.
- special exemptions produce, 169.
- invidious exemptions not allowable, 214.
- caused by accidental omissions, 216.
- caused by fraudulent assessments, 218.
- caused by duplicate taxation, 219.
- not caused by permitting commutations, 234.
- caused by want of permanence in legislation, 236.
- not supposed to flow from assessment by benefits, 606-7.
- does not necessarily result from selecting few subjects for taxation, 164.
- legislature must determine questions of, 165, 570.
- abatement in cases of, 127, 177, 180, 358, 747.

(See REMEDIES FOR EXCESSIVE AND ILLEGAL TAXATION.)

UNIFORMITY —

- must be aimed at in taxation, 164-236.
- constitutional provisions intended to secure, 175-200.
- apportionment with a view of securing, 287.
- required in federal duties, imposts and excises, 110.
- general consideration of questions of, 164-247.

(See EQUALITY.)

- application of rules of, to special assessments, 606, 622.

(See ASSESSMENTS, LOCAL.)

UNITED STATES —

- may levy direct taxes, 6.
- taxation of liquors by, 32.
 - of exports, 83, 110.
 - of imports, 83, 110.
- general right of, to lay taxes, 6, 110.
- tax bills to originate in lower house, 42.
- taxation in territories by, 61, 570.
 - in District of Columbia, 61, 570.
- cannot tax the states or their agencies, or official salaries, 85.
- or their municipal corporations, 86.

UNITED STATES — continued.

- agencies of, not taxable by states, 82-90.
 - or the bonds, stamps, etc., of, 84, 85.
 - or the public domain, 87-89.
 - or other public property, 87, 88.
- the commerce power a restraint on taxation, 94-99.
- constitutional limitations on power to tax, 110, 140.
- may tax for bounties, 110.
- collection of taxes by, 444, 456.
- taxation of business by, 570, 571.
- licenses by, 605.
 - do not give rights as against state laws, 605.
 - not granted under police power, 605.
- interest of, in railroad, precludes taxation of, 88, 89.
- salaries of officers of, cannot be taxed by states, 85.
- contracts to defraud revenue of, are void, 433-4.
- special regulations for collection of internal revenue, 246.
- direct land tax, collection of, 246.
- tax collectors of,
 - (See COLLECTOR OF THE CUSTOMS; COLLECTOR OF INTERNAL REVENUE.)

UNITED STATES RESERVATIONS —

- personal assessments of people living upon, 55, 371

UNITED STATES SECURITIES —

- not taxable by the states, 84, 85.
- corporations taxable on their franchises, though moneys invested in, 84.

UNJUST TAXATION —

- (See UNEQUAL TAXATION.)
- remedies for,
 - (See REMEDIES FOR EXCESSIVE AND ILLEGAL TAXATION.)

UNKNOWN OWNERS —

- assessment of lands of, 397-8.
- notice to cut off redemption in case of, 538.

UNLAWFUL CONTRACTS —

- those made under unconstitutional law are, 70.
- those in fraud of the revenue are, 433.
- enjoining making of, 764-768.

UNORGANIZED TERRITORY —

- taxation in, 239.

UNRESTRICTED POWER —

- to tax, does not exist, 2, 104.
 - (See LIMITATIONS ON THE TAXING POWER.)
- in case of municipal taxation, 678-702.
 - (See COMPULSORY LOCAL TAXATION.)

UNSEATED LANDS —

- separate taxation of, 393-396.
- meaning of the term, 394.

UNSEATED LANDS — continued.

- proceedings in selling must follow assessment, 483, 536.
- notice of sale in case of, 482, 528.
- surplus bond in case of, 495.

USAGE —

- cannot change the law, 258.
- influence of, in construction of town powers, 129.
(See CUSTOM.)

USURERS —

- impolicy of robbery of, 7.

USURPATION —

- of powers not conferred,
(See JURISDICTION; NULLITY; ULTRA VIRES.)

USURPERS —

- distinguished from officers *de facto*, 251.
- inquiry into authority of, 822.
- must pay over public moneys collected, 256, 705.

V.

VACANT TENEMENTS —

- limitation of actions in case of, 565.
- whether holder of tax title has constructive possession, 565-567.
- possession in case of, is purely matter of fiction, 566.

VACATING ASSESSMENTS —

- proceedings for, on *certiorari*,
(See CERTIORARI.)
- by striking property from the roll,
(See STRIKING FROM THE ROLL.)

VALUATION —

- necessity for, in assessment, 176.
- of franchise, 883.
- of lands, 409-412.
- is a judicial act, 410.
- cannot be made by legislature, 177, 410.
- effect of omitting dollar mark in, 411.
- assessors not liable for errors in, 786.
(See JUDICIAL OFFICERS.)
- remedies for excessive and illegal,
(See REMEDIES FOR EXCESSIVE AND ILLEGAL TAXATION.)

VALUE —

- taxation of property by, 35-40.
- constitutional provisions for taxation by, 175-200, 626.
- imposition of duties by, 238.
- assessments by, 351-423.
(See ASSESSMENT.)

VALUE — continued.

- certificate to assessment, showing how value estimated, 413.
- how provisions for taxation by, affect special assessments, 626.
- special assessments by, 649, 660
- (See ASSESSMENTS, LOCAL.)

VENDOR AND VENDEE —

- payment of tax by one for the other, 467.
- when one not entitled to acquire tax title as against the other, 500-505.
- right of redemption by, 538-9.

VERIFICATION —

- of tax list, 357, 413.
- of collector's warrant, 427.
- of assessment, 412, 777.
- of notices of tax sales, 484.

VESSELS —

- taxes on, 91-94, 97, 873.
- (See SHIPS.)
- of foreign countries, not taxable, 19.

VESTED RIGHTS —

- under contracts,
- (See CONTRACTS.)
- of municipal corporations in their property, 700.
- cannot be taken away by arbitrary rules of evidence, 297.
- nor by legislative mandates, 299.
- nor by statutes which undertake to heal fatal defects, 302, 306.
- (See LAW OF THE LAND.)

VICINITY —

- meaning of, 666.

VILLAGES —

- compulsory taxation by, 697.
- (See MUNICIPAL CORPORATIONS.)

VIRGINIA —

- provisions for equal taxation in, 199.
- property in, must be assessed by value, 626.

VOID AND VOIDABLE ACTION —

- in case of intruders and officers *de facto*, 251-256.

VOID ON ITS FACE —

- tax record that is, creates no cloud on title, 779.
- process that is, may be resisted, 796.
- process that is, no protection to collector, 799.
- what will render process invalid, 800.
- protection where one of two tax warrants is not, 803.

VOID SALE —

- does not divest the lien for the tax, 672.
- (See NULLITY; SALE OF LANDS FOR TAXES.)

VOID TAXES —

- may be enjoined though courts forbidden to interfere, 763.
- (See LIMITATIONS ON THE TAXING POWER; NULLITY.)

VOLUNTARY PAYMENT—

town, etc., not liable for illegal tax in case of, 805, 809.
 payment made without warning or protest is, 809-811.
 unless there was fraud or mistake, 810.
 payment to release goods from seizure is not, 812, 814.
 nor payment after threat of distress, 813, 814.
 nor one made on exhibition of process, 812.
 payment made for a license petitioned for is, 809, 814.
 and payment made to obtain discount, 812.
 recovery when the payment was not, 814, 816.

VOLUNTEERS—

taxation to pay bounties to,
 (See BOUNTIES.)
 one may be taxed to raise bounties for, though exempt from military
 service, 625.

VOTE—

by yeas and nays, 841.
 on ordering special improvement, 657-8.
 (See TOWN VOTE.)

VOTING THE TAX—

must be legislative authority for, 324.
 revenue bills, statement of purpose, 325.
 special regulations for determining amount of state taxes, 324.
 determination of local taxes, 329.
 1. by the legislature, 329.
 2. by local boards acting in legislative capacity, 330.
 3. by the vote of popular meetings, 332.
 meetings to vote taxes, 332.
 submission to tax payers only, 333.
 must be lawfully convened, 334.
 statutes fixing time are notice of, 334.
 failure to give additional notice not fatal, 335.
 limiting subjects to be considered at, 335.
 limiting the amount to be voted at, 335.
 special, must be regularly called, 335.
 methods of notifying, 336.
 action of, is political, 337.
 is to be favorably construed, 337.
 is not to be overruled by judiciary, 337, 342, 343.
 proceedings of, must appear of record, 339.
 construction of particular warrants for, 339.
 and of particular votes taken at, 337, 338, 340.
 notice of, 338.
 secondary proof of records of, 340.
 assessors may rely upon records of votes at, 340.
 statutory appeal from, 343.
 levy in excess of that voted, is void.
 (See EXCESSIVE TAXES.)

VOTING THE TAX—continued.

- action in, not reviewable on *certiorari*, 753.
- nor subject to be enjoined as being more than is necessary, 769.
- or on ground of intended misappropriation, 769.
- or because of unreasonable delay, 769.

W.

WAGES—

- taxation of, 29.

WAGONS—

- tax on, in proportion to animals drawing them, 187.

WAIVER—

- by purchaser, of conditions to redemption, 541.
- by tax payer, of objections to illegal tax,
(See VOLUNTARY PAYMENT.)
- of right to notice, cannot be made by occupant for owner, 537.
- cannot be made by one tenant in common for others, 821.
- of right to *certiorari* by delay, 755.
- of objections to a public work by silence, 830, 831.
(See ESTOPPEL.)

WARD—

- taxation of property of, to guardian, 377.

WAREHOUSE—

- belonging to railroad company, taxation of, 213.

WARNING—

- payment of illegal tax without, will preclude recovering back,
(See VOLUNTARY PAYMENT.)
- of town meeting, etc., 335-339.

WARRANT—

- for town meeting, etc., 335-337.
- for collection of taxes, 424-431.
(See COLLECTOR'S WARRANT.)
- against collector of taxes,
(See COLLECTOR OF TAXES.)
- protection by,
(See PROCESS.)

WARRANTY—

- none in tax sales,
(See CAVEAT EMPTOR.)
- municipalities give none, as to action of their officers, 818.

WATER—

- privilege of supplying a city with, is taxable, 403.
- power, is not taxable separate from the land to which it is attached, 403.
- special assessments to lay pipe for, 620.
- levees to protect against,
(See LEVEES.)
- assessments for drains and sewers to carry off,
(See DRAINS; SEWERS.)

WATER COMPANY —

exemption of, from taxation, 188.

WATER CRAFT —

where taxable, 378.

WATER HIGHWAY —

special assessments for, 615.

WATER PIPES —

when are real property, 868.

special assessments for laying, 630.

WATER POWER —

appropriating land for,

(See EMINENT DOMAIN.)

WATER RATES —

action establishing insufficient, cannot be corrected by *quo warranto*, 823.

WATER WORKS —

taxation for, 134, 188.

WAYS —

(See BRIDGES; CANALS; HIGHWAYS; PRIVATE WAYS; STREETS; TURNPIKES.)

WEEKS —

required in notices, must be full weeks, 484.

WEST VIRGINIA —

provisions for equal taxation in, 198.

taxation of property in, must be by value, 626.

WHARF BOAT —

taxation of, 211.

WHARFAGE FEES —

right to exact, 92, 98, 588.

right to, whether a tax, 588.

WIDENING STREETS —

assessments for, 613.

(See ASSESSMENTS, LOCAL.)

WIDOW —

right of, to redeem from tax sale, 588, 539.

WIDOW AND HEIRS —

assessment of estate to, 596.

WIFE —

redemption of husband's lands by, 588, 539.

WILD BEASTS —

taxation for destruction of, 138.

WILL —

(See EXECUTOR; SUCCESSIONS.)

WINDOW TAX —

formerly levied, now abolished, 27.

WISCONSIN —

- equality of taxation in, 199.
- constitutional provisions bearing upon special assessments, 634.
- special fund for payment of city contracts in, 669.
- short statutes of limitation in, 559.

WOMEN —

- taxability of, 59.
- (See MARRIED WOMEN; WIDOW.)

WORDS —

- (See DEFINITIONS.)

WORK —

- right to pay taxes in, not to be taken away by officers, 777.
- (See LABOR.)

WORSHIP —

- taxation for, not allowed, 118.
- houses of, generally exempt from taxation, 203.
 - may be taxed if put to other uses, 203.
 - exemptions may be recalled, 204.
 - must be strictly construed, 205.
 - will not preclude special assessments, 207.
 - estimate of benefits in such cases, 663, 664.

WRITS —

- (See CERTIORARI; INJUNCTION; MANDAMUS; PROHIBITION; QUO WARRANTO; REPLEVIN.)

WRONGFUL ACT —

- (See TRESPASSER AB INITIO.)

WRONGS, REMEDY FOR —

- (See REMEDY; REMEDIES FOR EXCESSIVE AND ILLEGAL TAXATION.)

Y.**YEARLY LEVIES —**

- one, exhausts the power for the year, 849, 850.

YEAS AND NAYS —

- recording votes by, 841.

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